

# Equitable Distribution of Negative Equity

By: Jeralyn L. Lawrence, Esq.



The factors that must be considered by the court for purposes of determining equitable distribution of assets and debts acquired during marriage are identified in N.J.S.A. 2A:34-23.1. Items included for purposes of equitable distribution include, but are not limited to, real estate, vehicles, bank accounts, stock options, retirement accounts, mortgages, credit card debts, and automobile loans, among other assets and debts obtained or incurred by the parties during the marriage.

An interesting issue arises, however, when one party to a marriage seeks to retain a marital asset that, at the time of trial or settlement, is underwater. Presented another way, how do courts determine equitable distribution of negative equity, whether a residence, automobile, or the like? In a recent unpublished opinion, the Appellate Division of the New Jersey Superior Court upheld the lower court's equal allocation of negative equity between two parties after the trial court determined that negative equity of a marital property is a joint marital liability subject to equitable distribution. *Flockhart v. Flockhart*, No. A-1578-16T2, 2019 N.J. Super. Unpub. LEXIS 1203, at 41 (Super. Ct. App. Div. May 24, 2019).

In affirming, in part, the trial court's decision, the Appellate Division calculated each party's share of equitable distribution by adding the "net value of all properties and businesses, and divid[ing] that amount in half..." Id. at 40.

It then subtracted \$100,000 from the wife's share of the negative equity in a marital timeshare for which the mortgage exceeded its value by more than \$200,000. Id. In justifying this calculation of negative equity, the Appellate Division relied on the fact that the wife asserted no objection in calculating the equity of other marital property by "subtracting the amount of the outstanding mortgage from the value of the property," and found that the only difference in doing so with respect to the marital timeshare versus other marital property, was that the timeshare was encumbered by more debt than its appraised value. Id. at 41. With this reasoning, the lower court's decision on this issue was affirmed. Id. at 40.

Although the Appellate Division's opinion is unpublished, and as such, does not establish precedent in New Jersey, it is worth noting that the Florida District Court of Appeal reached a similar conclusion as to the disposition of negative equity in *Byrne v. Byrne*, 128 So. 3d 2 (Fla. Dist. Ct. App. 2012). In so deciding, the Florida court opined that the trial court "erroneously assumed that the negative value associated with the [parties'] condominium would simply vanish if the parties were to 'abandon the residence' or 'return the keys to the banks holding the indebtedness.'" Id. at 4. The Florida court additionally relied upon the fact that debtors remain liable for any debt that is not satisfied following foreclosure proceedings. Id. For these reasons, the lower court was directed, on remand, to consider the condominium's negative equity as a joint marital liability for purposes of equitable distribution. Id.

This Florida court's principle appears consistent with the New Jersey Appellate Division decision. Notwithstanding its unpublished status, the New Jersey Appellate Division decision suggests that a determination as to negative equity in this state is similarly subject to the statutory factors set forth in N.J.S.A. 2A:34-23.1.

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