

## **Introduction to Dad's Financial Guide to Divorce**

In "[Dad's Guide to Custody](#)", I focused exclusively on issues relating to a father's custody concerns. My objective here is to address all the remaining hard or tangible issues confronting dad in a divorce. As you might suspect, they all relate to money.

I have tried to organize this guide in a way that allows a divorcing man (presumably yourself), who is uninitiated in the intricacies of the divorce process, to quickly develop a strong knowledge base from which to work as he walks through the system. Therefore, this guide equips its reader to most effectively partner with his attorney to achieve his goals. To this end, I begin by explaining the basic definitions and concepts governing the court's decisions relating to your and your spouse's money - from property division to the issue of maintenance. I then focus on two specific classes of property, the marital home and the family business. In the final section, I discuss specific strategies you might implement to enhance your financial position.

My task is potentially greatly complicated by the fact that there are fifty states, each with at least minor peculiarities as to various aspects of its divorce law. But a more practical analysis reveals that the overwhelming majority of states have far more in common than not regarding their divorce law. From 1974 to 1979, many states adopted the Uniform Marriage and Divorce Act, which, though amended in places, creates remarkable commonality as to these states' divorce law. However, when there is an issue as to which there is no clear consensus among the states, I try to point this out.

Regarding your financial objectives, I make an important assumption in this guide which thousands of cases persuaded me is a safe one - namely, that during the course of your divorce and thereafter, you would prefer to give your parting wife less money than more - less maintenance, less child support (this does not reflect on your willingness to support your kids), less property, less attorney fees and more debt.

Finally, the information I provide in this guide is not intended to be used in lieu of an attorney. I have a low opinion of any man's judgment who attempts a divorce without his own lawyer. (This incidentally is a redundant phrase necessitated by the common misconception that both spouses can use the same lawyer in their divorce). This guide if followed should make you a better client, and, as a result, your lawyer a better lawyer (i.e. more effective in his representation).

## **The Role of Psychological Warfare**

Before I deal with the "rules" of divorce, I should first discuss the psychological dimension. I don't mean by this that I presume to speak outside my field - I make no pretension to psychological expertise. But, on the other hand, no seasoned divorce lawyer can intelligently ignore the opposing parties' likely attitudes, priorities and motivations. Divorce, like any war (you may prefer the word "conflict") requires that its generals consider at every turn their opponent's state of mind.

At Cordell & Cordell, our experience has been that the wife's position as to money can in many cases be anticipated by the dynamics underlying the decision to divorce. Let me present to you two very broad scenarios which, it has been our experience, generally describe at least 75% of America's divorces. Although

it is true that divorces of necessity defy stereotyping by age or gender, the balance (ie, divorces of preference) do not. In fact, the great majority of divorces readily fall into one of two categories, depending on who wants out. Men and women choose divorce at different points in life and for different reasons. This was discussed in detail in Dad's Guide to Custody, as follows:

Regarding men, it is not surprising to hear that if a man is going to divorce, he is most likely to do so in his 40s. This is the period in most men's lives when they are enjoying more income, more success, and more respect than ever before. Furthermore, their prospects are the greatest during this period in their careers. Worsening matters further, men are often considered more attractive in their 40s than at any other time in their lives. You may find it interesting to know that despite Cordell & Cordell's almost entirely male clientele, I estimate that such men comprise no more than 10% of our client base. I must confess that this is not true because I sanctimoniously turn them away, although this has happened. I believe it is true because the stereotype is grossly overstated by the media.

Now let us consider the other gender: is there a pattern to be found among women in their decision to get divorced? (Let us first put aside gender-free circumstances- which I refer in [\*Civil War\*](#) as the "fatal-four"). What is left is an unmistakable and almost invariable profile of women who choose divorce. They are in their 30s; their husbands, by the wives' own description, are decent guys; they have young kids; and, almost invariably, they have a boyfriend.

Every day I meet with a man in his 30s whose wife wants a divorce. My client is usually stunned and confused. His wife is sending mixed signals, and her reasons for wanting a divorce are vague. She even seems, at times at least, ambivalent as to whether she wants the divorce. My client desperately wants to save the marriage. His tendency is to blame himself and to irrationally focus on his deficiencies as a husband. He tends to cling to her (in effect if not in fact), repeatedly asking for another chance. He pathetically assures her he will do better. If I ask him what exactly there is for him to do better, he commences an anguished recital of a much-considered and lengthy list of his spousal failings. As I listen, I realize these items cannot, even cumulatively, explain his wife's decision.

What my client does not yet realize, however, is that his wife's decision to surrender her family has nothing to do with him. I believe the stimulus is something much deeper. The fact is that women in their 30s are intensely conscious of aging. You do not have to have a Ph.D. in sociology to realize that the fact of aging is of more importance and urgency to your wife than it is to you. Women in this culture (perhaps in all cultures) have not failed to notice that physical and sexual attractiveness are powerful and frequently determinate factors in their relationships with men. Therefore there is a closing window of opportunity for women in their 30s to obtain a desirable mate. For married women this means a lateral move or, better still, the opportunity to trade up. Put differently, the cement is drying. If such a woman is not completely "fulfilled" (whatever that means), she must take steps soon, if ever, to rectify the situation.

The practical implication for you of these stereotypes is that your wife's position as to your money is likely affected. Absent the "fatal four", if your wife is the one leaving, she is far more likely to minimize or even forego maintenance as well to be reasonable regarding assets and attorney fees. Conversely, if the shoe is on the other foot, I typically expect for the wife a dispute driven as much by vindictiveness as by greed. Incidentally, the latter motivation is far more manageable than the former. What's the phrase - "Hell hath no fury....."?

Regarding the remaining minority of cases which relate to a substantive cause, the wrongdoer is often inclined to make concessions. This perhaps flows from some combination of a genuine sense of guilt and a desire to avoid the tawdry exposures which, at least potentially, accompanies litigation. Another more tangible factor, though typically less influential, is the potential for the court in some jurisdictions to punish a spouse monetarily for "marital misconduct" (this will be discussed more fully later).

I have sat as counsel on both sides of the table as to these concerns. As a result, I have seen guys extract very favorable settlements from their wayward wives. Conversely, I have painfully and disagreeably watched guys make abysmally lopsided deals simply to avoid various incriminating but monetarily unimportant disclosures. Often such cases relate to sexual misconduct by my client. I emphatically point out to such hand-wringing clients that the embarrassment will pass over time but the deal is forever.

Furthermore, when the preferred deal is really bad, I can usually add the assurance that the judge will be far less punitive (if punitive at all). As in all divorces, however, the client is ultimately the boss and therefore must make the ultimate decision. (I'll add here that the attorney, with the court's permission, may withdraw as counsel for a party if he believes the deal is too one-sided). Cordell & Cordell's general policy, however, has been to continue its representation so long as the client knows what he is doing. To do otherwise strikes me as unduly paternalistic. The bottom line is that, absent the knowledge of a mental illness, the client should be treated as the competent adult he presumed to be. If such termination were widely practiced, it would effectively deny the client his legitimate right to make his own life choices. In such circumstances the client is presented the Hobson's choice of doing the deal his lawyer likes or continuing through the divorce process without a lawyer (never a good idea!).

In all fairness, I must add here that law firms which have such withdrawal policies are likely motivated at least in part by legitimate malpractice concerns. In a number of cases regretful clients have sued their lawyers for permitting the bad deal to happen. Nonetheless, lawyers can reduce such risks to a minimal level by simply taking certain precautionary steps coupled with careful documentation. You should also be aware that the judge may also become an obstacle to a flagrantly one-sided deal. The Court has the decision to reject a settlement agreement it deems "unconscionable" (more about this later). Putting aside the patterns discussed above, the bottom line is that, absent "unconscionability", you and your wife can cut your own deal. While I will discuss the subject of settlement agreements in Chapter , it is important that you understand this point here, prior to becoming immersed in the intricacies of domestic relations law.

Therefore, as you and your attorney proceed - as you consider various discovery options, as your attorney drafts correspondence to the other side, as you interact on a day to day basis with your wife - you must do so at least with a preliminary eye to the likely psychological impact of your actions on the probability of a

favorable settlement. In some cases implementing certain discovery techniques (these will be discussed more fully ahead) such as noticing up a deposition of a lover/co-worker or the issuance of a subpoena for certain incriminating documents may have to wait. In many cases such adversarial discovery, while often essential for trial, slams the door on fragile settlement discussions. In any case, your lawyer will no doubt have to rely on you to accurately predict the psychological effect of such activities on your spouse. I should mention here that in addition to always considering the psychological responses of your wife, some consideration must sometimes be given to that of the opposing attorney. Remember, attorneys too have personalities and patterns of behavior. You must rely on your attorney to gauge this. While we're at it, I'll point out that this is also profoundly true of the judge. But this will be discussed ahead.

Having said all this, however, I must append my perhaps cynical but sagely chary admonition: go into your divorce prepared to have to fight for every nickel you obtain or retain. To be sure, if a realistic prospect for a favorable settlement exists, and if you can pursue a settlement strategy without significantly jeopardizing preparedness at trial, you should certainly do so. Why should you and your wife give a large chunk of your marital assets to divorce lawyers if you don't have to?

However, these risk-free conditions typically only exist, if at all, for a brief period early in the divorce process. Thereafter the two paths, settlement and trial, diverge. This creates a tough dilemma for a client deeply desirous of a peaceful resolution. Too often in such cases a client will cling too long to a misguided expectation, so that when talks do eventually collapse, it is no longer possible to do the things necessary to be adequately prepared for trial.

As an attorney, I can tell you this is often a no win situation. If the lawyer discourages settlement, his client is inclined to believe that, but for the lawyer fomenting litigation, he and his wife would have resolved things amicably and still be friends. Conversely, if the matter does go to trial and his lawyer is unprepared, the reason is often irrelevant to the client.

The best tact for both attorney and client is to explore preliminarily the prospect of settlement. If deemed realistic, pursue it only so long as it does not significantly inhibit trial preparation. When that conflict develops, absent firm and extraordinarily favorable developments, trial preparation should eclipse all else.

In conclusion, psychological factors must be considered in any great conflict. I have discussed them here only as they relate to stimulating at some point a settlement or more aptly in many cases, a surrender. Obviously this evaluation of your opponent should be an ongoing process from your divorce's commencement to its conclusion.

## **Property in General**

In this section I want to discuss the general concepts governing all your and your wife's property - whether real estate, cars, pension plans, household furnishings, or other assets. This discussion will give you a sense of what will be important to the court in reaching a decision in your case, (and perhaps more significantly, what is not important). Because the law on this topic differs between "source of funds" states on the one hand (which includes all states except community property states) and "community property" states on the other

Wisconsin ) I must deal with the two types separately. Since statistically more readers will be in "source of fund" states, my explanations will refer to those states except where expressly stated otherwise.

First, it is necessary to discuss the category of assets which a divorce court does not even have the jurisdiction, (i.e. the authority) to transfer or divide between the parties. That asset category is termed "separate" property. The remaining assets owned by either of both parties are termed "marital". This separate vs. marital distinction is a very complicated one which has spawned countless dry volumes of legal exegesis. Let me start with the UMDA definition (as used in Missouri, for example):

2. For purposes of sections 452.300 to 452.415 only, "marital property" means all property acquired by either spouse subsequent to the marriage except:

- 1. Property acquired by gift, bequest, devise, or descent;
- 2. Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
- 3. Property acquired by a spouse after a decree of legal separation;
- 4. Property excluded by valid written agreement of the parties; and
- 5. The increase in value of property acquired prior to the marriage or pursuant to subdivisions

(1) to (4) of this subsection, unless marital assets including labor, have contributed to such increases and then only to the extent of such contributions. As you can see, marital property is defined in the negative. It is all property owned by both or either party at the time of the divorce except for property received by one party prior to the date of marriage, or received by one party during the marriage by gift or inheritance.

It may be helpful for you to think of all property held by either or both of you as falling within one of three circles which some scholars terms "estates." This simple schematic may help you better visualize these concepts. Technically a fourth circle should be drawn and denoted as "others" to reflect the not uncommon scenario wherein one or both spouses own an asset jointly with a third party. Obviously the divorce court cannot justly or appropriately apportion a person's assets who is not a party to the case. For example, a husband might own a family business jointly with his brothers and the wife may contend that the husband's interest is marital. Depending upon what is in dispute, as well as what remedy the court is considering, it may be necessary constitutionally for the court to join the other owners as parties to the action. Certainly if a dispute exists as to what portion of the business husband owns, common sense and fair play (what the Constitution terms "due process") requires the "joinder" of the other claimants.

<b>HUSBAND'S SEPARATE</b>	<b>MARITAL</b>	<b>WIFE'S SEPARATE</b>
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These estates may engage in transactions with one another or assets may simply be moved from one estate to the other. These movements often occur without either party's conscious intent. Before I discuss separate property, the point should not be lost that in most marriages of 10 years or more there are no significant separate assets.

Because the statute is worded as it is, all property of the parties will be presumed to be marital unless the spouse claiming something is separate provides evidence for that claim. This task is often quite simple - as to many financial assets, if they were acquired by one of the specified means or prior to the marriage, there is a document trail which the asserting party can present to the court as evidence. Conversely, as to some assets, notoriously personal property such as furniture, there may be no helpful documents. The evidence may consist simply of the party's testimony or that of others, in which case the judge decides based on his opinion as to credibility. Further, documents may have been lost or destroyed.

