



# DIVORCE

## A PRACTICAL GUIDE

Achieving the Best Outcome  
for You and Your Family

FROM LAW OFFICES OF MATTHEW Z. MARTELL, P.A.

# **DIVORCE: A PRACTICAL GUIDE**

**ACHIEVING THE BEST OUTCOME FOR YOU AND YOUR FAMILY**

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# **DIVORCE: A PRACTICAL GUIDE**

**TO ACHIEVING THE BEST  
OUTCOME FOR YOU AND  
YOUR FAMILY**

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1st edition, 2018

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# **Chapter 1 - Coping with Change and Setting Goals**

## **Your Divorce Rule Book**

### **§1:01 Reducing Chaos**

Divorce creates chaos. The chaos is caused by changes in residences, self-perceptions, finances, social relationships and parenting. The rule book by which you have been living your life has been destroyed.

When this happens, you may find that you behave in ways you never could have imagined.

You may regress to a second adolescence and involve yourself in risky or self-destructive activities. You may find yourself drinking excessively or experimenting with drugs. You may leap into ill-advised romantic relationships in an effort to replace what you have lost.

For the best outcome for yourself and your children, you want to reduce the chaos of divorce to a manageable level. Keeping the chaos under control will help you progress through the grieving process that is a normal part of divorce.

Below is a temporary rule book to follow during your divorce until you are able to rewrite your own. These rules for minimizing chaos fall into three categories:

- 1. Limit change: If it isn't broken, don't fix it; if it doesn't have to be changed, don't change it.
- 2. Protect people: Protect your children first, yourself second (and yes, your spouse third).
- 3. Protect your financial position: Provide for necessities, protect assets, and pay bills.

### **§1:02 Rule #1: Give Yourself Time**

You are going through a lot, and it is going to take some time to recover. Don't listen to people who urge you to "just get over it." You'll get over it in your own time. Most people start to recover from a divorce in about a year or so. Some people require a lot longer. If you find yourself stuck or can't function at your job or as a parent, it is time to get help.



**§1:03 Rule: #2 Wait at Least a Year before Making Major Life Changes**

People often react to a divorce by deciding that since their marriage has ended, they need to start an entirely new and different life. They change jobs and homes, cash in retirement accounts, and adopt different lifestyles. You have enough changes in your life right now. If something in your life doesn't absolutely have to be changed right now, leave it alone.

**§1:04 Rule #3: Wait at Least a Year before Getting Involved with Someone new**

You are at your most vulnerable right now. You are also seeking to redefine the new you. You will very likely be a different person in a year than you are right now. The odds are you will not ultimately fit with anyone you become involved with now. Any relationship you enter into right now will be based on panic, need, or simply grief: a bad way to start a relationship.

**§1:05 Rule #4: Take Care of your Children**

You don't have any job that is more important than your children. Make sure they have what they need. Protect them from the divorce. Keep stress away from them. Maintain a positive attitude around your children. In addition to protecting the children, focusing on the needs of the children takes the focus away from you. This keeps you from dwelling on your problems while you are developing a new rule book for yourself.

**§1:06 Rule #5: Protect your Job**

Your job is more important than it ever has been; don't do anything to jeopardize it. Level with your employer. Tell your employer what is going on and be sure to make up time if you have to. Do whatever is necessary to keep the relationship sound.

If you are unhappy with your job, be extremely careful. The unhappiness could be a reaction to the divorce more than anything else. If after a year you are still unhappy, begin a systematic search for a new position. Do it right. Give proper notice and don't burn any bridges on your way out.

**§1:07 Rule #6: Take Care of your Finances**

Don't spend money on luxuries. Make your car payment. You can't get to work if you don't have a car. Make your house payment if you can. If you can't, make sure your spouse knows about it; then whether or not the house can be protected will be a joint problem. The same goes for your other bills. However, the necessities of life for you and your children come first. Any money you have goes to protect people first, then assets, and finally, your credit rating. For example, if it comes down to buying food or paying off a credit card, the choice should be obvious.

**§1:08 Rule #7: Keep your Friends**

Some of your friends will feel very awkward associating with you after your separation. Some will not and will be supportive. Keep them close. Friends can help in tough times. However, be very careful about taking any advice they might give you. You can listen to them, but before you make any decisions, get advice from your divorce lawyer.

**§1:09 Rule #8: Keep your Family**

Members of your family can be your greatest allies. Don't alienate them. Any unhappiness you may feel toward them right now may simply be a reflection of how you feel about the divorce process. It's possible that your family will want to defend you at all costs. Be very careful; letting them defend you at all costs may not be the best approach. Any advice they give you, or actions they want you to take, may not be in your best interests or what is best for your children. Talk it over with the experts you've hired before acting on any advice family members give you.

## **Understanding Emotional Barriers to an Amicable Resolution**

**§1:10 The Grieving Process**

A divorce can be divided into four categories: (1) legal requirements; (2) children and parenting; (3) money and property; and (4) grief. Legal requirements must be met. Assets and liabilities will need to be divided and family support determined. If you have children, parenting will have to be arranged. But above all, and often

out of all proportion to the rest, you and your spouse will be dealing with your grief over the loss of your marriage.

Divorce is the death of a relationship. Only the death of a spouse is generally reported to be more stressful for adults than divorce. Separation and divorce are consistently rated more stressful than going to jail, losing a job, personal injury, illness, mortgage foreclosure, and all other distressing life experiences except the death of a spouse.

