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**DIVIDING LOTTERY WINNINGS DURING
DISSOLUTION OF MARRIAGE**

I. Introduction

Denise Rossi was awarded a portion of a \$7 million jackpot in November 1996. Fearful that her estranged husband would have a claim to the prize money, she filed for a divorce and neglected to list her award with her joint or separate property. Her husband learned of the prize in May 1999 and filed an action to set aside the dissolution.¹ At the center of controversy is the how the court will divide the winnings. With the growing popularity of Powerball and state lotteries, along with the growing number of casinos and prize money games, courts are being forced to deal with prize money in dividing property during marital dissolution proceedings. The law is well settled that a lottery prize won during a marriage is generally considered property acquired during the marriage subject to equitable distribution.² However, community property and marital property states differ in the theories adopted, and even some marital property states differ in considering whether “equitable” means an equal distribution in dividing lottery winnings during a divorce. Courts that have already dealt with this issue have focused on a number of factors in determining how to divide the property.

II. Division of Property Schemes

States property schemes generally fall into one of two categories, common law or community property. Common law states differentiate their property scheme from community property states by the way property is titled during the marriage. Generally, in common law states, title controls ownership of the property during the marriage. At divorce, common law states presume property is “marital” property, unless it falls under one of the exceptions that generally relate to the source of acquisi-

¹ In re Marriage of Rossi, 90 Cal.App.4th 34 (Cal. App. 2nd Dist. 2001).

² Campbell v. Campbell, 213 A.D.2d 1027 (N.Y. App. Div. 1995); Ullah v. Ullah, 181 A.D.2d 699, 581 N.Y.S.2d 217 leave denied 76 N.Y.2d 704 (N.Y. App. Div. 2002).

tion, such as a gift, bequest or inheritance or the timing of acquisition as before the marriage.³ Common law property states divide property based on an equitable, but not always equal distribution.⁴ In equitable distribution states, “marital property” resembles community property.⁵ An equitable division is the division of marital property by a court in a divorce proceeding under statutory guidelines that provide for a fair, but not necessarily equal, allocation of the property between the spouses. Depending on the relevant state statutes, courts can take into account a variety of factors in determining a fair and just division of property in a divorce action including the disparity of earning power of the parties, their business opportunities, capacities and abilities, the physical condition of the parties and probable future need for support and educational background, the fault in breaking up the marriage, and the benefits the innocent spouse would have received from continuation of the marriage.⁶ Equitable distribution is applied in nearly all the states that do not have a community property system.⁷ Community property states view married couples as each having a one-half divided interest in property accumulated during the marriage, regardless of title. Upon divorce, courts in these states divide property that has accumulated during the marriage, but also exclude property acquired through individual gift or inheritance.⁸ Like the equitable distribution theory adopted by common law states, six of the nine community property states also use the equitable division rule. The states having community property are Louisiana, Arizona, California, Texas, Washington, Idaho, Nevada, New Mexico, and Wisconsin.⁹

III. How Timing Affects Distribution

A crucial factor influencing many of the marital dissolution cases that include lottery winnings rests on statutory determinations of when marital property ceases to accumulate. In jurisdic-

³ Black’s Law Dictionary 7th ed. (1999).

⁴ *Id.*

⁵ *Id.*

⁶ *Cooper v. Cooper*, 513 S.W.2d 229 (Tex. Civ. App.1 Dist. 1974).

⁷ Black’s Law Dictionary 7th ed. (1999).

⁸ *Id.*

⁹ *Id.*

tions where the marital estate is deemed to include property acquired up until the date of divorce, courts have refused to classify lottery winnings as separate property merely because one spouse purchased the winning ticket during separation.¹⁰

In *Lynch v. Lynch*,¹¹ the wife sought a share of lottery proceeds from a lottery ticket purchased by her husband. The husband and wife had filed for a divorce and attended a hearing where the wife testified the marriage was irretrievably broken. The parties had not obtained a legal separation and the divorce decree had not yet been entered. As a result the Arizona court viewed the ticket as community property and thus the wife received a portion of the prize.¹² In Arizona, the marriage is not considered ceased until a final dissolution is entered by the court.¹³ Couples in Arizona, like the Rossis, who wish to end accumulation of community property, have the option to file for a legal separation.¹⁴ Denise Rossi had the option of obtaining a legal separation when she no longer acted or intended to be married to her husband. The existence of that right combined with her failure to exercise it, further persuaded the court to find in her husband's favor and award him the prize money.