Also, where there are documents there may be a dispute as to what they mean. This disagreement often arises as to gifts - the parties can frequently establish when a gift, such as money or securities, was received but dispute whether it was intended as a gift. One party may contend that the transfer was repayment of a loan or payment for products or services, or was intended to be a loan, since forgiven.

Probably the most complex and litigious issue relating to the marital vs. separate distinction is the subject of "commingling." Commingling refers to the mixing or blending of separate and marital property so that the identity of each becomes confused. Before examining this issue further, we should go back to the definition of marital property and consider its scope.

Because all property acquired during the marriage excluding the above state exceptions is marital, the marital asset list must include wages, interest income, divided income, and all other sources of income - including income from separate assets. This means that what is earned on separate financial accounts, whether cash or securities, is marital. Conceptually this rule has a certain logical consistency. The income generated by your labor (your wages) is marital, yet is it recognized that your person is not a marital asset.

Returning to the issue of commingling, let me discuss the potentially grave implications of assets becoming commingled. If a court concludes that mixing has occurred such that the marital interest can no longer be confidently distinguished from the separate, it may deem the entire asset marital. At one time most courts were harshly fastidious in their tendency to declare an asset "hopelessly commingled." For example, it was, and perhaps still is in a small minority of states, enough for the party asserting that a given financial asset is now marital to show that the associated dividends or interest earned on the account was reinvested in the same account. Even though the reinvested amounts could typically be precisely quantified, the court nonetheless predicated its finding of "transmutation" (i.e. change in status) upon the hyper-technicality that the specific dollars could no longer be identified.

Today, most judges reject such clerical obsessiveness and evaluate more practically on the commingling question. Furthermore many states have adopted statutes in recent years specifically forbidding a finding of transmutation based on the simple fact of commingling with nothing more.

In fact, the applicable Missouri statute reads as follows: "Property which would otherwise be nonmarital property shall not become marital property solely because it may have become commingled with marital property." (R.S.Mo. §452.330.4.) Despite this forward step, however, you can probably still see the propensity for mischief inherent in the commingling issue, particularly where enterprising lawyers with

exacting clients are present. Commingling can occur with virtually any type of putatively separate asset if it is melded with marital accretions. While cash accounts and securities are perhaps the most common source of such contests, probably the most complex commingling cases, at least in my practice, concern closely held businesses (discussed later in this guide).

Your lawyer will be able to tell you the level of stringency regarding commingling that exists in your jurisdiction. At the risk of disturbing a picture that has finally started to come into focus, I have to point out that in most jurisdictions that assets which are separate property via ownership prior to marriage are not subject to transmutation by way of commingling. The underlying policy regarding this class of assets seems to relate primarily to the fact that documents of title exist which delineate ownership. It is contrary to both legislative purpose and public understanding to find such transmutation. Also the policy seems concerned for the integrity of certain public records of ownership. The most common such example is real estate. Another is corporate stock.

Such assets, however, are not impervious to spousal claims. The court's analysis focuses on calculating the contribution made by the marital estate to the separate estate. Instead of deeming the asset transmitted from one estate to the other by virtue of the monetary transfer, the court views the transaction as a sort of investment or loan for which the contributing estate is entitled to compensation. In Missouri, for example, a formula is used which effectively gives the marital estate a pro rata share of the increased equity. This will be discussed further in Chapter .

This approach is usually much more beneficial to the owner of record than the alternative. Most obviously, it allows the owner to avoid having to divide the asset entirely with his spouse (as opposed to a wholesale conversation to marital). Additionally it assures the owner can retain the asset if he chooses (subject of course to his ability to satisfy any resultant lien(s)).

Now that I've discussed the doubtlessly still obscure process by which assets may transmute from being a party's separate asset to being the parties' marital asset, I should point out that the reverse is possible. Most states have statutes that permit the parties, by agreement, to convert an otherwise marital asset to the separate asset of one of the parties. Missouri's statute, for example, excludes from the definition of marital property "Property excluded by valid written agreement of the parties". The process occurs when a party (more often the husband) uses marital funds to buy a gift (such as a car or jewelry) for the other party's birthday. Using the schematic above, the parties (the husband expressly and the wife implicitly) transfer assets from the marital circle to the wife's circle.

This example is notoriously disturbing to divorcing men whose gifts to their wives over the years are often of substantial value while the corresponding gifts from wives are frequently inconsequential. This imbalance is simply a cultural norm, with ramifications which, absent an extraordinarily diabolical wife, neither party can fairly be said to have expected.

Some guys will argue that one of their vehicles or other personal property was "kind of like that", by which they typically mean that the husband bought himself a gift or, slightly more persuasively, his wife consented

to the purchase. The bottom line here is whether both parties choose to gift the asset from marital to separate.

Obviously a party cannot unilaterally gift a marital asset to himself. Therefore if wife truly did tell husband to go buy himself a truck for his birthday, then, if proven, the asset will likely be husband's separate property.

While transfers from marital to separate such as those discussed above will not likely be disturbed, you should be aware that the court has the authority to declare void such agreements as it deems unconscionable. Such agreements are treated much like settlement agreements in this respect. Generally speaking the less routine and the more substantive such transactions are, the more vulnerable they are to the court's scrutiny. Though this point may be late in coming, such agreements, particularly the more inclusive deals by which you and your wife divide marital property, should be reduced to an unequivocal writing. Of course, you should thoroughly discuss the issue with your attorney beforehand.

Now that you've grasped the distinction between marital and separate property, you are probably wondering what all this means in simple dollar terms.

First I will repeat my previous statement: The Court must set aside to each party his/her separate assets confined in its Decree of Dissolution. Before, however, you derive undue salience from this constraint, I should quickly add that the court can often achieve through a back door what it can't through the front. To understand this, recall the list of criteria governing marital property distribution in the UMDA. Specifically consider the provision which in Missouri reads as follows:

"The court shall set apart to each spouse such spouse's nonmarital property and shall divide the marital property and marital debts in such proportions as the court deems just after considering all relevant factors including ... (3) The value of the nonmarital property set apart to each spouse..." (R.S.Mo. §452.330.1).

This criteria effectively allows the court to adjust its distribution of marital assets so as to mitigate, on otherwise, presumably gross, disparity between the total (i.e. marital and separate) assets received by each party. Though your judge's discretion here is likely constrained to some extent by prior court decisions, the simple truth is that the ultimate outcome is highly subjective. This disturbing reality permeates domestic relations law perhaps to a greater extent than any other area of the law. As a result this matter will receive recurrent attention throughout this book.

Lets turn again to the UMDA factors governing the distribution of marital property. In particular I want to consider the provision regarding marital misconduct. Missouri is one of many states that consider misconduct a substantive factor in awarding property. The fact is, however, that a few states do not even consider the parties' conduct except as it might relate to grounds for divorce (which as a practical matter makes misconduct superfluous as to any issue of substance in your divorce.

Not surprisingly most people are misled by the characterization of a given state as a "fault" or a "no-fault" state. These distinctions are less important than one would think, since they refer to the necessary grounds (or



reasons) one needs to obtain a divorce in a given state, not to whether the parties' conduct during the marriage is considered in awarding property, maintenance, attorney fees, etc. The result is that a "no-fault" state may in fact punish misbehavior in harshly monetary terms, while a "fault" state (e.g. Illinois) assures the wrongful conduct is without consequence. Furthermore, even the grounds proclaimedly necessary in "fault" states are routinely given short shrift in their courts and as a practical matter pose no obstacle to anyone wanting a divorce. You should consult an attorney for your state to determine the rule.

If misconduct is relevant to your divorce in your state, you should know what the phrase encompasses. The most ready association for most people (lawyers included) is sexual infidelity. But the term is broader than that in many jurisdictions. Some courts have found adultery without evidence of sexual activity. Conversely others, absent evidence of intercourse, will not find adultery.

Other conduct commonly deemed "marital misconduct" is physical abuse, emotional abuse, gambling and other overt dissipations of marital assets, alcohol abuse, and drug abuse. "Bad behavior" can no doubt take additional forms which many courts would denominate marital misconduct.

Much could be said about the definitions of each of the above phrases. I won't pretend to know the parameters of your court. I often struggle to accurately anticipate the parameters of judges I see on a daily basis. I can, however, offer a few reliable generalizations: For misconduct to affect property distribution, most jurisdictions require that you demonstrate a connection between the misconduct and either the destruction of the marital relationship or specific monetary harm to the marital estate. Regarding the latter, your incremental benefit is likely tantamount to your proven damages.

I should also mention here that clients complaining of misconduct are often disappointed by the stingy consideration such evidence is given in the court's final decision. Typically evidence of misconduct stimulates a favorable swing in property distribution of no more than 10%. Obviously egregious circumstances could dramatically affect this. These dismissive tendencies of the courts are no doubt attributable, in part to more permissive social and cultural trends. But as influential, I believe, are the attitudes to which many judges become susceptible over time.

I have found that after several years on a divorce court bench, judges tend to become inured to the somewhat repetitious and often petty charges and countercharges. The result is often a judge impatient with the ugliness accompanying misconduct issues, coupled with a jaded and cynical tendency to impute approximately equal culpability to both sides. (In fairness I must add that many judges heroically manage to maintain a fresh perspective. Those who fail, I am convinced, do so unconsciously, and are in other respects gracious men and women. Divorce court does strange things to those who live in it).

For the reasons discussed earlier ([link back](#)), my clients, I think, are disproportionately victimized by their wife's adultery. Understandably, therefore, they tend to obsess about the matter. Though Missouri law regarding marital misconduct makes clear its technical relevancy at trial, it is nonetheless, as discussed above, often ignored absent particularly culpable facts - e.g. kids see man and her lover having sex. Such smoking guns, however, are typically unavailable.

Having stated the above caveats, it is nonetheless crucial that you establish the misconduct at trial, the judge's

seeming lack of interest notwithstanding. In some cases a lawyer will prepare and present his case entirely for the court of appeals - since in such instances he will know in advance of trial the court's ultimate decision. (I will discuss in Chapter the common sources of foreknowledge).

The remaining factors determining the distribution of marital assets are largely self-explanatory, therefore I will not deal with the individually here.

As you can see, the distribution of marital property, like many areas of family law, is left largely to the discretion of each judge. Certainly parameters do exist, but the governing statutes' vague criteria make reversal by an appellate court difficult. The Court of Appeals is the body to which you turn if you feel the judge's decision is wrong, or even if its conclusions regarding the facts were disputed. In an appeal, there are several types of errors that can be alleged of the trial judge. Most promising are errors related to the trial courts misinterpretation of the law or its application of the wrong law. An example of the latter would be a judge's finding that a marital asset is separate in the absence of conflicting evidence. If, however, you seek to challenge the trial court's conclusions regarding its distribution of marital property, with nothing more, you are essentially challenging its factual conclusions.

The standard for reversal as to the judge's factual conclusions is a determination by the appellate court that no reasonable person could have reached the trial court's conclusion with the evidence presented. In considering this question, however, the appellate court must show great deference to witness credibility. Suffice it to say that reversal in such cases is very difficult.

This discussion should lead you to the ineluctable conclusion that your judge - with his peculiar set of values, attitudes and predilections - will likely be the most determinative simple factor in the outcome of your divorce. In some cases I thank God for this fact, in others I decry its capricious injustice.

Your lawyer should have an extensive familiarity with all the potential judges in your case, and he should have this knowledge from the outset of your case, not simply as it approaches trial. Key opportunities exist early in a case for changing judges which typically disappear 30 days into the process. For example, many jurisdictions give you one opportunity to "take a change of judge" without cause for a brief period, such as 30 days after a filing or assignment of a judge. It is reckless to let this period pass without a careful consideration of your present judge vis-à-vis his likely alternatives so that an intelligent decision can be made. Additionally, in some jurisdictions, given the right facts you may have the option of dismissing in one county and filing in another or, even better, of choosing among two or more venues in which to commence your case. I should add here that for various reasons some venues (counties) are more suitable to your circumstances or objectives than others. Though I won't cover them here, your attorney can explain them if, in fact, such alternatives even exist. But I'll conclude this discussion for the time being by emphasizing again the critical role your particular judge will play in your property (and other) outcome.

## **Maintenance / Alimony**

To our clients at Cordell & Cordell and I'd venture to say divorcing men everywhere, perhaps the single most offensive issue in a divorce is that of maintenance, once termed alimony.

Our clients typically had no objection to supporting their wives during the marriage wherein a sort of reciprocal marital relationship existed - a sort of division of labor, whereby each spouse plays a pivotal role. In fact during the marriage husbands are notoriously too generous as far as their divorce lawyers are concerned. But when the partnership is terminated and each goes his or her own way, the dynamic dramatically changes. That once powerful chivalrous impulse is lost. Now the issue of support becomes simply a matter of whether or not this male adult will be required to support another presumably healthy female adult. This objection is greatly magnified where the partnership was concluded by the wife's decision to abandon the marriage, which as we've discussed, likely included infidelity.

This reaction strikes me as perfectly natural, particularly in light of the cataclysmic social, political and economic changes of recent decades relating to women's rights. These efforts have proven remarkably successful. No longer can it be said, except in the most radical feminist circles, that women face any significant barriers in the marketplace because of their gender.