### **§1:11 The Stages of Grief**

Psychologists typically define the stages of grief as:

- Shock.
- Denial.
- Anger.
- Bargaining.
- Depression.
- Acceptance.

Settling a divorce requires a lot of hard work from both spouses. You will have to gather documents, prepare budgets, list all your assets and liabilities and put a value on them, and make many decisions about how to parent your children and divide your property. The emotions you and your spouse experience during the grief process can make it difficult for you to move ahead with these tasks.

In the shock stage, you may feel paralyzed and unable to take any action while you process the idea of ending your marriage. In the denial stage, you may put off doing the work that is necessary to settle your divorce thinking that the divorce is never going to happen. You may think that dragging out the process will give your spouse time to come to his or her senses and give up on the divorce.

In the anger stage, you may dwell on how your spouse has wronged you and feel a need to vent to anyone who will listen about what a horrible person he or she is. You may find yourself opposing proposals from your spouse, even when they make sense, because you want to punish him or her. You may also find yourself making unfair demands.

In the bargaining stage, you may hope to change your spouse's mind about the divorce by promising to change yourself into the ideal wife or husband. You may

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be overly generous to your spouse in negotiations in hopes of getting your spouse to believe that you are a wonderful, generous person and the divorce is a mistake.

In the depression stage, you may be disengaged from the negotiations and may not care how things are resolved. You will probably find it hard to follow through with tasks and make decisions.

In the acceptance stage, you recognize that your marriage is over and that you must move forward to create a new life for yourself. When both spouses are in the acceptance stage, negotiations are most productive.

### **§1:12 Moving through the Stages**

Grief is a normal part of life; you will survive it. But you must be patient with yourself and with your spouse who is going through the same process. The process cannot be speeded up. The only cure for grief is time. Understanding that you are experiencing a normal process with a predictable outcome is the first step in dealing with it.

While the grieving process has been neatly divided into stages, the actual process is not so orderly. You should expect to shift back and forth through the various stages until you finally arrive at acceptance. The same will be true for your spouse. For example, a husband could be in the acceptance stage until his wife tells him that, contrary to their earlier agreement, she won't be sending the children to see him on Christmas. This news drops him back to the anger stage from which he will have to climb back to acceptance. Recognizing where you and your spouse are in the grieving process, even in general terms, is valuable.

### **§1:13 The Problem of Grief Disparity**

You and your spouse will go through the grieving process at different rates. Chances are that you will be at a different stage than your spouse at any given time during your divorce.

Grief disparity hampers settlement negotiations. The further apart you are in the grief process, the more unlikely it is that you will be able to negotiate productively and reach a settlement. Patience is the solution. Since the only cure for grief is time, the only cure for disparate stages of grief is time.

Sometimes a couple is not as far apart as they appear. The differences in the stages of grief can be real or perceived. For example, a wife in the depression stage of grief may not be able to proceed with negotiations until she believes that her husband is feeling grief also. Some husbands who are horribly hurt refuse to show it, covering their grief with bluster or an unfeeling facade. An expression of their true feelings to their spouse may provide a commonality which will allow the couple to deal.

If you and your spouse are truly miles apart in the grief process, the best solution may be just to wait before attempting to work out the details of your divorce. Your lawyers or a mediator can help you establish some temporary arrangements to protect your children and finances and to limit conflict until you are both in a place where you can begin fruitful negotiations.

### **§1:14 Getting Stuck and Unstuck in the Grief Process**

Sometimes people get stuck in one stage. They will be unable to overcome their anger or depression, for example. When this happens, the best solution is to work with a qualified therapist.

If your lawyer believes you are stuck, he or she may refer you to therapy. It's important to give it a try. If one of you is stuck, negotiations will prove difficult. When one spouse is simply unable to accept the inevitability of the divorce, the odds are high that the couple will end up in court asking the judge to decide how they will raise their children and divide their property.

Court is the least desirable solution to divorce because it is enormously expensive, emotionally wrenching, time consuming, and most of all, highly detrimental to the children. *See Ch. 8.*

## **Communicating with your Spouse**

### **§1:15 Vow to Do the Right Thing**

Divorce is an emotionally charged process because of the long personal history you have with your soon-to-be former spouse. Also, when children are involved, an already emotionally charged atmosphere is even more volatile. As a result, even the most innocuous or insignificant of circumstances can spiral out of control on a moment's notice.

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Remember at all times that what you say, what you do, and how you react to your spouse, if seen or heard by your children, will have a life-long impact on them, and on their future relationships with you, your spouse, and others.

Vow to do the right thing, whether or not your spouse chooses to do so.

### **§1:16 Shift the Paradigm**

Now is the time to shift the paradigm of your relationship with your spouse from friends and lovers to business associates. The “business” is the successful rearing of your children and the successful negotiation of a satisfactory arrangement to end your relationship as spouses. Treat your spouse as you would a business associate or co-worker whom you might not like, but with whom you must work. When emotions flare, back off, walk away and allow time for things to settle down. Save your sarcasm, cynicism and biting humor for stories you can tell your friends beginning with the phrase, “What I wanted to say was. . .” Maintain as your mantra: “This is just business now.” You will be happier both in the short and long run, and your children will remember you for it later in their lives as well.

### **§1:17 Treat your Spouse with Respect**

If you’d never had any children together, then it might not matter what you did to your husband or wife during the divorce. You could spend every dime the two of you’ve got making him or her miserable. But think about it, you and your spouse are going to be parents forever. That means you are going to have a relationship forever. Do you want him or her as an enemy forever?