Other jurisdictions use the date of separation as the date of cessation for accumulation of marital property. Therefore, lottery winnings from a ticket purchased during separation become the separate property of the spouse who purchased the ticket. Courts are not in agreement with this theory in cases where the property would normally be considered marital since the parties were still in a valid marriage. Compare the facts in *Lynch*¹⁵ with *Alston v. Alston*,¹⁶ where the husband appealed from a judgment awarding the wife one half of his lottery winnings when the couple had been separated for 1 1/2 years and the wife withdrew an initial divorce petition after learning of her husband's stroke of luck. Neither husband nor wife had taken action toward disso-

¹⁰ See, e.g., *Alston v. Alston*, 629 A.2d 70 (Md. 1993); *Giedingham v. Giedingham*, 712 S.W.2d 711 (Mo. Ct. App. 1986); *Lynch v. Lynch*, 791 P.2d 653 (Ariz. Ct. App. 1990).

¹¹ 791 P.2d 653 (Ariz. Ct. App. 1990).

¹² *Id.*

¹³ *Flowers v. Flowers*, 578 P.2d 1006, 1009 (Ariz. Ct. App. 1978).

¹⁴ Ariz. Rev. Stat. § 25-313(B) (2000).

¹⁵ *Lynch v. Lynch*, 791 P.2d 653 (Ariz. Ct. App. 1990).

¹⁶ 629 A.2d 70 (Md. 1993).

lution proceedings prior to winning the Powerball. The wife urged the court to consider the parties' continuous relationship after the separation and the significant efforts of the wife in the household responsibilities. The husband argued that the wife had not made any significant contributions to the family and that the wife had abandoned the marriage, both factors considered under Maryland law.¹⁷ The husband further argued that one of the statutory factors¹⁸, which allows the court to consider how and when the property was acquired, should prevent a monetary award. Finally, the husband pointed to the "catch-all" factor, under which the judge may consider other necessary or appropriate elements.¹⁹ He argued that the situation before the court was unique, in that the asset was not acquired through the parties' joint efforts to provide for their future together."²⁰ The Court of Appeals ultimately sided with the husband and reversed the decision stating that property acquired after separation should be taken out of the marital property pool, noting that the timing of acquisition must be considered.²¹ The ultimate decision of whether to grant a monetary award and the amount of such an award are matters entrusted to the sound discretion of the trial court.²² Maryland distinguishes between an equitable division of property and an equal division of property.²³ The Maryland Legislature specifically rejected the notion that marital property should presumptively be divided equally.²⁴

A. *Full Disclosure Affects Division of Property*

Dissolution proceedings require full disclosure of property, both marital and separate property. Failure to disclose leaves parties exposed to causes of action. In *Rossi*,²⁵ Denise's ex-husband brought an action for fraud, failure to disclose (concealment), breach of fiduciary duty, and malice. Denise asserted her

¹⁷ Md. Code §8-205(b) (1994).

¹⁸ *Id.*

¹⁹ Md. Code §8-205(b) (1994).

²⁰ *Alston v. Alston* 629 A.2d 70 (Md. 1993).

²¹ *Id.*

²² *Lemley v. Lemley*, 649 A.2d 1119 (Md. App. 1994).

²³ *Alston v. Alston* 629 A.2d 70 (Md. 1993).

²⁴ *Id.*

²⁵ *In re Marriage of Rossi*, 90 Cal.App.4th 34 (Cal. App. 2nd Dist. 2001).

lottery winnings were separate property gifted to her from co-workers who formed a lottery pool. The winnings were placed in Denise's name only. Denise's husband asked the court to award him part or all of the winnings. Arizona courts are permitted to award to the innocent spouse 100%, or an amount equal to 100% of any asset undisclosed or transferred by the other spouse in breach of the fiduciary duty imposed by Arizona statute.²⁶ Though *Rossi* is currently on appeal, the court awarded 100% of the lottery winnings to Denise's ex-husband.