Opposing counsel, however, may concede this point, yet insist that his client is legally entitled to maintenance. He may be correct, depending both on his client's and my client's circumstances. Before I go further, let me insert a disclaimer here. Based on Cordell & Cordell's statistical experience, I make the assumption as I write that you are the party being asked to pay maintenance. Certainly it is possible, in fact likely, that at least some of my readers will be the ones seeking maintenance. If so, where I describe the basic law, simply adjust accordingly the gender nouns and pronouns. The law on this subject is gender-blind by federal constitutional mandate as well as by statute in every state. (I am not so naive as to suggest that biases do not surreptitiously creep in). Regarding, however, my empirical observations, which are not so interchangeable, I apologize. I focus my attention in this discussion, as at several other places in this guide, on the circumstances I believe to be of the overwhelming majority of my readers.

Let me at this juncture give you a brief tutorial on how maintenance, at least in theory, is determined.

The first step is to examine the relevant factors prescribed by the statute. Here is Missouri's:

§452.335.2. The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:

- (1) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
- (2) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
- (3) The comparative earning capacity of each spouse;
- (4) The standard of living established during the marriage;

- (5) The obligations and assets, including the marital property apportioned to him and the separate property of each party;
- (6) The duration of the marriage;
- (7) The age, and the physical and emotional condition of the spouse seeking maintenance;
- (8) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance;
- (9) The conduct of the parties during the marriage; and
- (10) Any other relevant factors.

As you can see the factors listed are vague. For example the statute tells us that the length of the marriage is important but it tells us nothing about its implications for a given marriage. You can safely speculate as to the provision's helpfulness or harm if you are on one end of the duration continuum or the other, e.g. a marriage of 3 years or one of 30. But if your case is among that great majority in between, the import is less clear.

But, of course, this is why you have a lawyer. He is likely familiar with the applicable case law in your jurisdiction which will give you some more specific guidance. Often better than case law, however, is your lawyer's familiarity with your particular judge's opinion on the subject. In many states a good watershed point is 10 years. This simply means that, all other things being equal, a judge in such jurisdictions is more inclined to deny maintenance when the parties have been married less than 10 years and to grant it when more.

The statute speaks of the recipient's reasonable needs and the payor's ability to pay. These provisions in theory at least simultaneously create a ceiling on payments to the recipient and a protective floor on the payor's minimum threshold of retained funds. Now let's look at how these two provisions interact operationally.

Preliminarily, we must determine whether wife has a reasonable need and whether husband has an ability to pay. According to the statute, if either of these conditions cannot be met, maintenance cannot be ordered.

This calculation is made from the financial forms which each party must file with the court - though called by various names, they essentially consist of a statement of property and debts and a statement of income and expenses. These may be merged into a single form. This is a good place to vividly and emphatically persuade you of the critical importance of your and your wife's financial statements. The numbers you place on these forms, as the exercise we are now doing illustrates, can dramatically affect your outcome. Furthermore, because these statements are signed under oath and filed with the court, they constitute admissions which can be used against you.

Before going further, however, I have to tell you that, though temptingly simple, neither the judge nor the opposing attorneys are willing to accept without challenge both parties' numbers. The simple reality of litigation is that each party creates statements which, though presumably truthful, are nonetheless thoughtfully self-serving with all doubts resolved in the signatory's favor. The divorce litigation process is in part devoted to the task of impeaching various numbers on your opponent's financial statements.

Getting back to the preliminary task of determining whether maintenance is appropriate at all in a given case, you have to start with both financial statements. More specifically, you need statements of all income and expenses of both you and your spouse. Obviously, before doing any final calculations, you must first examine each listed source of income and each item of expense. Then determine what the most credible numbers should be and adjust them accordingly. If this exercise is done early in the process you might find you don't have enough information to permit any reliable conclusions.

In evaluating the numbers, consider the following: keep in mind that the expenses must be reasonable, though they may reflect the standard of living enjoyed during the marriage. Pull out high expenses listed by your wife which will soon be going away or will disappear after the divorce. If your wife shows no income or underemployment income, your lawyer may choose to impute income to her (depending upon its ramifications for other issues such as child support). From a defensive perspective you should include or mark with an asterisk and explanatory note income you expect to decline or disappear. If overtime will not be available next year, it may be similarly tagged. Regarding expenses, you should be careful to include all expenses. You must not understate existing expenses and you must anticipate future expenses to the extent possible. (This too, you may, depending on your form, have to indicate by asterisk or other means). Also, do not assume all your expenses are picked up by the categories on the form. They are not. What about gifts? Do you have cable TV? Feel free to add whatever categories are necessary to include all your recurring expenses.

The foregoing are but a few of the many considerations an experienced divorce lawyer will confront in dealing with both your and your wife's numbers. If this discussion did nothing more than persuade you of the complexity and importance of your and your wife's financial statements, that makes it worthwhile - your attorney presumably already understands what you still may not.

Lets assume we have assembled the necessary records and other information with which we can now make reasonably informed adjustments to both your and your wife's income and expense statements. The result should be the numbers you reasonably expect the evidence to support at trial. The best-case-scenario and accompanying puffery inherent in each side's "official" statements have now been purged and preened to hard reality. Remember this is an "in-house" exercise intended only for your and your attorney's consumption. In legalese, it's termed "work product" and is absolutely protected from discovery by the other side. These numbers will likely affect your strategy going forward - particularly your position in future settlement discussions.

Now, when you subtract each party's expenses from his/her income the resulting numbers should allow you to answer with some confidence the preliminary questions raised above.

First, lets see if the claimant (your wife, we'll assume) is even potentially entitled to maintenance and if so, how much? If her total expenses don't exceed her total income, then maintenance is likely to be avoided

entirely, in which case your analysis can stop here. If, however, her total expenses exceed her total income, then the amount of the deficit represents her "reasonable needs". Now let's turn to your numbers. If your total expenses exceed your total income then per the statute you will not be ordered to pay maintenance. Conversely, if your total income exceeds your total expense the surplus represents your "ability to pay". Finally, since the applicable statute states that the maintenance ordered cannot exceed either her reasonable needs or your ability to pay, your maintenance order will be the lesser of these two numbers.

Remember, the foregoing analysis is predicated on the rather bold assumption that the trial court, or, failing that, the appellate court, will reach conclusions very similar to yours as to both statements. Additionally, this analysis fails to consider additional factors such as marital misconduct which are considered by some jurisdictions. Finally these clinically quantitative steps, while logically dictated and encouraged by courts and legislatures, belies the subjectivity inherent in this whole domain of the law. Nonetheless, the exercise is extremely useful since it typically provides the most reliable projection available.

## **Modification and Duration of Maintenance Obligation**

Some of my clients would have skipped the preceding material and proceeded directly to this topic. This interest, I think, reflects the anxiety associated with uncertainty, particularly protracted uncertainty.

As a guy goes through the divorce process he often feels an almost unshakable sense of impending doom, doubtless born largely of horror stories told him by "friends" and others. However, unless you think my discussion to this point warrants such an expectation, you have hopefully concluded that this ordeal, while by its nature hurtful financially and otherwise, is nonetheless surmountable in all these respects.

When the gavel goes down and the property and debts are allocated, whatever the result, most guys feel a sense of closure. The worst, be it good as bad, is over and the rebuilding can commence.

This is true even where maintenance has been awarded so long as the amount and its duration are fixed. (Child support will be discussed in a subsequent chapter). Even if excessive, a man can plan with an eye turned reassuringly to a point certain in the (hopefully near) future.

But often a maintenance order does not permit this horizon. The whole question of duration regarding a maintenance order, as with other aspects of this topic, can be frustratingly murky.

Let me first point out that since the women's rights campaigns of the late 60's and early 70's, maintenance is considered by most states to be "rehabilitative". This means that for women it is no longer a lifetime pension as it was in more sexist days. Now the presumption is that people, both male and female, are to be self-supporting as fully and as promptly as possible after (or even during) divorce. Therefore, once maintenance is ordered (unless for a fixed term which I will discuss momentarily), the court must reduce or terminate the maintenance if it subsequently concludes the wife's need for support has, or should have, diminished. Such modification or termination may occur at any time or at no time.

Maintenance can be ordered in basically one of two ways. It can be included in a settlement agreement entered into by the parties which the court then incorporated in its Order, or it can be simply ordered by the

court after each side has presented its evidence at a trial.

In the former scenario, the parties can choose to make the maintenance "non-modifiable" and for a fixed term (e.g. 3 years). The strategic considerations underlying such a deal will be discussed in Chapter .

In the latter scenario, where the court imposes the maintenance, it must be modifiable (both upward and downward) and typically be for an indefinite period of time. The rationale underlying the "indefiniteness" tendency is that the court, once it concludes maintenance is appropriate, cannot capriciously or arbitrarily declare when it will be inappropriate. Courts of Appeal and/or legislatures will not permit the court to simply speculate about the recipient's, or for that matter the payor's, future.

If you review the maintenance criteria and math discussed previously, - incidentally, don't shoot me, I am simply playing devils advocate here - the question as to when "need" has or should disappear is unclear. Even where the wife provides for the court a plan for self-sufficiency, such as her intention to commence and complete a specific program of education, uncertainty still exists as to, for example, her health, her educational capabilities and her prospects for employment.

I do not want to overstate my point, however. This threshold of certainty varies from jurisdiction to jurisdiction and (though in some cases reversibly) from judge to judge. For example, if the uncontroverted evidence revealed that wife was the vested beneficiary of a large irrevocable trust which by its terms required full distribution to her at a particular date in the future, most courts would order the maintenance to be for a fixed term ending on the distribution date. Obviously, few cases have circumstances affording this level of certainty. From here, however, as the self-sufficiency projection declines in clarity, so does the probability of a fixed-term maintenance order, but ask your lawyer about your judge and your jurisdiction. For example, some judges and jurisdictions, looking at all the factors - including length of marriage and wife's age and health - would think it appropriate to declare a fixed-term based upon the wife's avowed intention regarding a program of education.

In the event maintenance is ordered indefinitely, it is important to recognize that the standard for termination is not when, in fact, wife becomes self-sufficient. For many of my clients such a standard would effectively mean maintenance payments for life, simply because under such circumstances, their wives would never take any steps toward self-sufficiency. Fortunately, the touchstone is whether she should be self-sufficient, whether or not she actually is.

Once indefinite maintenance is ordered, it is up to you, as payor, to file a motion with the court when you believe it should be terminated, (i.e. when the above standard has been met.)

I will not discuss at length the modification or termination process here. It is beyond the scope of this chapter. I will tell you that for any modification, a substantial and continuing change of circumstances, or words to that effect, is required. This is the court's way of telling you it only wants to see you back there when you have a darn good reason, not just for a second bite at the apple. Obviously where a basis for termination of maintenance exists, this standard is met.

Apart from termination, however, unless the maintenance is declared non-modifiable in the decree of dissolution, either party may modify the amount of the maintenance payments upward or downward - again only where the necessary change of circumstances exists as to one or both parties.

But trips of this nature to the courthouse can be very expensive. Litigation regarding modification or termination of maintenance can easily equal the cost of your divorce. Additionally, if fees are allocated on ratios of income, you may pay some other attorney fees, particularly if the court concluded your allegations are unreasonable.

So, you're probably wondering, "am I never to go back?!" In a rare case, that may be the best answer. But only in rare cases. Every case is so fact-driven that I cannot enunciate invariable rules.

Here are some generalizations that will no doubt draw criticism from fellow divorce practitioners for the admitted profusion of exceptions and qualifications such points justly trigger (My alternative is to be more academic for my peers but less helpful to you. Given my purpose in this guide, I will always choose the latter):

- If the maintenance order itself is going to be a close call, i.e. the evidence could easily warrant no maintenance, then chances are it will be terminated in three years or less.
- If the wife is under 40 and healthy, maintenance will stop in less than five years, if under 30 and healthy, in less than three years.
- Conversely, when the wife is over 50 years of age, if a ten year marriage, she will likely receive maintenance until your retirement.
- For marriages of less than ten years duration, maintenance will rarely go beyond five years. Conversely if a duration of more than twenty years, the maintenance will likely persist beyond ten years.
- In a second wife's club scenario, where husband wants out because he has met someone else and wife is in her mid-forties or older, the court tends to be more generous with maintenance both as to amount and duration. (I believe this tendency exists even where misconduct is not a lawful consideration).
- If husband makes a ton of money (ton = \$150,000+), he is likely to pay at least several years longer, all other things being equal, than his less monied counter- part.
- All other things being equal, a husband will typically pay maintenance longer if he is in a rural county than in an urban county.

I have discussed the matter of wife's changing "needs" as a basis for modifying or terminating maintenance (remember the court can impute a lack of "need" where your wife should, as discussed above, have less or no "needs"). You should also be aware that, though less common, a modifiable indefinite order may also be changed due to the payor's (meaning your) change in circumstances. If you think about it, this is only logical. You will recall the mathematical process of determining, then reconciling, husband's ability to pay and wife's needs. The maintenance ceiling was the lower of husband's ability to pay or wife's needs. So if husband's ability to pay is legitimately diminished or eradicated, and this is a "continuing" circumstance, it would be a basis to modify or terminate maintenance.



The word "legitimate" is important. Obviously (I hope) the court will not permit the payor to engage in various calculated ruses to reduce his ability to pay and, similarly, he cannot simply choose to earn less without good cause (e.g. medical necessity or compelling family circumstances).