You say he is a good dad, or she is a good mom. Then put your anger aside and give your spouse credit for being a good parent. Think about what happens when you work at making him or her angry or tell your spouse that a negotiated settlement isn’t going to happen. That’s your anger talking, and just who exactly is that anger going to end up hurting? If it hurts your spouse, then it hurts his or her ability to parent, and that hurts your children. Surely, this is not what you want.

Even if you have no children, do you really want to waste time, emotional energy, and all your money on fighting? You have much more important things to do with your life. You don’t want to emerge from your divorce without the resources to do them. You don’t want to devote years of your life obsessing over past hurts and injustices.

## **§1:18 Defusing a Spouse's Anger**

Anger is the most visible and pervasive of the stages of grief in a divorce. There are a number of reasons for this.

- Anger is the default position. When anything goes wrong during a divorce, the most common response is anger.
- Anger is infectious. When faced with an angry individual, the most common response is to become angry in defense.
- Anger is a common response to chaos, frustration, and uncertainty. The typical divorce has liberal quantities of all three.

Since anger is a normal response to numerous conditions that exist in divorce, developing techniques for dealing with it will mitigate its effects. When your spouse is angry, the normal response is for you to become angry yourself. Understand that two angry people will delay the divorce process. Consequently, the best response is no response. The expression of anger requires energy. The angry party needs to be acknowledged. If the energy expended does not serve to meet the need, the individual will stop expending the energy. You may be skeptical that this approach will work. However, give it a try; you have nothing to lose. It will be difficult not to defend yourself or respond in kind, but you may be surprised at how well this approach works.

## **Establishing Your Goals**

### **§1:19 Getting Started**

Early in the divorce process, you will want to establish some short and long term goals. Your divorce lawyer can guide you. Your goals can be tangible and specific (“I want to get alimony”), or they can be less concrete (“I want to be able to develop a better relationship with my soon to be ex-husband for the benefit of our kids”). Goals will help you and your lawyer to better organize your efforts and will help your lawyer understand how best to help you.

Establishing goals might seem like a Herculean task, particularly if you have been blind-sided by the divorce. You can begin by thinking about the following issues and jotting down your thoughts on paper. Share your notes with your lawyer at your next meeting so he or she can discuss with you whether your goals are feasible and can devise strategies for achieving them.

## **§1:20 Children and Parenting**

Think about what type of parenting time, and what division of parenting obligations will best serve your children, and fit into the lives of you and your spouse. If you have not been the children's primary caregiver but think you want custody, seriously examine your reasons. You should never consider seeking custody because you think it will give you a negotiating advantage on economic matters or reduce your child support payments.

You and your spouse should sincerely try to resolve any disputes you have about the children through negotiation and mediation. There are no winners in custody trials. They are detrimental to your children and rob you of control over how you will raise them. For more on children and parenting, *see* Ch. 2.

## **§1:21 Budgeting, Child Support, and Alimony**

Both you and your spouse will need to fully disclose your income to the other for purposes of establishing the need for and ability to pay support and alimony. You can begin gathering the information necessary to establish your income and to prepare a budget. *See* §1:31 below and Ch. 3 for details

If you are the major bread-winner, you can expect to pay child support and possibly alimony (also called maintenance or spousal support). If you have not been employed, you will need to think about whether you can reenter the work force. Visualize where you want to be six months and six years from now. For more on child support and alimony, *see* Ch. 4.

## **§1:22 Your Home**

If you and your spouse own a home, think about whether you want to stay there and, if you do, what are your reasons. Are the children close to a life event, such as finishing elementary and moving on to high school, where staying in the house until school is completed is something you wish to do? How realistic is that desire, both economically and practically? Can you economically afford to remain in the house, and if so, can you realistically perform the maintenance and upkeep required? Does it make sense for you to spend half of your monthly budget keeping the house, when suitable housing is available in the same school district at half the cost?



For many couples, what happens to the home is a visceral issue that tends to lead to unrealistic expectations and goals. Frequently, the home is really an albatross that needs to be let go. If you want to “buy out” the other spouse’s interest, consider whether it is economically feasible. Does it make sense for you to keep the house if you only wish to stay there in the short term? If your plan is to stay in the house for less than five years, it might make more sense to sell the house now, so that your spouse will bear some of the costs of sale.

### **§1:23 Your Other Property**

Think about the assets you might want to retain. Prioritize the ones that are most important to you.

When you think about how much an asset is worth, you may naturally think about how much it would cost to replace or how much you spent to buy it. But those are not the standards of value used in divorce. What matters is how much you could get for the asset if you sold it.

Few people own assets that are so valuable that they can’t be replaced, and nearly everyone believes that what they own is more valuable than it really is. Think in terms of garage sales. That is to say: If you had to put the property on the curb and solicit an offer for purchase, what would it realistically bring? Too often, divorcing couples waste time and money negotiating over assets that aren’t worth the time invested in discussing them. For more on property division, *see* Ch. 5

## **Working Effectively with Your Lawyers**

### **§1:24 Trust, Communication, Information**

The key to a successful working relationship with your divorce lawyers is trust. Trust is built on a foundation of communication and information. Keep the following suggestions in mind and work with your lawyers in pursuit of the most advantageous and satisfactory resolution of your case.

