



FUNDAMENTALLY SPEAKING

## EXAMINING THE *BYINGTON* CASE OF MARITAL PROPERTY

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When a couple dissolves a marriage, property division can be one of the most important and complicated issues. As a general rule, courts are only concerned with property acquired by reason of the marriage or more commonly referred to as marital property.

The statutory basis for dividing marital property is found in MCL 552.19, which provides:

MCL 552.19 Restoration of real and personal estate to parties.

Upon the annulment of a marriage, a divorce from the bonds of matrimony or a judgment of separate maintenance, the court may make a further judgment for restoring to either party the whole, or such parts as it shall deem just and reasonable, *of the real and personal estate that shall have come to either party by reason of the marriage*, or for awarding to either party the value thereof, to be paid by either party in money. (Emphasis added).

By default, separate property is property that is not marital. This distinction between marital and separate estates has long been recognized in this state. *Davey v. Davey*, [106 Mich. App. 579, 583 \(1981\)](#). Generally, the marital estate is divided between the parties, and each party takes away from the marriage that party's own separate estate with no invasion by the other party.

However, a spouse's separate estate can be opened for redistribution when one of two statutorily created exceptions is met. [MCL 552.23](#) and [552.401](#). Separate property of one spouse may be awarded incident to divorce to the other spouse under appropriately compelling circumstances such as when the estate awarded to other party is insufficient (MCL 552.23) and where a party contributed to the acquisition, improvement, or accumulation of the property (MCL 552.401).

Property can have a marital and separate component. By way of example, in *Reeves v. Reeves*, 226 Mich. App. 490 (1998), the Court of Appeals held that a premarital down payment for a condominium purchased prior to marriage was separate property and the appreciation of the property during the marriage when the parties shared in the maintenance of the condominium was marital property. *Id.* at 496-497.

In analyzing property exposure, a lawyer must first de-

termine "what" property is divided before addressing "how" property is divided. *Leverich v. Leverich*, 340 Mich 133 (1954), "... property accumulated through the joint efforts of the parties during their marriage, is to be given first consideration in determining the award of property." *Id.* at 137.

If there is a single case that every divorce lawyer should read on "what" property is divided in a divorce, it is the case of *Byington v. Byington*, 224 Mich. App. 103 (1997). A recent Westlaw search on *Byington* provides 353 citing references.

In *Byington*, the parties separated in 1989 and filed for divorce in 1992. The husband resigned from his company in 1993 returning after receiving a bonus package. A dispute arose over the bonus package. The husband argued the bonus package was separate property and the wife argued the bonus package was marital property.

In addressing the question, the Court of Appeals in *Byington* examined the case of *Wilson v. Wilson*, 179 Mich. App. 519 (1989). The husband in the *Wilson* matter lost an eye after an injury and received a \$75,000.00 settlement in 1983. The parties divorced in 1987. The trial court determined that the personal injury proceeds were separate property because the parties' marriage had "ended" in 1980 when the wife stopped cooking and otherwise stopped caring for her husband. *Wilson* at 523. The Court of Appeals reversed holding:

The acts seen by the trial court as ending the marriage are insufficient to end a marriage and to end the rights included within that marriage without some external public manifestation of intent by the parties, such as moving out or filing a complaint for divorce. *Id.* at 524-525.

The Court of Appeals in *Byington* addressed the application of the *Wilson* decision stating:

The obvious implication of the *Wilson* decision is that an "external public manifestation" of the intent to divorce could, at least in some circumstances, be sufficient to create a separate estate with respect to assets subsequently earned. In fact, the *Wilson* Court intimated that the marital estate effectively ended when the parties in that case took up separate residences in 1987. *Id.* at 112-113.

The *Byington* Court distinguished the *Wilson* holding stating:

Thus, while the emphasis of the *Wilson* decision on the external public manifestation of the intent to lead separate lives may not have been misplaced in the context of *dividing* a marital estate, we decline to endorse *Wilson* to the extent that it may be interpreted as standing for a broader rule of law that property acquired after a public manifestation of the intent to lead separate lives is not part of the marital estate. *Id.* at 113.