One such occasion commonly accepted as reasonable is retirement. Everyone, even hopeless ex-husbands, is allowed to retire (at least as to maintenance). The dispute in such cases often surrounds the reasonableness of the age of retirement. In many cases this becomes a non-issue where wife can then commence drawing her interest in her husband's retirement.

Finally, with respect to an indefinite maintenance order there are a few circumstances of a non-economic nature which will warrant termination of maintenance. These are:

1. Death of either spouse.
2. Remarriage of the party receiving maintenance (unless the parties agree to the contrary in a settlement agreement.)

Cohabitation by wife may also result in termination. This rule varies somewhat from state to state. The general rule is that the payor must prove economic benefits sufficient to equal the reduction sought.

This is not as difficult as it sounds. You can usually subpoena or otherwise obtain the boyfriend's payroll records, bank deposit records, and canceled checks relating to housing utilities and other living expenses.

Remember, the court's modifiable indefinite order can be preempted by a settlement agreement between the parties. The parties have the ability to do their own deal and the court will rarely upset it. You should know, however, that a judge does have the lawful discretion to reject a settlement agreement which he deems "unconscionable." In my years of practice, I have had this happen only a few times where the offending sections did not relate to either child custody or child support. (two areas infamous for triggering court intervention). I should hurry to add that in our practice wife virtually always has an attorney. If you overreach in a settlement where your wife is without counsel, expect the court to more solicitously scrutinize the deal and, if deemed too ambitious on your part, to reject it

## Specific Assets

I have already discussed the general rules governing the division of assets and liabilities in a divorce (Property in General). The asset picture in the great majority of divorces is dominated by several big ticket items which constitute 80% or more of the parties' marital net worth. I will examine two such assets that merit individual discussion.

The first and most obvious asset is the **marital home**. The second, though not an issue in the majority of cases, is nonetheless arising in precipitously greater numbers. I am referring to a **family business**, typically a small one. The reason I suspect for its growing prominence is the favorable economic environment we saw in the 90's.

## The Marital Home

I'll start with that staple of the American dream, that item which more than any other tangible thing symbolizes family life, the bricks and mortar of each couple's shared lives. I am of course referring to the house, which, if you are in the great majority, you and your wife own together.

I was not simply waxing poetic in my opening sentence. The associations and emotions which often attach to this piece of real estate can create irrational complications, arguments whose roots are less economic than psychological. Emotions aside, however, there is the often considerable economic significance of this asset. For many if not most couples, their equity in the marital home is their most valuable single asset. Fortunately I can say that the clients of Cordell & Cordell are for the most part actuated less by the symbolic, the non-economic factors, affecting such assets, than are their spouses. That is not to say that my clients handle their divorces with the dispassion of a Mr. Spock. (In fact as to some issues, my clients are intensely emotional. These issues I discuss in my guide relating to custody, "Civil War".) As to the marital home, the fact that you are reading this guide suggest to me that you are ultimately likely to do the rational thing, whatever that is.

By contrast, and I am generalizing here, wives, particularly mothers, too often assume reflexive positions respecting the marital home as though they are barricaded in a ROTC building during a circa '68 campus sit-in. I can almost hear chanting, "Hell no, I won't go!"

In fairness however, where children are involved and my client is not seeking primary custody, he is often amenable to mom and the kids staying in the marital home. This minimizes disruption to the kids during what is already a horrendous experience for them. They at least can know the same home, neighborhood and school. (Incidentally the logic is the same if dad is seeking primary custody - then mom must go).

I will add here that the court as well typically prefers that the children continue to reside in the marital home when practical.

"How then," you are probably wondering, "can a guy safely allow his wife to stay in the marital home?" The most obvious possible solution before the court is to order her to refinance the property thereby removing your name from all the relevant documents. However, the court lacks jurisdiction to simply order your name off the loans. To refinance, your wife must go through the complete loan process and qualify for the loan as a new purchase would. Unfortunately, as you might expect, this is often impossible.

Even if your wife has a good job, if you are like most couples, you needed both incomes to qualify for the loan that put you in your present home. Obviously this prospect disappears entirely if your wife earns nominal or no income. Another more direct method, assets permitting, is for your wife to simply pay off the note from her share of the marital proceeds. A variation on this approach would be for the wife to reduce the debt with her marital monies to a level for which she could qualify on a refinance. Both approaches likely would require substantial liquid funds. Many couples simply do not have the \$50,000+ lying around during a divorce. Furthermore, harsh tax consequences may be triggered by such a move. Finally, even if such funds are available, is this their best use given the present crisis and its attendant costs and uncertainties?

Now let's return to the judge's conundrum. In the case at hand, you will recall, the judge is confronted with a mom expressing a desire to continue to live in the marital home with her two school age children. (We are assuming here there is no custody dispute). Mom's lawyer will repeat like a mantra mom's power points connecting the kids and the house: home, friends, neighborhood, school (otherwise known as the HFNS incantation). However, that the court's preference regarding mom staying in the home is predicated primarily on two key conclusions. If the court rejects either of these the house would be either ordered sold or transferred to dad. The first is that such an arrangement is in fact in the children's best interest. A variety of issues may be raised on this score - the condition of the house, the quality of the neighborhood, the quality of the schools, etc.; may, among other evidence, militate against continuing such an arrangement.

Though tied to the second basis, you may also attempt to show the court that the concomitant expenses would require an unacceptably large portion of the funds otherwise available for the kids. Another factor trumping mom's desire to stay in the house despite its putative or real benefits to the children regards its practicality. As suggested previously, it must be feasible given the financial circumstances of the parties. As with maintenance analysis, the court recognizes that where there was once one household, now there will be two. Yet, the latter must subsist on the resource levels required of the former. There are simply too few dollars available. Therefore, the hard monetary reality of divorce many times necessitates a sale of the marital home.

Such impracticalities could relate to any of a variety of financial circumstances. For example, the existing financing may balloon in the near future or such a provision would require mom to refinance or face possible foreclosure (the courts will not require an ex-husband to refinance his wife's house.) In this scenario, the court would presumably recognize the futility of awarding the house to mom only to see her lose it in foreclosure 2 ½ years later, not to mention the waste of the parties' equity that accompanies a foreclosure sale. Another common impracticality in such cases concerns the equity in the marital home. It's not unusual for such equity to represent 80% of the parties' total net worth. This can be a serious complication at a time when two households are vying for too little funds. Both likely face a cash flow crisis. Mom cannot gainsay her budgeting shortfall. Dad needs a nice place to live since the kids will be with him at least 10 days per month. Is it unreasonable for him to insist on sufficient funds to buy a house himself?

In divorce litigation, perhaps to a greater extent than in any other litigation, your case is often a mixed bag. It is not enough that you have to contend with a seeming cornucopia of potentially relevant factors. Your task is complicated further by the subjectivity imbruing each factor. And people wonder why so many cases are tried! (Pardon my venting - it's a sort of primal scream therapy - I feel better afterwards).

If forcing a sale of the marital home is important to you but your wife insists on staying, you will likely rely on one of the two pillars just discussed. Happenstance is such that you likely cannot claim all the above objections, nor perhaps can you even claim one incontrovertibly. Depending on the strength of your wife's facts, this may be enough. As already discussed, some HFNS arguments are stronger than others.

You should be aware, however, that some judges cling more tightly to their preferences than do others, particularly where children are concerned. This might effectively create a higher threshold regarding foregoing a sale in some courts than in others. Where money is the problem, some courts are inclined to

almost always permit mom to try to stay in the house if she expresses that desire.

Now let's deal with your most probable scenario which, to recap, assumes 1) you and your wife jointly own a marital home 2) you have at least one child which you expect to live primarily with mom 3) mom wants to stay in the marital home and 4) she has neither presently nor prospectively a huge income (excluding your support) nor a lot of cash or its equivalent and, finally, 5) the judge likes the HFNS and the monthly payments do not seem excessive when adjusted for tax deductibility of interest taxes and insurance when compared to prevailing apartment rents in the area.

Absent *deus ex machina* of what I am not aware such as wealthy and generous in-laws, the court in such a case will likely transfer the property to your wife. (You may be ordered to execute a quitclaim deed). However, the court will issue an order which declares your wife responsible for the underlying note(s) and other related obligations. She will also be ordered to "indemnify" and "hold you harmless" as to such debts. This often sounds more reassuring than it actually is.

You will recall my previous discussion regarding a judge's limitations as to the parties' creditors. Because the judge cannot prevent your being sued if your ex-wife fails to pay, he can enable you to obtain compensation from her for any resultant harm. Obviously this course of action will not repair the damage resulting to your credit rating (though a copy of the court's order will mitigate the adverse effects) nor does it assure you actual compensation, particularly if your ex-wife has no significant attachable assets. As a practical matter, however, when there is a serious default such secured lenders proceed first against the collateral by way of foreclosure. If sufficient value exists, the outstanding note(s) will be paid entirely from the foreclosure sale proceeds.

Obviously such a foreclosure would stimulate concerns beyond that of potential liability. It would indicate the presence of more serious underlying problems which might warrant modification of the existing custody arrangement (for further discussion on this topic I refer you to another book, "[Civil War](#)").

If foreclosure in such circumstances has a virtue, it is financial closure. Statistically, however, such post-divorce foreclosures are relatively rare, at least, among the divorced in the middle and upper classes. In our practice, it is a relatively unusual occurrence. Far more common is the ex-wife who is chronically behind in her payments, but never permits matters to degenerate to the point of foreclosure. The only person more frustrated by this situation than the lender is my client. While there are usually at least some corrective steps available when matters have descended to this stage, it is not my purpose to deal with them in this book. Instead as to this and other subjects discussed in this book, I will focus where possible on preventive measures.

Obviously, the best time to consider potential pitfalls is at the time of your divorce when at least the prospect exists that such matters may be minimized, if not preempted entirely. Before discussing tactics and strategy, however, it is important that you have a grasp of the underlying legal framework. This tells you, among other things, what is and is not possible. A cold but apt analogy can be made to a great machine comprised of both moving and non-moving parts and a control panel spanning a variety of functions, but as to each a needed continuum prescribing its upper and lower limits. A skilled engineer with considerable experience with that machine, if possessed of proper tools, can not only assure that such a machine is performing optimally for his

desired purposes, but can increase further its utility as to certain functions by going past the control panel to the underlying mechanisms. But despite his skill, experience and tools, he can never obtain a level of performance exceeding its structural capabilities.

I will discuss ways that you might address at least some of the concerns raised in this section. I do not pretend to have the means to transform all of what you consider bad news in this guide to good news or even to better news. But I do presume to favorably transform for you what I can with such information as I possess. Where, however, as in the above scenario, your wife may get the marital home over your objection, there may be no corrective measures. I hurry to add here, however, that we have not nor could we in this context discuss your every possible avenue of attack. That conversation is for you and your attorney. Such prospects notwithstanding, this is likely one of those occasions where bad news remains just that.

We've discussed at length the court's inclinations where children are involved. Your circumstances may dictate more interest in the courts propensities where there are no children. Here the rule is straightforward. If there are no children, the court will likely order the house sold and the net proceeds divided between the parties. While the court could likely lawfully award the house to one party, the other would have to be awarded counter-balancing assets to reach an "equitable" (fair) division of assets. Many judges consider this approach unnecessarily laborious where no children are involved. To award the house to a party, the court must reach a determination of the property's fair market value, which often means weighing wildly contrasting expert opinions or worse, the parties' own estimates. Then there is the underlying note and deed of trust which is virtually always signed by both parties. As previously discussed, the court does not have the legal authority to impair rights of the parties which means it cannot change the joint liability on the underlying note.

Before I go further, I must digress to be sure you have at least a rudimentary understanding of certain key real estate documents. There are only three documents or pieces of paper with which you need to be familiar.

1. **The Deed** - This paper states who owns the property. Normally, both you and your wife's name will appear here.
2. **The Note** - This paper is the promise to pay the lender back for the money it gave you to buy the house. You may have added notes by borrowing more money from other lenders.
3. **Deed of Trust (Mortgage)** - This paper pledges the house as collateral for your loan(s). When you got your loan to buy the house, or a later loan, signing the note was your promise to repay. Your deed of trust simply provides that if you fail to pay the note as promised, the lender can sell your house to get his money (called foreclosure).

You should understand one final refinement. The above documents are to some extent independent. By this I mean the name(s) on the deed may be different from the names on the note. In fact, to challenge understanding further, your loan for the deed bearing your name to your house could theoretically be signed by someone other than you and secured by a deed of trust on a different property. The signer of the deed of trust, however would need to own the property he pledges, just as you and your spouse own the house you pledged to secure the note you and she signed.

I am concerned that the first part of my discussion of these documents was too elementary and the second part too complex. Those permutations, incidentally, were merely intended to deepen your understanding of the three core documents. I cannot recall a divorce in which each of these documents were in different names.

The discussions regarding real estate in a divorce, however, will often revolve around these issues, particularly where one party desires to continue living in the marital home.

Before my tutorial digression, I was pointing out that a judge cannot peremptorily change the rights of entities not a party to the action. This point was made in a previous context where I discussed the rights of co-owners in a business to be included in a divorce action that jeopardizes their interests. To do otherwise would violate, among other things, our sense of fair play.