### **§1:25 Be Candid with your Lawyers**

This is a very difficult time for you. Your lawyers realize that you will be delving into some very personal information and areas, things that you might

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feel reluctant or reticent to discuss. Do not be afraid or embarrassed to be totally truthful and candid with them about what has gone on in your life. Your lawyers are professionals who will not judge you and are obligated to keep everything you tell them in confidence.

Telling your lawyers the whole truth enables them to represent you with all the powers at their disposal. Often, it will help alleviate concerns you might have and comfort you in this most difficult time. It also eliminates the possibility of your spouse's lawyers "surprising" your lawyers and gaining an unwarranted tactical advantage. Do not ever hesitate to tell your lawyers the truth, in the same fashion you would tell your doctor of any physical issues you are experiencing.

### **§1:26 Ask Questions**

This is your divorce and, very likely, unfamiliar territory for you. You will no doubt receive advice, both solicited and unsolicited, from friends, neighbors, family, co-workers and others who have been through a divorce, or know someone who has. While these folks mean well, they are often misinformed about the law. There are many common myths about divorce. If any "advice" that has been passed on to you causes you concern, ask your lawyers about it. Your lawyers should give you direct, understandable answers to your questions. The correct information might be very different than you expected.

### **§1:27 Get Organized**

During the divorce, you will be asked to provide certain information and documents as part of the process known as "discovery." Get a head start on this obligation by gathering and organizing your important documents, such as tax returns, bank statements, retirement account records, life insurance policies and the like. For a list of the documents you will need, *see* §1:31 below.

This can often seem like a waste of your time, particularly when your spouse "already has all that information." Whether he or she does or does not is beside the point; the object of the exercise is to disclose what you know, and what you have. Also, remember that if you have information or documents that are requested by your spouse and his or her lawyers and you do not disclose them, you might be barred from using them for your own benefit. Discovery is often a time consuming process, but an important one. The more thorough and organized you are, the less time your lawyers will need to spend on discovery, and when they save time, you save money.

### **§1:28 Use your Lawyer's Services Wisely**

You can save money and control the costs of your divorce by using your lawyers' services wisely. Organize your thoughts and write down your questions before you call, so you can be sure to discuss all of your questions in one phone call. Use your lawyers' office staff and paralegals to make appointments, answer routine questions (such as when your next court date might be), confirm receipt of a document or other information, and for assistance with discovery.

### **§1:29 Rely on your Friends and Family**

Your lawyers are not therapists. They can assist you in dealing with some of the normal emotional distress and personal difficulties you will experience. For more complicated issues, you will need to rely on mental health professionals trained to deal with people in emotional distress. For the routine types of emotional upset that are engendered by every divorce, it is likely far more cost effective for you to discuss your feelings and concerns with family and friends when you need a sympathetic ear.

## **Homework**

### **§1:30 Initial To-Do Checklist**

Because divorce is essentially a business transaction, much of the work of a divorce involves separating your joint finances and assets. Hopefully, you and your spouse can agree through much of that process. Either way, you will want to begin with these steps:

#### **CASH AND CREDIT**

- If you don't have one, open a separate checking account. You can do so with a small amount. What is important is that you have this account, not how much is in it. You need your own financial system.
- Set aside some cash in a safe place. Sometimes in divorces, the bank accounts and credit cards are frozen.

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- ☑ Close your joint credit card accounts and obtain a credit card in your own name. Any debt on the joint card can be transferred to the individual cards. Alternatively, you can tell your credit card company that no new charges can be made on the joint card. Watch your credit report to make sure that your spouse does not obtain a new joint card (or apply for a joint loan).

### SAVINGS AND INVESTMENTS

- ☑ Freeze all your joint investment accounts so cash cannot be withdrawn and loans cannot be placed against them. Obtain statements for all the accounts.
- ☑ If your spouse has a retirement account, ask the retirement plan administrator for its current statement and a copy of the plan description.

### PERSONAL

- ☑ To ensure privacy of your communications, rent a post office box and open a new email account.
- ☑ Change the passwords for your ATM cards, bank accounts, online stores, social networks, and email accounts. Ask your spouse to return the duplicate key to your car.

### CAREER

- ☑ If you have a job, tell your boss you are going through a divorce. Offer to make up the hours you will miss.
- ☑ If you don't have one, begin making plans to obtain a job. Update your resume, research job prospects, and begin applying for interviews.

INSURANCE

- ☑ If you depend on your spouse's health insurance, investigate the cost and availability of continuing its coverage. Compare separately obtained insurance.

RECORDS

- ☑ Make a detailed list of all the property in your home. Append photos of the more valuable items, enabling the date stamp on your camera before shooting.
- ☑ Gather and organize information about what you own and owe. You will need financial statements, tax returns, bank statements, insurance policies, and investment account statements. *See* the checklist in §1:31 below.
- ☑ Start thinking about which assets you want to keep and which you are willing to give up.
- ☑ Write for your attorney a concise narrative about your marriage, and include the date you began living together, the date you got married, your children's birth dates, any previous separations, when various assets were acquired, and separate property either you or your spouse inherited or brought with you to the marriage.

**§1:31 Supporting Document Checklist**

Use this form as a checklist to help you collect the documents you will need to give your lawyer to substantiate your income, assets, and debts for purposes of resolving the financial issues in your divorce.