In *Byington*, the court determined that the asset earned by one party after moving to another state and after the other party filed for divorce was marital. More importantly, the *Byington* Court determined that a court *may still consider manifestations of intent to lead separate when apportioning the marital estate.* *Id.* at 114.

With over 350 cases citing *Byington*, I have tried to highlight the seminal cases below.

**Passive Appreciation.** *Reeves v. Reeves*, 226 Mich. App. 490 (1998). Appreciation of Defendant's minority interest in a shopping plaza during the marriage was "wholly passive" appreciation and therefore not marital property.

*McNamara v. McNamara*, 249 Mich. App. 177 (2002). Appreciation in a pre-marital retirement account was not wholly passive when the parties made contributions to the accounts during the marriage.

**Retention Bonus/Signing Bonus.** *Skelly v. Skelly*, 268 Mich. App. 578. (2009), Husband's pre-paid \$180,000.00 retention bonus for work not yet performed was not marital property holding: "Unlike in *Byington*, where the compensation package was earned before the entry of the judgment of divorce, no portion of plaintiff's retention bonus was earned during the marriage." *Id.* at 583.

*Oriedo v. Nyanul-Oriedo* Docket No. 288432 (2010) – unpublished. A signing bonus partially received during the marriage and contingent on remaining with the company for a period of time after the entry of the Judgment of Divorce was marital property earned during the marriage.

**Pension.** *Vander Veen v. Vander Veen*, 229 Mich. App. 108 (1998). Value of ex-husband's pension attributable to the marriage was properly calculated by using "coverture factor," which is a fraction of years of marriage that ex-husband was working over the total years of his employment, rather than to change in pension's net worth that occurred during the course of the marriage.

**Retirement package.** *McNamara v. Horner*, 255 Mich. App. 667 (2003), after remand. Husband's retirement package consisting of a consulting agreement, nondisclosure agreement, non-compete agreement and release agreement was signed prior to the parties' divorce. The release agreement was properly included as part of the marital estate accrued during course of marriage. The consulting agreement, nondisclosure agreement, and agreement not to compete were excludable from the marital estate as husband's separate asset in divorce proceeding because they were not earned during course of marriage.

**Workers Compensation Package.** *Cunningham v. Cunningham*, 289 Mich. App. 195 (2010). Workers' compensation benefits are to be considered marital property only to the extent that they compensate for wages lost during the marriage. Any workers' compensation benefits awarded for periods before the marriage or after its dissolution are to be considered separate property.

**Severance Package.** *Russell v. Russell*, Docket No. 325405 (2016) – unpublished. A severance package that included 5 months of wage continuation (after the parties divorced) and a release of liability from claims which may have arose during the marriage as marital.

**Stock Split.** *Stanko v. Stanko*, Docket No. 220167 (2001) – unpublished. Stock acquired one month after the trial court's decision but before the entry of the Judgment of Divorce was marital property when the trial court awarded half of the monetary value of the stock and not the shares of stock.

**Contributions to Stock Savings Investment Plan After Filing Divorce.** *Mackie v. Mackie*, Docket No. 214758 (2000). Trial court erred in determining contributions to stock savings investment plan after filing for divorce was separate property.

## About the Author

*Daniel Findling is a divorce and family law attorney in practice for over 20 years and managing director of Findling Law, PLC, a divorce law firm with attorneys who share the core value of practicing law to help people navigate change in their life without compromising principles. Daniel is a proud father of three, private pilot, prolific blogger and lecturer. A 1971 graduate of Shaarey Zedek Beth Hayeld very good student award, a 1993 graduate of Wayne State University Bachelor of Public Affairs, magna cum laude and a 1997 graduate of Wayne State University Juris Doctor, cum laude. A member of Pi Sigma Alpha – National Political Science Honors Society, recipient of the Bronze Key Certificate – Wayne State University Law School, a DBusiness Top Lawyer, Super Lawyer, Crains Detroit Business Top Lawyer, Hour Detroit Top Lawyer and Avvo Top Divorce Attorney.*