Creditors, however, are rarely joined in divorces. This includes the holders of notes and deeds of trust on real estate. Therefore, any transfer the court orders respecting the real estate must be subject to the existing note(s) and deed(s) of trust. This means that if the court awards the house to wife, husband continues to be liable. Now, however, in a sense he is in the worst of all possible worlds - the deed would be in the name of his wife while the debt would continue to be his. (Though both names would remain on the note, as a practical matter, the lender will look first to the party with the income for payment - typically ex-husband.) Failing that, the lender can foreclose. If there is sufficient equity to pay the debt, then the extent of ex-husband's injury is that his credit is destroyed. If, however, there is insufficient equity to cover the balance due, the lender may then sue ex-husband personally for the balance.

While the court can preempt these creditor issues by ordering the receiving party to refinance the debt, it may nonetheless have to revisit the matter if the refinance process does not occur as anticipated.

Finally, since the matter required a trial, there is always the prospect of an appeal by the losing party. While ordering a sale of the property could trigger an appeal as well, it is far less likely to succeed if the sale is proper and the net proceeds reasonably distributable.

## **Marital Home - The Sales Process**

I have made several references to the prospect that the court may order the marital home sold. To many this statement conjures up images of an auction on the courthouse steps. While it is true that court-ordered sales in other legal contexts often do proceed in this manner, most judges prefer a sales process that assures the parties the most net proceeds. This is not to say, however, that a judge is legally constrained from less lucrative methods of sale. The judge is simply required to order a method that is "reasonable" in light of all the surrounding circumstances. While this shibboleth does have outer parameters, it's not clear in any given case where they are. Clearly, the court has considerable imaginative discretion here. You may wonder how the court could ever reasonably order an auction sale, when such a notorious process generates lower purchase prices than more traditional methods. First I should point out that the circumstances vary drastically from case to case. It may be that the peculiarities of a particular house may allow it to fetch a higher price at such a sale. Though a bit devious, this is often true where serious defects may exist which under normal conditions would require or would simply be more prone to discovery. A sheriff's sale is in most states an "as is" sale.

Exigent circumstances requiring a prompt sale may also warrant an auction sale. Also, there may be such friction between the parties that any other method of sale is impractical.

Absent such extraordinary factors, however, the court will likely order a traditional sale in which the house is listed with a reputable broker and shown to prospective buyers until it is sold. In the meantime both parties are typically instructed to cooperate fully in the marketing and sales effort. This typically includes keeping the house in a presentable condition for showing, being available when necessary for related meetings and showings, and executing promptly any documents necessary or helpful to the process.

The court's order regarding this sale could be as simple as the first sentence of the previous paragraph. Alternatively, it could add the remaining sentences of that paragraph to make more definite the parties obligations.

On the other hand, the court could be much more specific in its order. It is not uncommon for the court to prescribe not only the listing price, but to impose a schedule requiring specified price reductions and stated intervals until the property is sold. Your circumstances and objectives will dictate your position on this point. If you are the one in the house and you would prefer to stay there six or more months, you may prefer the shorter, less precise order. Conversely if your wife is ensconced in the house, fattening all the while on a generous interim order by which you pay all or most of the house-related expenses, you are likely what the real-estate profession terms a "motivated seller." In scenarios such as this in which the occupant of the property has strong monetary and perhaps other incentive to remain in the home, and hence to postpone as long as possible its sale, the occupant's wish virtually always comes true. Furthermore, this subterfuge can be accomplished with subtlety that is often very difficult to prove. Since she controls the condition of the home and interacts with at least some if not all potential buyers, she need not be flagrant to discourage a deal.

I have had clients who have waited years for their ex-wife occupied houses to sell. (Fortunately I was not their attorney during their divorces).

I do not mean to suggest that such situations are without remedy. A contempt action may lie where the decree language is very specific. Alternatively, a motion to enforce will often prompt the court to take curative steps. As in all such cases, however, the court is stuck with its original order since orders relating to property, unlike those relating to custody and support, are not modifiable, and because the time during which it retains jurisdiction after its order (usually 30 to 90 days) has probably long since expired.

## **Marital Home - The Separate vs. Marital Question**

Referring back now to the "estates" I described earlier (HUSBAND'S SEPARATE, MARITAL, WIFE'S SEPARATE), symbolizing the concept that the divorce process in effect requires the court to correctly assign each of the parties' assets (whether in joint or individual names) to one or more of these three circles. Errors in these characterizations are frequently the basis for reversal by a Court of Appeals, assuming you or your spouse supplied the court with sufficient evidence with which to reach its conclusions. Absent any

controverting evidence, the court is directed by law to consider property as marital (the rule is commonly termed "the marital presumption").

In my discussions prior to this I have focused your attention on the implications in divorce for a marital home that is jointly held and therefore presumptively marital. But what if the deed to the marital home is in only one spouse's name? Would such a deed conclusively mean the asset is the separate property of the deed holder? The answer is "no". Generally speaking, divorce courts are not hostage to deeds of title. The court is charged with the duty to reach its own conclusions on such matters. This is not to say, however, that a party's name on a title document is irrelevant to the court's conclusion. In most jurisdictions such titles create a presumption in the named party's favor, thus shifting the burden of proof to the unnamed party.

You will recall that most state statutes essentially define marital property as all the assets of either party, except for certain specific exceptions. Among the exceptions, you will recall, is property acquired during the marriage.

Now returning to the above example where the burden had shifted to the unnamed party. If that party can show that the property was acquired during the marriage, the burden would in most jurisdictions shift back to the named party.

The fact is that since most states are source of funds states, the title is often unimportant (assuming it names no 3rd party) where the property was acquired during the marriage and was acquired with marital funds.

This last clause deserves careful attention. Marital assets include all monies earned during the marriage by either party as well as by any asset, even separate assets. Therefore, unless either you or your wife were fastidiously premeditative, anything you purchased during the marriage is likely marital.

In the interest of being thorough, it is possible in many states for the parties by agreement to convert a marital asset to a separate asset. While the party claiming separate, in such cases, does face a heavy burden, recorded deed appropriately executed by both parties is powerful. The court, however, will want to see some quid pro quo. Furthermore, the court has the jurisdiction to invalidate such deals at the time of the divorce if they are deemed unconscionable.

## **The Family Business**

If all divorce lawyers asked to identify their most perplexing cases many, if not most, would point to disputes relating to business interest. Because this topic is potentially so broad and complex, I will not even attempt to cover it fully in this guide. Instead, my objective here is to familiarize you with the key issues and in doing so, to give you a sense of the court's perspective(s).

First let me give you the context in which these disputes often arise. Obviously all such cases involve businesses which exist at the time of the divorce. In some cases, however, these enterprises existed prior even to the marriage. More commonly, however, at least among marriages of long duration (10 + years), the business is commenced during the marriage.



A not uncommon exception to this rule however are cases in which disputed business was created and developed by the family of one of the spouses and is perhaps still generally regarded as that family's business. In such cases the marital interest in the business is often a fraction of its total ownership.

Back to the more common scenario in longer marriages - i.e. cases where the business is commenced during the marriage - typically the business is almost entirely the creation of one of the spouses, typically the husband.

Before you accuse me of being reckless in my assumption, let me explain. Successful businesses are created and developed by entrepreneurs, by uniquely dynamic, imaginative and driven individuals whose dreams becomes their obsessions (which, by the way, might explain in part his divorce). While I have seen cases in which both parties seemed to have contributed equally to the success of a business, these are rare. Let me use an admittedly grandiose illustration to help explain this point. As a simple matter of probability, what are the chances that a 25 year old Martha Stewart would meet and date a 25 year old Donald Trump. Now multiply that improbability by the remote chance that two such entrepreneurial personalities would even desire to marry someone so like themselves. While people clearly seek to marry people with similar interests, they just as clearly (and thankfully I might add) seek to marry those with decidedly dissimilar personalities.

When viewed from this perspective, it makes sense that the entrepreneur with his assertive, sometime overwhelming qualities is prone to marry someone amenable to these traits (and of course visa versa).

All this is not to say, however, that the spouses of such entrepreneurs do not participate in the business. In fact, they may play key roles ranging from administrative responsibilities to sales and marketing. While the extent of participation may vary, it is very unusual for a spouse to contribute no assistance to the marital business, particularly in those early formative years.

In light of the usual relative roles of each spouse in the marital business, it is understandable that in a divorce the husband/entrepreneur often resents the principles governing marital property law we discussed in Chapter . Clients have paced about my office as he vented with frustration his sense of injustice.

Up to this point I have spoken somewhat nebulously about this thing called a "business". Before going further you should understand what is meant for our purposes by that term and the various forms such enterprises may take. In the process, for reasons of brevity and relevance (and in very small part, indolence) I will take care to go no deeper in this discussion than the subject necessitates.

From the perspective of a divorce court, a business is simply an enterprise relating to a service or product that has, is, or is expected to generate a profit. Such an enterprise can assume several forms. For our purposes I will discuss only the primary three.

## **The Family Business - Three Common Forms**

### **Sole Proprietorship**

Perhaps the least formal way a business may operate is as a sole proprietorship. This means the owner does not create any formal separate entity. Generally such businesses tend to be small and their owners less

punctilious about separating personal finances from those of the business. Additionally because it lacks a clear entity (e.g. corporation), such a business affords its owner no protection from lawsuits and is often difficult to transfer to someone else whether by sale or other conveyance. As you might suspect such enterprises can easily become inseparable from their operators, and, in fact, may not be businesses at all (more about this later).

## **Corporation**

In contrast to the informality and simplicity of a sole enterprise it may be organized as a corporation, which is regarded legally as an entity completely distinct from its owners. (Therefore an owner who works in his business occupies two distinct roles - he is both an owner and an employee.) In fact, it is for many purposes treated as a "person". Among other things, a corporation can hire, fire, sue and be sued. Its ownership is represented by shares of stock. A major corporation may have shareholders numbering in the hundreds of thousands.

However, far more numerous are the thousands of corporations across America whose only employee is also its only shareholder and whose annual gross income is less than \$1,000.

Why incorporate at all? The most common reason doubtlessly relates to efforts to insulate business owners from the personal liability their businesses might otherwise entail. Another reason concerns the ease with which the interest of multiple owners can be defined as well as the comparative ease with which such interests can be transferred to others.

## **Partnership**

Finally a business may elect to conduct its affairs as a partnership. This organizational form has characteristics of both a sole proprietorship and a corporation. It is essentially a business comprised of two or more owners, which are typically operators as well, whose respective rights and obligations are spelled out in a partnership agreement. While each owner may be an equal partner it is not uncommon for both ownership interest and authority to vary from one partner to another.

A partnership is in many respects treated by the law as an independent entity, but no as comprehensively as is a corporation. For example, partners may be held personally liable as to certain debts. Also, for tax purposes a proportionate share of the businesses income and expenses must be recognized on the partners individual returns. (This, however, is in many cases an attraction feature).

Finally, partnership interests (sometimes denominated "units") typically lack the transferability of shares of stock. (In the interests of full but unnecessary disclosure, you should know that various hybrid entities exist which are designed primarily to give one organizational form some of the benefits of another - e.g. limited partnerships, limited liability corporations, and limited liability partnerships).

## **The Family Business: Is it Really a Business?**

Now let us go back to a very fundamental question, yet one which has stimulated much divorce litigation. Put most simply it is this: Is your money-making activity really a business? Forget for a moment that you may have called it a business for 20 years. It is not even particularly helpful to know that your activity is

incorporated. The fact that you earn a living with this activity is not a reliable indicator either. I should point out her that while different jurisdictions may couch this discussion in different terms, the distinction is pivotal in all. Usually the underlying dilemma concerns whether a particular income-generating activity is on the one hand more in the nature of a job, trade or profession, or on the other, a business.

A courts conclusion regarding this dilemma determines whether or not the activity in question constitutes "property". If so, you will recall from Chapter , the court must then determine whether or not it is marital, then, if deemed marital, the court must distribute the property equitably between the parties.

Though at times seeming unsympathetic, courts have declared a spouses job martial property and thereby effectively require him to pay his spouse for it. (This, you should note, is the same job he uses to pay her child support and/or maintenance).

This issue normally arises in contexts where the husband is self-employed, in personal service capacity, particularly when in a field where businesses are often found. Typically, in such cases he generated substantial income (\$80,000+) and has one or more workers under his direction (whether as employees or independent contractors).

While it is likely apparent to you that a job is not a business, its probably less obvious why this is so. It seems the term "business" suffers usage problems directly obverse to those which, according to a Justice of the Supreme Court, afflicts the term "pornography". Of a business it can be said that while a court may not know one when it sees it, it can define it.

Because the term "business" is not defined in state statutes, (at least for divorce law purposes), one has to look to appellate court decisions for direction. Fortunately, in most jurisdictions the matter has been generously if not entirely comprehensibly discussed.

While the emergent definitions vary somewhat from one jurisdiction to another (not to mention variation that occurs among opinions within a given jurisdiction), there was nonetheless a general consensus regarding the touchstone:

To be a business, the income-generating activity must be, at least potentially, severable from the spouse's labor. Put differently, it must at least potentially have value if the spouse were removed entirely. If met, these criteria denotes the presence of "goodwill" which I will discuss momentarily. If not, the business may not even have any value because it cannot be sold.

A number of useful points flow from these core considerations. Jurisdictions seem to agree that a good reputation does not by itself convert what would otherwise be a "trade" or "profession" into a "business". Obviously, to conclude otherwise would produce the bizarre result that "a job well done" would eventually transform all workers into business owners.

Clearly if one practices his chosen vocation with high degree of skill and great pride in workmanship, he will over time acquire a good reputation which, in turn, will likely result in greater income. This is the process by which plumbers and physicians alike can expect to succeed.