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### DOCUMENT CHECKLIST:

| DOCUMENT  | YES | NO | OTHER PARTY'S POSSESSION |
|---|-----|----|--------------------------|
| List two pay stubs  |     |    |                          |
| Last month's utility bills (phone, electric, gas, village, garbage, etc.)   |     |    |                          |
| Receipts: household repairs or replacements, if any (any anticipated or ongoing repairs?)   |     |    |                          |
| Last auto loan statement and Titles (if applicable)   |     |    |                          |
| Auto repairs and/or maintenance (any major work needed or immediate expense?)   |     |    |                          |
| Medical/Dental/Optical bills or quotes or statements for unexpected expenses (for ongoing medical treatment or medications)         |     |    |                          |
| Children's school fees: registration, PTO fees, books, etc.   |     |    |                          |
| Last statement of any credit card currently used  |     |    |                          |
| Copy of savings statement (most recent or copy of passbook)   |     |    |                          |
| Last month's checking statement (do not include actual canceled checks unless otherwise instructed)                                 |     |    |                          |
| Certificates of Deposit   |     |    |                          |
| Money Market Accounts (most current statement)  |     |    |                          |
| Stock, Bonds, and/or Investment accounts (most current statement)   |     |    |                          |
| Real Estate documents (closing package from purchase/refis) and last month's mortgage statement (if unencumbered, mortgage release) |     |    |                          |
| Last month's home equity line or loan statement (if applicable)   |     |    |                          |
| Any and all documents relating to secondary vacation residence and/or timeshare   |     |    |                          |
| Any and all documents relating to vacant land   |     |    |                          |
| Any and all documentation relating to any business interests (tax returns, financial statements, and the like)                      |     |    |                          |
| Copy of life insurance policy statements (need death benefit values and any cash values)  |     |    |                          |
| Most current statement of any and all retirement accounts, pension plans, IRAs, 401(k) plans  |     |    |                          |
| Tax return, State and Federal (last three years, unless otherwise instructed)   |     |    |                          |
| Any lawsuit claims against you or your spouse   |     |    |                          |
| Any and all appraisal for property; jewelry, collectibles, certificates of authenticity, etc.                                       |     |    |                          |

## **Chapter 2 - Children and Parenting**

## **Protecting Your Children from your Divorce**

### **§2:01 Keep Your Children from Becoming Collateral Damage**

During and in the immediate aftermath of your divorce, it's easy to get wrapped up in your own emotional and financial concerns. Although you have a lot on your plate, don't let your children become collateral damage. Your children should be your most pressing concern. They are your most important responsibility. Put them first.

To help your children survive the divorce without lasting harm, study these rules and put them into practice.

### **§2:02 Rule #1: Shelter Your Children from Conflict**

Don't draw your children into the divorce by fighting around them. Even if you fight in a separate room behind closed doors, your children know that you are fighting. Studies have concluded that conflict between parents during and after divorce leads to significant and lasting problems for the children.

During childhood, they suffer with:

- Lower academic achievement.
- More behavior problems.
- Poorer psychological adjustment.
- More negative self-concepts.
- More social difficulties.
- More problematic relationships with mothers and fathers.

As adults, they are characterized by:

- Lower psychological well-being.
- More behavioral problems.
- Less education.
- Lower job status and lower standard of living.



They are also:

- More likely to never marry or experience lower marital satisfaction.
- More likely not to have children.
- At a heightened risk for divorce.

### **§2:03 Rule #2: Keep Your Children out of the Divorce**

Don't draw your children into your divorce. You should never expect them to fill the role of friend, confidant, or spy. Treating your child like your best buddy only confuses the child and removes you as an authority figure. Confiding in children dumps emotional issues on them that they are simply not mature enough to deal with. Pumping children for information about your spouse makes children feel as though they have betrayed their other parent.

You are the parent, and they are the children. The line between parent and child should remain crystal clear. Do not let the roles change. Your children are not your friends. They are not your confidants. It is not their job to give you emotional support and validation. Build a shell around them, and keep them protected from the divorce.

Never use your children as pawns to extract more favorable settlement terms from your spouse. You will feel ashamed and degraded if you treat your children like items of property

### **§2:04 Rule #3: Reassure Your Children that They Are Loved and Will Be Cared for**

Your children must be told this repeatedly. Tell your children that both of their parents love them very much. Make it a mantra: "You are loved, and you will be taken care of."

You can also reassure your children by providing them with age-appropriate information. For example, you and your spouse should tell your children that you are divorcing, but don't share the reasons with them. Tell them that you and their dad or mom are going to be living apart, and that they will have two houses instead of one. *See* §2:09 below for more tips on telling your children about your divorce.

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Answer their questions honestly, if you can. Their questions will normally center around their immediate needs, like if they will still be able to go a friend's birthday party or participate in a school activity. Other questions may not have answers right now. If you don't know, say so, and then repeat your mantra: "You are loved and will be taken care of no matter what happens."

### **§2:05 Rule #4: Do Not Denigrate Their Other Parent**

Don't tell your children their other parent is lazy, worthless, or a cheater. It is not your job to enlighten your children about their other parent's character flaws. Do not say or do anything to degrade your children's other parent in their eyes. Your children have an enduring bond with their other parent. This bond cannot be broken under any circumstances. Any attempt you make to damage or alter the bond will only hurt your children. Ultimately, you will damage your own relationship with the children.

Bear in mind that children who have both parents actively involved in their lives do better than children who do not. For the sake of your children, you need to encourage a relationship between them and their other parent even if your spouse has not behaved as you might have wished.

There is something else you have to consider: What will happen to your children if you die or become unable to care for them? The children will most likely end up with your spouse. If a safe haven hasn't been prepared for them there, and if a solid relationship doesn't exist between them and their other parent, your children could very well be damaged for years.