B. *Considering When Winners Take Ownership of a Prize*

Courts also consider when a prize winner takes ownership of lottery winnings. A lottery ticket has no value prior to publication of the winning numbers. Some courts look at the purchaser of the ticket as a factor in determining who will have possessory rights should the winning numbers be those on the ticket. Courts may have to decide ownership rights based on the timing of the purchase. Is the winner entitled to the funds at the time the ticket is purchased, or at the time numbers are drawn and the ticket is in the winner's possession? Or does ownership occur at the time the winner presents the ticket to the Lottery Commission? The final phase of ownership may be upon arrival of the winnings to the owner. Timing of ownership would have played a significant factor in Denise Rossi's case. Community property states such as Arizona generally divide assets equally that have accumulated during the marriage.²⁷ In Arizona, accumulation of the joint property ceases upon dissolution of the marital union. In *Rossi*, Denise explained, "I went to the Lottery Commission office and told them I was married but contemplating divorce. They told me to file before I got my first check, which I did. I believed that the lottery winnings were my separate property because they were a gift."²⁸ Notwithstanding the claim that the prize money was a gift, if ownership is determined when Denise receives the proceeds rather than after the decree is entered perhaps a different result would be warranted. In Arizona, when a spouse acquires an asset before marital dissolution, the law treats

²⁶ Ariz. Rev. Stat. § 25-211 (2000).

²⁷ Ariz. Rev. Stat. §25-318 (2000).

²⁸ In re Marriage of Rossi, 90 Cal.App.4th 34, 35 (Cal. App. 2nd Dist. 2001).

the asset as community property unless it falls within one of several statutory exceptions. All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, is the community property of both the husband and wife.²⁹ However, because Denise failed to disclose the asset as required under the Arizona code, the result may have been the same.

IV. Source of Funds or Disbursement

Courts have also considered the source of funds used to purchase the winning game or ticket in determining the property division. Significant factors include: who purchased the ticket, whose money was used to purchase the ticket or who put effort into the game, and whose name is on the prize. In *Noil v. Noil*,³⁰ the husband appealed from an order declaring the family home to be the wife's separate property. The wife entered a sweepstakes advertised in connection with a crossword puzzle in the newspaper. She completed the puzzle and entered the sweepstakes on her own initiative, using only her name.³¹ Consequently, the prize money received was issued in only her name but was deposited into the joint checking account of she and her husband.³² Part of the proceeds from the sweepstakes was used to purchase the home in dispute. When purchased, the home was titled in both parties' names during the marriage. The parties were residents of Louisiana, a community property state, which characterizes property as either community or separate.³³ According to Louisiana Code,³⁴ property acquired during the existence of the marriage is presumed to be community property, but either spouse may rebut the presumption and prove the separate nature of the property. Classification depends on the time of acquisition, the character of the transaction, and the source of funds used to purchase the asset.³⁵ Unlike marital property states that consider title, community property states classification

²⁹ Ariz. Rev. Stat. § 25-211 (2000).

³⁰ *Noil v. Noil*, 699 So.2d 1134, 1135 (La. App. 1997).

³¹ *Id.*

³² *Id.* at 1134.

³³ La. Civ. Code Art. 2335 (1985).

³⁴ La. Civ. Code Art. 2340 (1985).

³⁵ *Id.*

of an asset as separate or community is not determined by the name on documents of title.³⁶ The husband in *Noil* argued that the house was purchased in both parties' names using funds deposited into a joint banking account. Furthermore, no separate source of funds was used to enter the sweepstakes, instead, it was wife's skill and effort that helped her complete the crossword. In Louisiana, community property is comprised of property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse.³⁷ The court, however, ultimately focused on the source of funds, concluding that the source of funds used to purchase the home came from the parties' joint checking account and reversed the District Court thereby awarding him part ownership in the home based on the fact they had commingled funds.