But this point, though persuasive, does raise an important question: Is there ever a point at which such vocational success ascends to the level of a business? If so, what are the transforming factors? The answer to the first question is clearly yes. The answer to the second is like many area of the law somewhat nebulous. This is in part because of the law's varying coloration from one jurisdiction to another. It is also attributable to the very subjective criteria of this area of the law, which seem to reflect at least in its application, both quantitative and qualitative factors. I realize this statement sounds annoyingly pedantic. Just bear with me while I explain. At Cordell & Cordell, our experience which is reinforced by the case law, suggests that courts do correctly give great weight to the central issue in such cases, which is: Has what was simply a good reputation metamorphosed into what accountants reverently term "good-will" (the key nutrient essential to all business life forms)?

Courts are therefore in agreement that the presence of goodwill is a reliable indicator that the enterprise in question is indeed a business. But this without more is not very helpful. To be of assistance, the simple assertion that A assures B must be supplemented with a reliable means to test A's presence. The accounting profession, if asked, would readily explain that to derive a number for goodwill (or even to determine its existence) one must first determine a businesses' market value then subtracting from that number the businesses' net asset value. (i.e. fair market value of all assets - total liabilities). The theory makes sense. It simply assumes that anything someone is willing to pay over the net value of a business's assets, must represent its additional value as a "going concern" (i.e. when operating as a business). (We will discuss this matter further when we come to the topic of valuation.)

Most courts do, in fact, give great weight to evidence concerning the presence or absence of a market in which such an enterprise may be sold. (This process will be covered in detail ahead.) Unfortunately, some courts tend to stop there. To a theoretician, this is obviously a fatal error since it leaves unexamined the critical question of whether there is goodwill, i.e. whether a premium value exists above merely that of the sum of its parts. On a practical level, however, this defect would not normally make a difference. For if an activity which has no goodwill is incorrectly deemed a business, this must mean that the value used by the court is equal to or less than that of the value of its net assets, which if you think about it, the court would have considered in any case, whether marital or separate. (If this point eludes you, bear with me, I will cover it in more deal below.)

To be most helpful, I should caution you here that in considering the question of goodwill, courts are sometimes influenced by the more potentially prejudiced (and less conceptually defensible) evidence concerning the level of income the activity generates. If a doctor is making a lot of money, particularly when this is true even vis-à-vis his peers, courts tend to impute goodwill. You should know, however, that when courts in such cases incorrectly reach unfavorable conclusions by such superficial quantitative considerations, they may nonetheless be difficult to reverse on appeal. (The criteria regarding appeals are discussed in Chapter ). I hurry to add however that its not arbitrary for courts to consider such income levels when done in conjunction with other facts relating to the firm's operations - namely it staff size, its organizational structure, the spouse's present role, etc. You can see where these things relate to the courts definition of a business on page . Together they reveal a great deal about the hypothetical severability of the spouse from the enterprise.

Let me conclude this discussion regarding personal service enterprises on an important point which, I reserved for discussion after having introduced you to some core concepts and methods of analysis that you

must "get" to understand my later discussions (as well as some you are likely to have outside this guide).

Thankfully, many jurisdictions have developed, through definitive appellate opinions, criteria specifically intended to preempt at least some of the complexities we've discussed here. While jurisdictions approach the matter in different ways, some impose criteria governing whether a particular enterprise can be termed a "business" or "property", while others prescribe the specific evidentiary prerequisites with which a trial court may, if at all, determine dollars in expert fees alone for a relatively small business. The numbers go up from there. Though these figures likely seem inordinate to you now, I believe they will seem less so as we discuss in more detail the valuation process.

## **The Family Business: Valuation Process**

I will assume in my discussion here as elsewhere that you are the entrepreneur (if this isn't the case, simply take care to adjust the parties accordingly at the appropriate junctures). This means that you have an informational, what military men would term an "intelligence", advantage over your opponent. This is simply due to the fact that you likely have physical control over all the relevant documents, but in a broader sense, you likely also possess greater knowledge about all aspects of the business. This means that, again in military parlance, you control the hill which your opponent seeks to take.

This is not to say however that your position is impregnable - but it does mean that the other side, at least in most such cases, has to work harder. You might say they have an uphill battle. But the rules of engagement require you to turn over any relevant information requested. It would probably be useful for you to review the section on discovery from the custody guide since virtually all the primary discovery tools discussed there may be employed by opposing counsel in this scenario.

For both attorneys and their experts to develop their cases regarding the value of a business, each must have access to or possession of virtually all financial and legal records - almost certainly those of the most recent 5 years. This typically includes, among other things, income and expense records, financial statements, tax returns, loan documents, shareholder and partnership records and agreements and prospective contracts including any existing leases.

But rarely can documents alone provide all the necessary, or at least useful, information needed. This means that you can expect to be called upon to answer under oath, opposing counsel's various questions about the business. These will be posed and answered either in writing by way of interrogatories or orally in a deposition. It is also often necessary for valuers and appraisers to have access to the business premises. While it might be accomplished formally by an appropriate motion, in practice the attorneys usually simply reach an informal agreement specifying the times and conditions for such inspections.

At this point you are probably thinking that this hill you occupy is appearing increasingly vulnerable. Despite, however, these extensive tools of discovery, the side forced to obtain its information from its reluctant but procedurally compliant adversary must fastidiously develop and propound each properly item of discovery. That party can expect to act only that information that is specifically and correctly requests. This of course includes the questions asked in interrogatories and depositions.

I have been on both sides of the table in such cases and I can tell you that substantially more time and effort is demanded of the side having to obtain its information from its adversary who understandably cooperates only to the extent the rules require (if that). Furthermore, your adversary can be expected to provide such information no sooner than his deadline and then simply the requested items that were "in his possession" which, incidentally, arrive in tattered boxes, with hundreds of pieces of paper piled disorderly inside.

I should add here, however, a caveat. While a party answering discovery is technically within his lawful rights to respond in a minimalist fashion (always cooperating as little as the rules permit) this tactic may nonetheless incur the displeasure of the court as well as potentially its suspicion that you have something to hide. You can also expect a reciprocal response from the other side.

Generally a better strategy is to comply only to the extent reasonableness (judges like this word) requires. This means that, unless opposing counsel is behaving obnoxiously, you should avoid tactics which, though technically correct, are nonetheless petty and serve no important concern. Generally speaking you should utilize discovery technicalities and provide minimalist responses only on occasions and as to matters of consequence. Your lawyer can tell you when those circumstances exist.

This approach provides an optimal balance between two potentially conflicting but important concerns: On one hand there is your completely rational desire to provide as little assistance as possible to the enemy, particularly one whose undisguised purpose is to take as much property from you as possible. (That's his job). On the other hand, you understandably seek to develop and maintain a positive impression in the mind of the person who will at least in large measure ultimately decide which things will be yours and which your enemies.

Now I would like to discuss the fundamentals of business valuation. My purpose here is to simply give you a general overview. The countless qualifications and refinements surrounding this subject are best pursued in a business valuation textbook. Here I hope to provide you with only the information likely to be useful to you in your divorce...

There are several ways to categorize the various methods by which businesses are valued. My experience has been that it's easiest to think of this subject as having two broad branches, each with two or three sub-branches. Use the following outline as a point of reference. My discussion will be organized accordingly.

1. Business Liquidation Value
  - a. Forced Sale
  - b. Orderly Sale
2. Going Concern Value
  - a. Net Asset Value
  - b. Comparable Transactions
  - c. Net Present Value of Future Income

The first approach dealing with liquidation is far less commonly used in divorce than the later approach

addressing a going concern, i.e. an operating business presumed to continue operating in the future.

As the term implies, this method is applied to businesses which have already or are soon expected to discontinue their operation. Such circumstances virtually always reflect intrinsic business problems rather than simply the divorce of its owners. In the latter case, the business would likely be marketable as a going concern, and therefore appraised as such.

A liquidation value is predicated on one of two methods with which the various component assets of a business are sold and its outstanding obligations paid (at least those that are secured by the assets sold). Depending upon the business involved such assets may include office furniture, equipment, machinery, inventory or real estate.

One method, the Forced Sale, values each item based on the price it would command at a forced sale such as an auction or a lot sale in which a particular wholesaler buys large portions or all of the assets. In both cases, one can be confident that the sale prices will reflect a deep discount, commonly in excess of 50% of its likely sale price under normal conditions.

When a divorce court has to deal with the assets of a discontinued business, it is generally the court's preference, if not its duty, to do so in a manner calculated to obtain the most money it reasonably can for the marital estate. This concern you may think is poorly served by a sale which produces such discounted proceeds. However, I was careful to insert the word "reasonably" in that statement. The court in assigning values must do so in consideration of the practicalities involved in the disposition of such assets - particularly where he knows they must be sold. In choosing a valuation method a divorce court will likely consider also the exigencies of the parties circumstances and the potential for cooperation given the level of conflict.

The alternative liquidation method, an orderly sale, assumes some degree of effort and marketing which reduces the discount at sale. A discount is not eliminated, however, for the anticipated buyer is still not likely an end user, or if he is, he is likely drawn to the purchase by the promised discount. You have probably driven past storefronts with wide sheets of paper coating the glass with the word "liquidation" emblazoned across them in large red letters. Putting aside the occasional marketing ruse of some quite healthy businesses, such sales represent one example of an orderly liquidation.

In the interest of disposing of the assets promptly, both the buyer and seller expect the price to be discounted. Usually such discounts range from 20% - 50%. The fact is that one objective all liquidation processes have in common is on expeditious disposition of all the business's assets. Accordingly, to accomplish this, both the Forced Sale and the orderly sale require a substantial discount in the sales proceeds, (though clearly the former more so than the latter).

Therefore, a court will only utilize a valuation predicated on a liquidation method when it must distribute the assets of a discontinued business which, as a practical matter, it realizes are likely to be sold in this fashion. In most cases, it simply is not realistic to assume all the sundry assets of a business can be sold at market value. For example, the party to whom the court awards the property often lacks the skill and/or experience to dispose of such assets more profitably. In addition, the party receiving such assets in a divorce setting often pressing cash flowing issues which will necessitate a quick sale. Remember the few but powerful benefits of

liquidation sales - they require comparatively little specialized skill or knowledge and they provide comparatively speedy relief.

Now let's discuss the far more common scenario relating to businesses in divorce - namely that neither the parties nor the court anticipates the business will discontinue its operations anytime soon.

You will recall from the outline above that such businesses are termed "going concerns" and typically appraised in one of three ways. I should add here that the appraiser (in my experience a C.P.A.) will usually utilize more than one of these methods during the course of his analysis to assure the measure he ultimately relies on is the best.

Remember, the appraiser's job is to arrive at a valuation number that best reflects the fair market value of the business. Strange as it may seem, some businesses are worth more dead than alive. By this I simply mean that some businesses through going concerns, have no goodwill, no synergy that gives the whole a greater value than its parts. In such cases an appraisal using one of the other two methods - i.e. comparable businesses or present values - would result in a value lower than one based on simply the sum of its component assets less its liabilities. Under such circumstances, the court considers the latter the most reasonable measure of value.

You should note however that where the business is a going concern, the court does not normally use one of the discounted bases of value (i.e. the liquidation methods). The net asset value is normally determined by reference to the assets' fair market value. This means the sales prices such items, in their used condition, of course, would command under normal sales conditions. Where, for example, the various item may be marketed individually (at least where reasonable) at a more leisurely pace. Why the distinction, you may wonder? If the evidence is that a party will continue its operation, it would arguably give him a bonus to assume distress sale conditions. Conversely, liquidation scenario is immanent and real.

Now let's consider the other methods by which a going concern may be valued.

The "comparable transactions" method is in part, self-explanatory. The appraiser will attempt to identify other similar businesses that have sold and attempt to extrapolate from that a value for your business. Rarely is there a fully analogous transaction available. The appraiser would prefer to discover a transaction of the same type of business, of the same size, in the same market, and in the same year. But such parallels occur with the frequency of your winning lottery tickets. The analogous transactions when they can be found, lack congruity in one or more of the critical areas. This is where the appraiser's professional judgment comes into play and is, of course, a fertile topic for cross-examination at trial.

The final method regularly used to value going concerns is the present value of future cash flows. If you have a business background, you already have the idea. If not, you will likely not be completely clear absent several chapters of discussion which neither you nor I want to cover. In its most simplistic terms, the appraiser would consider the businesses historical net earnings then by extrapolation and the incorporation of other data, the appraiser deems important, net income is projected to some point in the future. Then, the appraiser, with the use of an appropriate discount rate, determines what number in today's dollars would be equivalent to the total of all these future annual net incomes.



This approach, like its prior alternatives, requires a number of judgment calls by the appraiser which could produce widely varying by each party's appraiser. Potential sources of disagreement include such issues as the way historical income is calculated, adjustments for future conditions and the appropriate discount rate for present value. However, appraisers will follow certain pre-defined guidelines that will limit their areas of disagreement.

Professionally, the appraiser has the duty to use the valuation number that circumstances suggest is most reliable. The net asset value as suggested above is typically used only after its two alternatives have been rejected. When selecting that value, the appraiser posits that after its two alternative have been rejected, though existing as a business and despite conducting its on-going operations, the entity's value is that of its assets piled in a heap less its debts. In making this point, I do not mean to suggest that such a scenario is incredible. In fact, people are operating such businesses across America as I write this sentence. But it does suggest that the person(s) at the helm are not proceeding rationally (I must add, absent some positive potentially the appraiser and presumably the market is missing - such things do happen.)