### **§2:06 Rule #5: Maintain Structure and a Sense of Normalcy**

Reassure your children by maintaining structure. Stick with the children's normal routines. Regular scheduling of homework, meals, and bedtimes will do far more to supply reassurance than simple words.

### **§2:07 Rule #6: Be a Positive Role Model**

Present a strong positive face to your children. If you collapse under the stresses of divorce and allow your children to witness it, they will also collapse. If you go to pieces, or let anger overwhelm you, they will go right along with you. Do your grieving in private after your children are asleep or when they are not with you.

If you behave as a confident leader in spite of internal turmoil, the children will be reassured and join you in facing the changes. A positive mental attitude and a structured, secure atmosphere will help your children survive the divorce without lasting damage.

### **§2:08 Rule #7: Monitor Your Children Closely**

You must monitor your children's development very closely during the divorce process. The conflict will normally delay their development and may even cause some regression. For example, children who have been successfully toilet trained may have a significant increase in the number of accidents.

Children normally recover from these delays or regressions as their situation becomes more stable and predictable. However, severe regression or destructive behavior needs immediate attention such as counseling. Violent behavior directed at siblings or other children should be addressed immediately.

Talk to your children's teachers and caregivers. Let them know what's going on and ask them to tell you the type of problems the children may be experiencing. It's kind of like taking the children's temperature. You'll be able to tell how well they are doing by how they are functioning at their jobs of growing up.

### **§2:09 Telling Your Children about Your Divorce**

If you haven't yet told your children about the divorce, you may be wondering how to broach the topic. Parents sometimes delay telling their children because they think they are protecting them. However, children often know that something is going on and feel more stress because of the uncertainty than they would if they knew the truth.

As a general rule, both parents should talk to the children together. The children should be told at the same time, whenever possible. You and your spouse should agree in advance on how, when, and where to tell your children, and what to say when they ask "Why?" If you can't agree, a therapist could be helpful in resolving your dispute.

Before you sit down to talk to your children, be sure that you are in control of your own emotions. You must behave in a mature fashion and not reveal any anger, disappointment, fear, frustration, hurt or blame. So do not talk to your

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children until you can be in control. Watch your body language and tone of voice, in addition to what you say.

Offer clear, honest explanations. Avoid elaborate details of your marital problems (i.e. affairs, sexual problems, money problems). Stress to your children that they are not responsible for the divorce, but that this is an issue between the adults. Emphasize that the divorce is not their fault, but make clear to them that they can do nothing to change your decision.

Focus on what will happen to each child. Describe basic changes (i.e. living arrangements, financial changes, time with the other parent). Give your children a time frame for the expected changes if you can. Assure your children that you will tell them about all major developments and changes. Invite your children to express their concerns and offer suggestions.

Reassure your children that your divorce will not change the love either of you feels for them. Give them permission to love both of you.

## **Developing a Parenting Plan**

### *The Truth about Parenting Plans*

#### **§2:10 What Is a Parenting Plan**

A parenting plan is a written blueprint for how you and your soon to be ex-spouse will care for your children now that you are no longer living in the same household. The best plans are based on agreement between the two parents. If you and your spouse are unable to agree on a parenting plan, the court will impose one on you. Neither one of you may be happy with its terms.

Parenting plans vary in complexity from a few lines to 20 pages or more. Often the simpler the plan and the more flexible the parents, the better the plan works. See §2:26 and §2:27 below for two typical parenting plan agreements.

If you and your spouse want to parent your children effectively after your divorce you need to understand and accept two things about parenting plans:

- No matter how complete your parenting plan, there is no possible way to anticipate everything that will happen. Work,

school, and extracurricular schedules change, kids and parents get sick, and an infinite number of other variables interfere with your carefully thought out plan.

- By and large, parenting plans are not enforceable. Courts cannot force a person to become a good parent. They can't send a sheriff's officer out every time a parent brings a child home late. Courts can't mandate respect, empathy, or simple good manners, all of which have to be applied to one degree or another in order to successfully share parenting.

It is best to treat parenting plans as a tentative schedule of parenting time that is subject to change. They can't foresee and deal with everything that will happen in the parenting of children. Only responsible, loving parents can do that.

## §2:11 What Goes Into a Parenting Plan

At a minimum, your parenting plan should address:

- Who has decision making authority for your children. This is known as legal custody.
- How you and your spouse will share parenting time with your children. This is known as physical custody and visitation.

**Legal custody or decision making authority** refers to the right to make major decisions about your children. It includes such things as where the children will go to school, what religion the children will be raised in, and what type of medical treatment the children will have.

You and your spouse can agree that you will make decisions together (known as "joint legal custody"). Joint custody means conferring before any decision is made. Alternatively, you can agree that one parent will make all the decisions (known as "sole legal custody"). These are the two most common arrangements. However, some couples agree that they will attempt to make decisions jointly, but if agreement cannot be reached, one parent will have the final word. Others agree that one parent will make certain decisions and the other parent will make other decisions.

**Physical custody or time sharing** refers to how the parents schedule time with the children. It addresses where the children will live and who will provide care and supervision during specific times. Parents can agree to just about any arrangement that suits their schedules and their children's developmental needs.

Many parents agree that the children will live primarily with one parent and will spend specific periods of time, such as alternating weekends and part of summer vacation, with the other. Other parents agree to share time with the children equally by alternating weeks, or months, or splitting the week, for example. In choosing a time sharing schedule, it's important to consider the children's ages and developmental needs, as well as the practicalities of transportation, work schedules, and living space.