V. Other Factors

It is no surprise that the spouse of a lottery winner would urge a court to treat lottery winnings as community property, but does this mean that property continues to accumulate after separation, and if so, is division an equal or equitable division? Consider the rule in *DeVane v. DeVane*,³⁸ where the court summarized two contrasting theories used in determining a division of lottery winnings. The court states as follows:

Two distinct rules have emerged concerning the manner in which lottery winnings should be disbursed between the parties on the dissolution of the marriage and distribution of marital assets. One rule, represented by *Ullah*, emphasizes that the asset is a windfall and was not created due to the efforts of either party; therefore, it should be divided equally. . . The other rule is represented by *Alston*, which holds that the court should apply the factors guiding equitable distribution to arrive at an appropriate distribution decision.³⁹

In *Ullah v. Ullah*,⁴⁰ the parties were married at the time the husband won the \$8 million lottery. The trial court in *Ullah* awarded wife an equal share of the winnings. Husband appealed the judgment. The New York Supreme Court viewed the win-

³⁶ *Matrimonial Regimes*, 16 Louisiana Civil Law Treatise, § 3.41 (1989).

³⁷ La. Civ. Code Art 2338 (1985).

³⁸ 655 A.2d 970 (N.J. Super App. Div. 1995).

³⁹ *Id.* at 971.

⁴⁰ 555 N.Y.S.2d 834 (N.Y. App. Div. 1990).

ning a result of “sheer luck,” and the enormous return required “little effort or investment” on the part of either party. The court stated the winnings were “predominately the result of fortuitous circumstances and not the result of either spouse’s toil or labor.” The court affirmed the lower courts determination that the circumstances in the case warranted an equal 50-50 split. The fortuitous circumstances rule has been adopted in other states.

South Carolina views an equitable distribution of property to be discretionary based on the individual circumstances peculiar to the parties involved and to fashion the division of the parties’ assets in a manner that is uniquely fair to the parties concerned.⁴¹ The court in *Thomas v. Thomas*,⁴² found the lottery proceeds were marital property, and awarded the husband fifty percent of the lottery proceeds. There, the wife won a \$9 million pot from the Georgia lottery during her marriage. The prize money was shared by both during the marriage, although titled only in the wife’s name. Courts in marital property states consider title in determining ownership rights to property, but the husband argued the fortuitous circumstances rule established in *Ullah*, and the court found in his favor.⁴³ In *Alston*,⁴⁴ a Maryland court reversed a finding of equal division of winnings from a lottery ticket which the husband purchased during a substantial period of separation and holding that the wife was not entitled to any portion of the prize. Although the Maryland court decided the property accumulated after separation was separate in *Alston*, that was not adopted as a hard and fast rule.

In *Ware v. Ware*,⁴⁵ the husband won the Powerball lottery four months after separating from his wife, but prior to filing for divorce. The court awarded the wife a monetary portion of the Powerball prize despite the husband’s contention that the case contains no evidence which would justify awarding any portion of the annuity to the wife. Maryland law requires the application of a three-step analysis when calculating a monetary award in the course of a divorce proceeding.⁴⁶ First, the trial court must ini-

⁴¹ *Marsh v. Marsh*, 437 S.E.2d 34, 36 (S.C. 1993).

⁴² 579 S.E.2d 310 (2003).

⁴³ *Id.*

⁴⁴ 629 A.2d 70 (Md. 1993).

⁴⁵ 748 A.2d 1031 (Md. App. 2000).

⁴⁶ Md. Code §8-205(b) (1994).

tially characterize all property owned by the parties, however titled, as either marital or non-marital; second, the court shall then determine the value of all marital property; and, finally, the court then makes a monetary award as an adjustment of the parties' equities and rights in the marital property.⁴⁷ Maryland law states the factors set forth for courts to call upon in balancing equities as part of a divorce proceeding include "how and when specific marital property. . . was acquired, including the effort expended by each party in accumulating the marital property."⁴⁸ In *Ware*, the husband argued the prize money was won solely through his own efforts. Consistent with the statute, the court considered the efforts of both parties and concluded that generally the efforts factor would be given greater weight.⁴⁹ The husband urged the court to consider *Alston*,⁵⁰ which concluded that, where one party, wholly through his or her own efforts, and without any direct or indirect contribution by the other, acquires a specific item of marital property after the parties have separated and after the marital family has, as a practical matter, ceased to exist, a monetary award representing an equal division of that particular property would not ordinarily be consonant with the history and purpose of the statute. The *Ware* court noted that *Alston* did not create a rule that post-separation winnings are separate, but rather one that requires a court to weigh the relevant factors and exercise sound discretion. The court considered the distinction of the facts from *Alston*, including the short duration of the separation, the frequent visits between the parties, and the lack of action taken toward divorce. The *Ware* court concluded it was equitable to award the wife part of the lottery winnings.