This situation probably most commonly occurs when the business involved is being operated by its owner for a level of compensation below that at which someone could be hired at prevailing market rates for the same position combined with surrounding circumstances suggesting that the situation is not amendable to improvement.

Remember why this is so, a business has value which produces income above the expenses, required to run it. This includes the necessary labor costs, a prospective investor would have to pay. If this situation is transitional, it may not be objectionable. If its permanent a seller in of such a business would be asking a prospective buyer to give him a premium above the net asset value of the business so that, the buyer would then be faced with either hiring someone to run the business paying the uncovered expenses out of his pocket each week or foregoing earnings otherwise available to him so he can perform a job for less money than anyone else would accept to do it.

This is probably the appropriate place to mention that in valuing a business particularly those closely-held, an appraiser must often make various adjustments to both income and expenses in order to permit an arms-length valuation. In the above business the owner's actual labor expense was so low that they did not reflect the market costs of interest to a prospective 3rd party purchaser. The reverse often occurs, as well - owners of closely held businesses often pays themselves and other family members excessive salaries which have the effect of artificially reducing the net income of the business and consequently, if no adjusted, producing an inaccurately low business valuation.

Similar adjustments may be necessary for a variety of expense and revenue items improperly recorded as business when in fact personal or visa versa. Such casual practices (where properly reported for tax purposes) are one of the prerogatives of family ownership and, may in fact continue without incident for generations. But once someone files for divorce, the process it commences envelopes these assets just as it does all putatively marital assets.

Apart from the valuation issues raised by such informalities in business management, various other issues are impacted as well. Perhaps the most obvious are maintenance and child support. Each will be determined in

large party by the husband's income, which often requires a number of adjustments where it is derived from a closely held business. The effect of such adjustments is often to include in income a number of the direct and indirect benefits which the husband had not previously considered income. This subject could occupy its own chapter. Your attorney in conjunction with an accountant (and your expert) will develop and advance your best arguments regarding these issues.

## **Tying it All Together (Part 1)**

In previous sections of this guide, I discussed the primary money components of divorce. We examined the underlying rules and concepts governing the courts ultimate decision regarding all the non-custody matters relating to your divorce. In this closing section, I want to give you a sense of how these various parcels of issues, these financial clusters, are commonly configured in the final outcome. As should already be clear, with infrequent exceptions, this ultimate outcome, whatever the tapestry of its various threads, is at heart a product of the judge's actual or anticipated leanings. (The exceptions are related to those intangible psychological factors such as guilt, fear of embarrassment, etc., as well as to that occasional case tried essentially for the appellate court). Trials of course reflect the former and settlement the latter.

The previous sections should have given you a sufficient foundation to allow me to try to tie it all together in the fashion of final decrees. Also, I believe that as I discuss these interrelationships, your understanding of each of the topics considered will inherently increase. Furthermore, while the quid-pro-quo underlying the discussions in this chapter relates most directly to settlement scenarios, keep in mind that if the case is tried, the judge will likely weigh many of the same cost-benefits vis-à-vis each party in its search for an "equitable" judgment.

Some of my discussions in this section will overlap other portions of this guide as well as areas of Dad's Guide To Custody, but the resultant repetitions hopefully solidifies more than bores. The prospect for settlement should be explored by you and your attorney as early in a case as your information permits (Note: I did not say both side's information - you may aspire to settle before unfavorable information is discovered by your opponent - this tactic is subject, of course, to certain legal and ethical parameters). Also remember that settlements need not be global. That is, they need not settle every issue. The wisdom of a particular partial settlement is dictated by each party's circumstances.

Once you are aware you are facing a divorce and have retained an attorney, you and he will gather all the financial information relating to both you and your spouse - this means all assets, debts, incomes & expenses. In fact you will likely be required to provide this information with some degree of specificity to both the court and your spouse early in the process.

For informed purposes, however, you and your attorney will attempt to identify each asset and debt owned or incurred by either or both of you. You will then characterize each according to the three estates discussed in "Property in General" (recognizing some assets may be both). Next you must reach the most informed opinion possible as to the values of each, including those subject to claims by more than one estate.

You and your attorney (with the help of appropriate experts) may be able to complete the above process at the time the Petition for Dissolution is filed or, at the other extreme despite all due diligence, you may find yourself frantically gathering information the day before trial or, occasionally, during trial itself.

The point is that you obviously cannot rationally settle where you do not have at least a sufficiently reliable sense of the financial facts to allow you to know a deal when you see one.

But even having such objective knowledge alone is not enough. As discussed in Chapter regarding the litigation process, you need to combine this with as much familiarity with the judge's probable ultimate ruling as possible. Obviously, settlement conferences can be very useful for this purpose. Your attorney may know your judge well enough, however, to predict the trial result without a settlement conference.

During the course of you and your attorney's assessment of your position, you inexorably must grapple with what are termed in technical legalese "issues." This term refers to points of legitimate dispute between the parties. To have a legitimate issue, both sides must have some prospect for success as to the disputed matter, even if, as it is often the case, one party's position is far stronger than the other's.

In some cases the issues are so substantial that neither side can realistically entertain much hope of settlement, even after a settlement conference. If both sides are being reasonable, these cases should involve only matters in which each side's probability of success (at trial or appeal) when considered with the net value of the prize sought (i.e. after all associated costs, particularly attorney fees, are deducted). Common examples of such issues include: 1). Marital vs. separate disputes with ambiguous documentary trails, 2). Valuation of closely-held businesses, 3). Marital assets such as real estate in which a large separate contribution was made, 4). Enforceability of a prenuptial agreement.

The list could go on. In these cases, unless a party's risk/reward analysis is altered, both may quite rationally forego settlement discussions which will do nothing more than squander both time and money.

There is another category of cases in which the prospect for settlement is comparably futile, but for utterly antithetical reasons. Fortunately, these cases can often be identified early, frequently before they start. Their common denominator is a resolute determination by at least one party to not settle, irrespective of what's offered. Obviously this attitude betrays a non-economic problem - I have sat on both sides of the table of such parties. They are Kamikazes. Settlement, no matter how draconian, is an accommodation. It allows her to get off too easy, to avoid embarrassment or confrontation.

Between these two poles, however, the one intensely analytical and the other as intensely visceral, lie the great majority of cases. Though many may involve monetarily substantial issues, neither the attorneys nor their clients are so statistically cocky as to rule out settlement.

Similarly, on the non-economic side there are many cases deeply influenced and even at times driven by powerful emotions, but in which neither party is so self-destructive as to reject summarily a patently generous offer. Toward the middle of this broad spectrum are the many cases in which there are financially significant issues coupled with varying levels of economic uncertainty as to the likely outcome at trial. Then toss into this ambivalence those non-economic elements notoriously infecting the clients', if not their attorney's,

putative dispassion. The resulting concoction of thought and feeling in which each ebbs and flows periodically represents the conflicting dynamics underlying most divorces.

Now let's discuss some settlements which our clients at Cordell & Cordell often regard as favorable, in addition to having proven, in many cases, attainable.

## **Focusing on the Post-Tax Outcome**

At the risk of offending your intelligence, let me begin by stating what may seem to you the obvious: That absent extraneous and compelling non-economic forces, you and your wife will each seek, among other things, as much money (in some form) as you can get.

This axiom warrants mention because commonly one party or the other in a divorce, normally the one who most desires it, invests his every expectation in a desired outcome early in the process that almost invariably later proves unrealistic. Such hopes often rest on nothing more than his uniformed wife's acquiescence to his subtle but relentless nagging. Ultimately she ends up with a result that at least resembles what the law would have given her. In the meantime however, a lot of precious time and money can be wasted.

Therefore any exploration of avenues for settlement should begin at least by considering the areas commonly permitting win-win resolutions.

Most prominent among these is the parties' and the court's focus on the post-tax outcome for the parties. After all, this is what counts, not the nominal dollars each receives. A good divorce lawyer will keep his and his client's eye on this ball, not the facial pre-tax numbers.

For there to be prospects for a tax-driven deal, there must be either substantial disparity between the parties' present or anticipated incomes, or there must be a proposed asset allocation which triggers substantial but soluble tax concerns.

Regarding the former, if your income is six digits per year and your wife's is lower than 5 digits, it is quite conceivable that the spread between your top margin rates (state and federal) and your wife's may be close to 20%, given that the top marginal rate is 39.6 percent. As previously discussed, maintenance is deductible to you and includable by your wife. Therefore, in the above scenario it could cost you approximately 50 cents for every 1 dollar you pay your wife in maintenance. Furthermore, in the above scenario, she will likely retain approximately 85 cents after taxes. She may in fact keep 100% if her income is sufficiently low and she has all the tax benefits accompanying dependent children.

By contrast, you will recall, child support is not deductible and similarly I have explained that a simple division of assets in a divorce does not create a taxable event.

Naturally then, notwithstanding the visceral distaste of maintenance to most men, it can be highly advantageous to structure, where possible, child support and property settlements as maintenance. In such cases both parties can walk away ahead. This strategy has its limitations, however, as the IRS imposes limitations on such characterizations.

Also, to sell your wife on the deal, such agreements must be worded so as to assure the stream of payments irrespective of changes in either parties' circumstances (keeping in mind of course any applicable IRS red flags). The wife's confidence level is bolstered by the laws governing bankruptcy which preclude a debtor from discharging debt "of the nature of support," which specifically targets child support and maintenance in bankruptcy.

## **Maintenance for Property Deals**

When you are considering a maintenance for property deal, evaluate carefully the additional property you would retain for such a commitment. Your accountant should provide you a worksheet on which he has analyzed the deal. Particularly he should incorporate tax analyses as well as "present value" calculations. ("Present value calculations" seek to reduce the value of money which will not be acquired until some time in the future to what it would be worth if acquired today, on the theory that a dollar acquired today is more valuable than a dollar acquired next year). Next you must get some handle on the asset's likely appreciation where lurking capital gains issues may force you to retain the asset. Additionally, you must weigh the likely present value of any future tax impact resulting from its sale or income.

If there are no existing capital gains problems, you still must calculate your likely future rate of return on such assets and reduce that number to a present value. If you have a financial background, you may have yawned as you jogged tolerantly through the preceding paragraph. If, however, your college major was history, you may have lumbered through it several times grumbling intermittently at its author. In either case, I will reiterate here the importance of using experts in divorce - particularly accountants and psychologists. Where there are children, the parties sometimes exchange child support dollars for maintenance dollars, or visa versa, depending, of course, on relative tax brackets. For the reasons discussed above, if optimally calibrated, the resulting order can leave more money in both parties' pockets. But there are a number of potential impediments to such a deal. One prominent problem is the IRS, which insists that child support and maintenance be properly denominated. (See Chapter ).

Obviously my allocation must comply with the law. Another potential deal-killer is the applicable child support provisions in your state which purport to define the appropriate child support amount for each case. (See Chapter ). But there is some degree of elasticity in every state, which is stretched or contracted further by the particular judge in your case.

When making such adjustments, both you and the court must consider the impact of future changes in circumstances relating to the child's support needs. For such a deal to be viable in virtually any jurisdiction, the resulting deal must permit future modification of the child support amount. The maintenance segment may or may not be modifiable depending upon the deal you are able to negotiate. The bottom line is that any issue of tax consequence (again assuming the appropriate income disparities) should present an opportunity for a win-win deal. Other such examples are child deductibility, interest deductibility on debt and investment loss. There are too many possibilities to list. You must rely on your accountant and lawyer to help you spot these opportunities.

Another scenario commonly holding promise for win-win is where particular assets hold for greater "in-kind"

value to one party than to the other and where the fair market value of the asset is likely much lower than its "in-kind" value to the first party. Real estate, typically the marital home, is a common such example. A small business may be another. Rationally, in such circumstances there typically is an incentive for the parties to negotiate a number somewhere between the two values. This is particularly true where uncertainty exists in the event of trial as to whether the court will order the asset sold or, absent an order of sale, uncertainty as to the particular party to whom the court will likely award the asset.

If this analysis reveals that the court will give your wife those things she wants, then you are left with little leverage up to and including trial. For example, as discussed in Chapter , if your wife is expected to get custody and she wants the house. Absent the superseding circumstances previously discussed, she may have no incentive to make concessions for this provision by way of settlement, particularly where the court can be expected to order you to pay much of her attorney fees.

Alternatively, if she seeks the house under less reassuring circumstances, you may offer your consent in exchange for certain concessions relating to your objectives. Such concessions could pertain to virtually anything.

My clients often need liquid assets to set up a new household. Additionally, they often seek to keep their retirement benefits intact. They frequently place great emphasis on minimizing maintenance or child support payments.

Above all, perhaps (at least regarding money matters), my clients normally seek certainty. This means, among other things, locking down support amounts wherever possible. As to all the items listed in this paragraph, my clients will generally, if necessary, make concessions which, in simple numerical terms, exceed the value of that which they obtain.

Even concerning custodial arrangements, there are often implicit exchanges by which a party (often my client) will obtain a more favorable result (be it primary custody, additional temporary custody or provisions relating to legal custody) in exchange for financial concessions of one sort or the other. Rarely, of course, is such a quid pro quo overly discussed. Moms and their attorneys in such cases are careful to clothe such discussions in a proper attire for the court. For example, the two topics are never placed in the same paragraph, much less the same communication (written or oral). As you might suspect, to accomplish such deals both sides must employ great skills of diplomacy and indirection in negotiations so that neither mom nor her lawyer appear ignobly mercenary. Ultimately, in the court of such dealings, the child-related terms reflect "best interests" and the property a "fair and equitable division."