The time sharing and decision making are independent concepts. Parents who share decision making need not have equal parenting time. It is still probably more common for the child to live mainly with one parent and spend time with the other parent on weekends and during school vacations.

## **Developing a Time Sharing Schedule for Your Parenting Plan**

### ***General Guidelines***

#### **§2:12 Set Up a Definite Schedule**

It is better to have a set schedule as a fall-back position even if you feel like you don't need it now. There may be times when your relationship with the other parent is strained and it is better to be prepared than to be sorry. You may ignore the set schedule now. Either parent can invoke it at difficult times, and then ignore it again at better times.

#### **§2:13 Consider Your Children's Age, Temperament, and Developmental Needs**

Infants and very young children need the stability of a primary caretaker. They should have short but frequent visits with the other parent. As they get older, the time with the other parent can be increased and the parents can even share time equally, if desired.

If you are considering equal timesharing, think about how your child adapts to change, a new caretaker, and a new school. Some children must sleep in one bed or had to use one toilet when being toilet trained or did not do well their first time in preschool or when being separated from their caretaker. These children may not

be good candidates for equal timesharing, at least until they are somewhat older. For more on age appropriate timesharing, *see* §§2:21 through 2:25 below.

### **§2:14 Consider the Parenting Arrangement You Had before your Separation**

Agree whether to continue your previous parenting arrangement or make changes, and why. Often one parent (usually mom) has been the primary caregiver. The other parent often wants to increase his involvement with the children after the divorce, even having the children 50 percent of the time or more. Seeking greater involvement with the children is admirable if for the right reasons. Reducing your child support obligation is not one of them. This is a focus on your needs and wants, not what is in the best interests of the children.

### **§2:15 Remember that Frequent and Continuing Contact with Both Parents Is Best**

In the vast majority of cases, the children will be best served by having frequent and continuing contact with both parents after their divorce. Any parent who opposes this arrangement should be able to show that the children's emotional, mental, or physical health would be at risk of permanent harm.

Sometimes a parent who has been especially hurt by the divorce will avoid contact with the children. He or she may feel cheated by the financial outcome or shut out and not needed by the children. If this describes you, be assured that your children do need you. A child needs a relationship and personal contact with both a mother and a father. Even though the parents have not been able to get along, the children still need both of you to have the best chance to grow into healthy adults.

### **§2:16 Plan “Responsible” Time for Both Parents**

Both parents should be actively involved in the children's lives with responsible time as well as recreational time. One parent's time shouldn't consist solely of fun, while the other supervises work.

Children need chores and involvement in day-to-day activities in both homes, for example, food shopping and cleaning the house. Both parents should have an opportunity to supervise homework and school projects. Both parents should have time when the children have school activities and extra-curricular activities.

**§2:17 Think About the Practicalities**

Think about the geographical proximity between your homes, your work schedules, and the children's school and activity schedules. You want to make a time sharing schedule that is workable and requires little change. The change should be to the appointment that interferes with the schedule, rather than to the schedule, so the children are not disappointed and understand that they are the priority in their parents' lives.

**§2:18 Understand that Quality Time Trumps Amount**

The amount of time spent with the children is not as important as the quality of the time. One way to have quality time is to create rituals with the children. These can be holiday traditions, shared hobbies, and treasured routines, such as reading favorite bedtime stories. Rituals with each parent create the memories that children will carry with them to their children.

**§2:19 Make Avoiding Conflict your Highest Priority**

In developing a parenting plan, parents often focus on and argue about how much time they will or won't have with their children. The best outcomes for children occur when there is little or no conflict between parents. It does not matter where the child lays his or her head down more of the time if there is conflict. It does not matter if a parent spends more or less time with a child if there is conflict.

**§2:20 Plan for Periodic Review**

Parents will need to re-evaluate and adjust the time sharing schedule from time to time, according to the children's age, interest, and activities. Plan on meeting after certain set periods of time to reconsider the schedule.

***Creating an Age Appropriate Schedule***

**§2:21 Infants and Babies**

Children up to age eighteen months need familiarity and consistency. A plan that provides for a three month old child spending one week with dad and one



week with mom is a bad idea. Very young children are bound to one parent and disturbing that bond will probably cause abandonment issues for the child. Taking a very young child away from his or her primary caretaker (usually mom) for an extended period of time is just not wise.

The younger the child, the shorter and more frequent should be the visits with the other parent. The environments at both parents' homes should be as identical as possible, down to the smells of the fabric softeners and detergents. If possible, parents should use the same caretaker when neither of them can be with the child. Try not to leave the child with unfamiliar caretakers or with frequent environmental changes. The child should have the same schedules of naps and bedtime, bath time, feeding, type of formula, etc. Overnights may be appropriate depending on the amount and frequency of contact between the parent and child, the duplication of environment, and the parent's commitment to the schedule.

### **§2:22 Toddlers**

Children eighteen months to three years old need continuity as well as familiarity and consistency. Toilet training methods need to be the same. The child needs the same routine, eating, activities, and bedtime. Structure is important and the structure should be the same in both homes.

### **§2:23 Preschoolers**

Children age three to five need predictability and frequent assurance of when they will see the other parent to prevent separation anxiety. The same calendar highlighted with the days with each parent in different colors in each parent's home will give the child a reference point. Changes should be minimal. The child may be fine with adding two night weekends to the weekday contacts and may be fine with one week blocks of time in the summer and during school vacations.