States such as California and Washington have statutes that assert acquisition of community property ceases when spouses begin to live "separate and apart."⁵¹ Under the "will to union" doctrine, property acquired after the union of wills has ceased is not considered community property.⁵² In Washington, when a

⁴⁷ *Strauss v. Strauss*, 647 A.2d 818 (Md. App. 1994).

⁴⁸ Md. Code §8-205(b) (1994).

⁴⁹ *Strauss v. Strauss*, 647 A.2d 818 (Md. App. 1994).

⁵⁰ 629 A.2d 70 (Md. 1993)

⁵¹ Cal. Civ. Code § 5118 (Deering 1984); *In re Marriage of Baragry*, 140 Cal.Rptr. 799 (Cal. App. 1977).

⁵² *See also* Wash. Rev. Code Ann. § 26.16.140 (1986).

husband and wife live separate and apart, their marriage may be defunct, and, under Washington code,⁵³ all earnings and accumulations are the acquiring spouse's separate property. Mere physical separation does not dissolve a marital community; however, it is not necessary for purposes of the statute governing earnings and accumulations of husband and wife "living separate and apart" that dissolution action be final or even pending.⁵⁴ In *Seizer v. Sessions*,⁵⁵ the daughter brought an action on behalf of her ill mother seeking a community property share in the husband's lottery winnings. The couple had not lived together in thirty-eight years at the time the complaint was filed, but had never filed for a divorce. The husband had been remarried and was living in Washington, while the mother and daughter lived in Texas.

Under Texas law, the marriage is terminated through divorce or decree.⁵⁶ In contrast, Washington expresses a policy that may find a marriage "defunct" even without an official divorce decree or death. The *Seizer* court focused on jurisdictional authority between Texas and Washington. Though both are community property states, they vary in their distinction of when accumulation of property ceases. In Washington, when the marital community no longer exists, there can be no community property because there is no longer any common enterprise to which each spouse is contributing.⁵⁷ In Texas, if a marriage is found to still be valid, and one spouse remarries, the properties acquired during the second putative marriage relationship by the putative spouses, are owned in one-half by the second putative spouse, and the other one-half of those properties are owned in equal one-quarter parts by the prior spouse and by the twice-married spouse.⁵⁸ Texas law would permit the mother to acquire one quarter of her husband's lottery winnings. Applying Washington law would yield one of two results. If the separate and apart statute applies, the marriage would be defunct, and mother is not entitled to any of the lottery winnings. If the statute does not

⁵³ Wash. Rev. Code Ann. § 26.16.140 (1986).

⁵⁴ 940 P.2d 261 (Wash. 1997).

⁵⁵ *Id.*

⁵⁶ *Estate of Claveria v. Claveria*, 615 S.W.2d 164, 167 (Tex. 1981).

⁵⁷ *See* Wash. Rev. Code Ann. § 26.16.140 (1986).

⁵⁸ 940 P.2d 261 (Wash. 1997).

apply, mother would be entitled to her one half share of the community property. The court held that Washington law applies but remanded the decision back to the trial court to determine if the mother has an interest in the lottery proceeds and whether the lottery ticket was purchased with separate or community property and how this would affect her interest.⁵⁹