Conversely, to avoid any pretensions of moral superiority, I must add here that there have doubtlessly been occasions in which I pursued custody for a client whose motives I suspected to be at least in part monetary. My client's cynical expectation may have been to simply create enough perceived risk in his opponent's mind that she could lose custody, however improbable, to stimulate monetary concessions otherwise unobtainable. (I should add here that, while an attorney's primary duty is to serve his client, he must do so within the parameters of both the law and his code of professional ethics. Therefore, if any such stratagem were at any time to necessitate fraudulent or other dishonest conduct vis-à-vis either the courts or opposing counsel, expect your lawyer to apply the brakes.)

In such circumstances you must either proceed with a plan that is lawful and ethical or your attorney should withdraw from your case.

As you can see, the possibilities for settlement are usually there so long as:

1. You recognize what both your and your wife's priorities and concerns are, and
2. The two lists can be achieved, at least in part, simultaneously.

I will now close this guide with some ideas our clients often find useful...

## **Closing Thoughts on Marital Property**

Never wage a war over particular items of tangible personal property unless the contested items have a great value as, for example, certain antiques or works of art. Generally speaking, the value of any particular item of personal property is exceeded by the attorney fees necessary to obtain or retain it. (As used here, the term personal property refers to the standard items one finds in and around most homes, excluding however, automobiles of more than \$5,000 value.) This is not to suggest, however, that you should shrug off this category of assets. Quite the contrary. Collectively such personal property may afford you an opportunity to enlarge your cut of the marital pie in two respects:

1. Wives often place greater value on such things than do husbands. Men tend to think less passionately and sentimentally about such items (or they are at least more amenable to such detachment than are their spouses). As suggested earlier, emotions are an inflammatory factor in negotiations - they elevate the value of particular items to a particular party, which in turn typically means greater concessions to the opposing party. Presumably you have already concluded that in no event should you jeopardize an otherwise favorable deal over such items. I realize however that there are occasionally compelling circumstances regarding certain things such as heirlooms and pictures which, while de minimus to the accountant, are of great value to you. I can only caution you in such cases to weigh the potential price accompanying these items, whether procured by settlement or conflict. (Obviously I am referring in this paragraph only to circumstances where obtaining the items sought would in fact require something substantial on your part. If handled appropriately, you might get such things gratuitously.)
2. As discussed previously, it is not uncommon for the personal property of a marriage to have a total fair market value between \$50,000 and \$100,000. For some of you, the total will be twice that. You will likely be surprised when you prepared the detailed personal property list requested by your lawyer where you must methodically value each piece of china, each item of furniture, all your electronic equipment, and your exterior maintenance tools and equipment. The bottom line here is that your interest in the marital personal property is not something to be casually dismissed or thoughtlessly waived as many husbands are notoriously prone to do. Instead, you and your attorney must assure such assets are appropriately highlighted in negotiations and/or trial. In either case, you should receive a compensating credit in your column via other marital asset(s).

## Closing Thoughts on the Marital Home

As discussed earlier, where there are minor children its fate is often determined by the resulting custody arrangement. If, for this or other reasons, you expect your wife to be permitted to stay in the house, you should consider the following potentially mitigating provisions. You should note that these provisions may be advanced whether the anticipated outcome will flow from settlement or trial:

**Your objective in this situation should be to force refinancing as soon as possible.** At one extreme, where the wherewithal exists, you should propose the refinance be completed within 90 -120 days. (i.e. the shortest period practical in your area given your house and your wife's circumstances). At the other extreme, where the prospect for something better does not exist (again whether in negotiations or trial), you should insist on refinance or sale deadline which correlates to the underlying concern that prompted the court's protectiveness in the first-place - e.g. the existing notes must be refinanced no later than the youngest child's 18th birthday.

Depending on the age of your youngest child, the latter extreme may be quite acceptable. Where, however, such a date lies in the distant future, I have found that both the other party and the court are inclined to accept seemingly distant dates such as five years, particularly where the children will be teenagers at that point. The bottom line is that you should seek the soonest refinance or sale deadline possible.

**You should insist on language calculated to protect your credit rating** as well as to potentially trigger an early sale or refinance. The wording of this provision may be as draconian or permissive as the parties or the court choose. Naturally your objective to insert the strictest terms possible. For example, a decree could require that the property be listed for sale after the third late monthly mortgage payment. Over the multi-year life of most such loans, such a provision would likely be considered excessively harsh by most courts, though, of course, it may be included by way of settlement. More common is a provision that imposes an annual limit on late payments. In any case you get the jest of what you are seeking - namely the most intolerant language possible. This requires the maximum specificity possible. Define "late", define "payment", prescribe the specific procedure followed when a sale provision is triggered - e.g. Who lists the property for sale?, Within what time period?, With what entity?, How is the sale price to be set?

Whether or not you are able to obtain a specific sale provision as described above, you must at a minimum assure the decree contains an order directing your wife to keep all loan payments current. This simple provision at least permits the court to address in some fashion the matter should such problems develop in the future. While this provision is routinely included in many decrees, often immediately preceding the language indemnifying and holding you harmless as to 3rd party actions, there are exceptions much too numerous to permit any boiler plate assumptions (to which I add, as any self- respecting lawyer must, such assumptions never warrant reliance).

**Concerning your equity, your objective I assume, is to obtain your money or its equivalent at the earliest time possible.** Unless the house is being sold, the parties or the court must first reach some conclusion regarding its value. This often becomes a matter of dispute since a low value serves the interest of the party retaining the property while a high number serves the interests of the vacating party. The matter is most quickly, though not perhaps as accurately, resolved by compromise between the parties. Failing this, both can sometimes at least agree on one disinterested expert - i.e. a duly qualified appraiser, to which the matter will be submitted. This approach, while comparatively simple, quick and inexpensive, is, to some extent, a gamble. Also, such deals may not be binding on a subsequently remorseful party. Of course each party can hire his own expert.



This route is typically more complicated, time consuming and expansive than its alternative. Furthermore, this approach is likely only useful for trial purposes, and is even vulnerable to a further discount there via judicial cynicism. Since, however, the only alternative for purposes of trial is the testimony as to the property's value, (which likely has substantial credibility problems), the former course is generally the less undesirable of the two.

Whichever method is used, once an equity number has been reached, keeping in mind our above assumption, the vacating party wants closure regarding this issue. In many cases, circumstances are conducive to a prompt conclusion. Keep in mind there is a general judicial preference, absent superseding concerns, for an order that disentangles the parties financially and otherwise to the extent possible. This suggests that the court, as well as rational parties in negotiations, will give dispose of the equity entanglement where circumstances and superseding concerns permit (you will recall that one such superseding concern is children's "best interests").

One obvious solution (again) assuming children are involved, is to order a prompt refinance where the occupant's post-divorce financial position reasonably permits. Sufficient means may consist of an adequate salary alone to permit a refinance or a second note and mortgage in an amount sufficient to pay off the vacated party. More feasible may be a partial payoff of the loan from the property proceeds awarded the occupant party coupled with a refinance. This is often preferable to a simple cash payment to the vacated party in that it eliminates his liability on the original note while lowering the future monthly payments of the occupant party.

Alternatively, where the marital estate is comprised of adequate assets, the parties or the court may simply apportion the assets in a way that compensates the vacating party for his equity thus awarding the equity in its entirety to the occupant party. (Who, you will recall will in any case become the sole owner of the property pursuant to the disentanglement preference). While this offset can be achieved with virtually any marital asset, retirement benefits represent perhaps the most common such means. This is due in part to convenience where the vacated party (often husband) can simply retain a larger share of, or perhaps all, such funds which rest already in his name. This approach is also popular because it frequently is consistent with many such parties' desire to minimize any tampering with their retirement benefits.

But this allocation of marital assets has some significant shortcomings. It may not afford the vacating party sufficient liquid funds with to address the pressing financial needs of accompanying the dislocation of divorce. Additionally, from a tax perspective, such funds, while deferring tax liability, nonetheless will ultimately be subject to taxation while the equity interest he exchanged, at least under present tax law, is free of taxation. Mathematically, depending upon your present and future tax rates and the amount of the equity surrendered, this disparity could be substantial.

At the risk of becoming hyper technical, I must add that the tax code does provide you a tremendous opportunity by permitting your retirement funds to compound long-term tax free. The equity interest you surrender could not have been transferred to such a vehicle - (i.e. a 401(k), IRA, Roth IRA, etc. which given the comparatively low ceiling and other restrictions, the bulk of any significant amount could likely not) your ultimate rate of return via the retirement account could down the road easily exceed that of the presently tax free equity.

For a detailed and reliable analysis of these countervailing effects you should submit the actual numbers to a

tax accountant. Obviously this should be done prior to your taking a position on this or any such exchange. Also worthy of consideration is the relative illiquidity of the retirement interest vis-à-vis the equity interest. Your particular circumstances will dictate the importance of this factor. But in any case this element must be considered along side the financial analysis just discussed before any rational conclusions can be reached.

## **Parting Words**

As this guide has made clear, decisions and judgment regarding the financial aspects of divorce will affect you for years to come. While more tangible than issues of custody litigation, the financial side of divorce is still an area filled with numerous intricacies, rules and state-specific legislation. I hope I have provided you with a clearer understanding of the court's decision making process, as well as the choices, opportuneness, and strategies that are available to you.

I would like to close this guide with a reminder: the information provided in this guide is not intended to be used in lieu of an attorney. I sincerely hope that, in reading this guide, you will have become a better client, and, as a result, your lawyer a better lawyer (i.e. more effective in his representation). As always, I wish you and yours the best possible future.

## **About The Author**

Statistics indicate that in America over 50% of all marriages end in divorce. As a divorce lawyer and a senior principal in one of the largest divorce firms in the Midwest, if not America, I deal on a daily basis with the conflict and complication accompanying divorce. These challenges occur on basically two levels - the emotional and the practical. Regarding the former, as an attorney I can only be of limited assistance. It is the latter, the hard outcome that must occupy the divorce lawyer's primary attention, viz custody, support, maintenance and property issues.

Let me begin by telling you a little about our firm, Cordell & Cordell, P.C. I founded Cordell & Cordell in 1990 after a brief stint with a major law firm. Originally a general practice firm focusing its attention on domestic relations matters, Cordell & Cordell has evolved into a firm practicing exclusively domestic relations law with an overwhelming emphasis on fathers' rights. Men represent approximately 90% of our clientele. We serve the greater St. Louis metropolitan area, practicing in both Missouri and Illinois, as well as Kansas City. We presently employ 13 lawyers and to date have served thousands of men.

We unapologetically hold ourselves out via marketing and advertising as a firm devoted to men's interests. The website we sponsor, [DadsDivorce.com](http://DadsDivorce.com), is the most comprehensive site on the web for information relating to dads and custody.

Men come to Cordell & Cordell because they want to feel that their interests and the interests of their children are aggressively championed. Too often lawyers and even judges have resigned themselves to stereotypes and a perpetuation of the status quo. I am not suggesting this mentality is malicious or even conscious, but it is prevalent. Exacerbating things further is the feminist movement and its shrill insistence on women's interests to the utter exclusion of the underlying merits of a given case. The result is that the judicial system - lawyers, judges, social workers and the administration - is prone to assume without proof that moms should be the

primary custodial parents, that men accused of abuse are guilty of abuse, and conversely, that men alleging abuse are lying or overreacting, that women are not as capable of generating income as men are, and that a man is less deserving of assets earned by a woman than when the reverse circumstances exist.

Naturally, no law firm can completely rectify these deep-seated and multifarious injustices. We do not promise our clients transcendent justice. All we can promise our clients is their best shot. At Cordell & Cordell we have cultivated a reputation for challenging fallacious assumptions, for calling the court's attention to inequalities, to advancing without equivocation bold arguments from which other attorneys might shrink. Sometimes it is necessary to insist on a hearing on the record when the result proposed by the court in chambers is contrary to the law as properly construed. While such positions occasionally cause conflict, they nonetheless engender respect and encourage, I believe, more reasonable positions from the Court as well as from the other side.

In addition, Cordell & Cordell teaches its clients steps they can take to maximize their chances of receiving the greatest amount of time and participation in their children's lives and minimizing any money they must give their wives - be it child support, maintenance or property.

For example, when men come to us sufficiently in advance of any legal action, we can often strengthen our position with planning. Sometimes men will come to us more than a year before they anticipate anything will be filed. Strategizing should begin as soon as the husband is on notice of an approaching divorce. Men must be carefully coached regarding the wiles of both their opponent and opposing counsel.

Similarly, men can take steps to increase their chances of success in a custody dispute while the case is pending. During this period, for example, a man must be on his best behavior and scrupulously ignore his wife's often calculated provocations. When men lash out in anger, they damage their image before the court. When angry, men are deemed dangerous or abusive, whereas women who display similar behavior are dismissively labeled "frustrated" or "hysterical."

In conclusion, the task of representing men is a challenging one requiring skill and experience. In a system seemingly predisposed against them, men can only hope to succeed by utilizing all the help available to them - legally and strategically. Cordell and Cordell has built its practice on helping men do just that.