In New Hampshire, a marital property state, the court considered factors including the existence of a marriage at the time of a lottery winning, but equally considered other factors such as length of marriage, children, and contributions to the marriage and a lengthy period of separation prior to the winning. In *Holliday v. Holliday*,⁶⁰ the parties married in 1984 and separated in 1989. The wife filed for divorce shortly after the separation. Nearly three years later, the husband won approximately \$734,000 in the New Hampshire lottery. The trial court in the parties' divorce action awarded the wife one-half of the pension benefits the husband accrued during marriage and a share of other assets but none of his lottery winnings. The wife appealed. The New Hampshire Supreme Court agreed with the lower courts that the decision not to award the wife any of the lottery winnings was not an abuse of discretion. The winnings were marital assets, the court acknowledged, because under the state equitable distribution statute, marital property includes any property acquired up to the date of a decree of legal separation or divorce.⁶¹ The court also acknowledged that the statute presumptively requires an equal division. But if the trial court "determines an equal division to be inappropriate after considering the parties' property in its entirety and the enumerated statutory factors, it may find that an equitable distribution of a marital asset means awarding it in whole to one party, the court declared."⁶² The trial court in *Holliday* decided that the winnings were marital property as they were acquired before divorce. On appeal, the court noted, the trial court's acknowledgment of the short duration of the marriage, the fact that the parties had no children together, and the circumstances surrounding the purchase of the lottery ticket as factors that made it equitable to

⁵⁹ *Id.*

⁶⁰ 651 A.2d 12 (N.H. 1994).

⁶¹ *Id.* at 14.

⁶² *Id.*

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award the winnings entirely to husband.⁶³ Those factors supported the trial courts' division of property, and the appeals court agreed with the result.

VI. Maintaining a separate asset

As a safeguard to maintaining separate property parties have exercised their rights to a prenuptial agreement, however, as the court in *Parker v. Parker*⁶⁴ decided, even a prenuptial agreement may not be sufficient to prevent the division of lottery winnings after the parties marry. In *Parker* the court noted there is no reported precedent governing the effect of a prenuptial "opting-out" agreement vis-à-vis lottery winnings won during marriage.⁶⁵ *Parker* presents a unique set of facts where husband and wife, both entering their second marriage, executed a prenuptial agreement waiving rights to the other's estate and providing that the only property subject to equitable distribution would be property held in their joint names.⁶⁶ The wife won a \$25 million lottery during the marriage and kept all proceeds in her name only. The husband filed for divorce two months after she won the lottery and asked the court for an equitable division of the lottery. The husband argued that he and his wife made an oral agreement to share the lottery winnings. An oral agreement to share lottery winnings has been held to be valid and enforceable.⁶⁷ The *Parker* court issued an injunction prohibiting the disposition of proceeds pending further discovery. The case is still being reviewed.

VII. Conclusion

Courts generally view lottery winnings as community property because they are deemed to be accumulated during the marriage. But what do lottery winnings have to do with a marriage? How much does a marital union contribute to winning the prize money? Are the courts in *Lynch* and *Ullah* providing parties

⁶³ *Id.*

⁶⁴ 766 N.Y.S.2d 315 (N.Y. Sup. 2003).

⁶⁵ *Id.* at 317.

⁶⁶ *Id.*

⁶⁷ *Johnson v. Spence*, 286 A.D.2d 481 (N.Y. App. Div. 2001).

with a windfall? The court in *Ullah*⁶⁸ determined the winnings required little effort or investment on the part of either party.

The Washington court offers a clear understanding of how courts should divide lottery winnings upon dissolution of a marriage. If the marriage is truly broken and the parties separate, or are even in the process of a divorce, then the “will to union” has ceased and the accumulation of the assets for the benefit of the marriage has ceased. The purpose of a court’s authority to divide property is to protect what the marriage produced. When attempting to reach just, fair and reasonable division of assets of parties in jointly owned property, courts already consider spouses’ earnings, income and sources of income, spouses’ contribution at marriage, the way and manner in which the marital estate was accumulated and depleted during the marriage, the spouses’ contribution to marriage independent of contributions of earnings or property, gifts between parties, duration of marriage, health of parties, together with their age and station in life, and their ability or inability to maintain themselves at present or in the future.⁶⁹ But once the parties have taken action to end the union of the marriage, the cessation of accumulation of property should be measured from this point. There is no longer marital intent, nor a desire to accumulate marital property. Courts treating a final divorce decree as the requisite action necessary to discontinue marital or community property provide the non-winning spouse with a windfall.

Katie Foster

⁶⁸ 555 N.Y.S.2d 834 at 835 (N.Y. App. Div. 1990) leave denied 76 N.Y.2d 704.

⁶⁹ *Fisher v. Fisher*, 648 S.W.2d 244 (Tenn. 1983).