### **§2:24 School Age Children**

Children from ages six to twelve years old need responsible as well as recreational time with both parents and responsibilities at both homes. Both parents need to be committed to school as a priority with a reasonable bedtime, homework time, and the same priority placed on finishing homework. Extended summer time with both parents, with contact with both parents during the extended time may be

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appropriate. Both parents should car pool and supervise activities if possible to remain actively involved in the children's lives.

### **§2:25 Adolescents**

Children from ages thirteen to seventeen require considerable supervision despite their seeming independence. This is a trying time for parents as well as children and requires a commitment to school, predictable and consistent parenting and flexibility in the time sharing schedule. The teenager may want a reduction in weekend time and vacation time spent with a parent to spend more time with his or her friends. Parents can volunteer for car pooling and chaperone activities to provide supervision while respecting their children's needs to socialize and become independent. Children may want friends along on family activities as well as other input into the time sharing schedule.

### ***Sample Parenting Plans***

### **§2:26 Parenting Plan Agreement: Joint Physical and Legal Custody**

This parenting plan provides that the parents will have joint decision making authority and will spend equal time with the children by alternating weeks. It's most appropriate for school age children, but is not a good idea for infants and small children who should not be separated from a primary caregiver for extended periods.

#### **JOINT PARENTING AGREEMENT**

THIS AGREEMENT, made and entered into this \_\_\_ day of \_\_\_\_\_, 20 \_\_, by and between JOHN DOE (hereinafter referred to as "father") and JANE DOE (hereinafter referred to as "mother") is intended by the parties to be a Joint Parenting Agreement, as contemplated by and provided for in [legal authority].

#### **RECITALS:**

The parties agree that they shall have and enjoy joint legal custody of their three (3) minor children, JESSICA DOE, born (date), and JEFFREY DOE and JASON DOE, twins, born (date); and

The parties have further agreed that the residential circumstances of each parent

favors an award of joint custody; and

The parties possess the ability to cooperate effectively and consistently with each other towards the best interests of their minor children; and

The maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of the parties' children is in the best interests of the children.

THEREFORE, THE PARTIES AGREE AS FOLLOWS:

**1. Joint Physical Custody.** The parties have carefully weighed and considered the question of the custody of their minor children. In doing so, they have been guided solely by considerations touching upon the children's welfare. The parties acknowledge and agree that they shall have and enjoy joint physical custody of their minor children, JESSICA DOE, JEFFREY DOE, and JASON DOE.

**2. Cooperation in Arranging Parenting Time.** Subject to the further provisions set forth in this Agreement, father and mother agree to cooperate in every respect to arrange for parenting time between them and their minor children. Parenting time is to be arranged in conjunction with the children's school and extracurricular and work activities, and to the extent possible and appropriate, by considering the children's best interests and the parties' respective schedules.

**3. Joint Legal Custody and Decision-Making.** The parties agree that, except for emergencies, they shall share responsibility for, and shall jointly make, all decisions affecting the best interests and welfare of their children on issues involving the children's health, education, summer, and extracurricular activities. Due to this custodial arrangement, both parties' residences shall serve as the residences of the children.

**4. Parenting Time: Alternating Weeks.** The parties further agree that the children shall spend parenting time of one week with mother, commencing on \_\_\_\_\_, and parenting time the following week with father, commencing on \_\_\_\_\_. The exchanges of the children shall occur on Sunday evening at 5:00 p.m., year round. The party who is to commence his or her parenting time shall be responsible for the pickup of the children.

**5. Mutual Cooperation and Respect.** The parties agree and acknowledge that it is in the best interests of their children that both parents instill and generate affection in their children for their parents. To accomplish this, each party agrees to assume the responsibility of frequent association with, and attention to, the chil-

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dren. Further, each party agrees to refrain from making any insulting, derogatory, or deprecatory remarks or comments about the other to, or in the presence of, the children. Each party shall also cooperate in accommodating the other who may wish to have the children for some special event or occasion.

**6. Access to School and Medical Records.** The parties agree that they shall continue to reside in the [Name] School District, and that the children shall attend school in that district. The parties agree that each party shall be afforded access to the school and medical records of the children. The parties further agree that, to the extent required by either a school district in which the children are enrolled, or a provider of medical services to the children, either party shall be authorized to (i) have access to information concerning the children, and/or (ii) release information concerning the children to any third party.

**7. Notification of Activities.** The parties agree that they will keep each other informed as to all school functions, meetings, and other activities in which the children are involved, so as to enable both parties to attend and participate in these events, and be an integral part of the children's involvement in them.

**8. Notification of Serious Illness.** Each party shall promptly inform the other of any serious illness of the child/children that requires medical attention while the child/children are in the physical possession of that party. Elective procedures shall only be performed after consultation between the parties. Emergency surgery necessary for the preservation of life or to prevent a further serious injury or condition may be performed without consultation with the party who does not, at that time, have actual physical possession of the child/children; provided, however, that if time permits, the other party shall be consulted, and, in any event, informed as soon as is reasonably possible.

**9. Notification of Other Health Problems.** Both parties shall inform each other of any medical or health problems that arose while they had physical possession of the child/children, when information about that medical or health problem would aid the other party in the care and treatment of the child/children. Both parties shall provide each other with any medications that the child/children is/are taking at the time of the transfer of physical possession and with sufficient information to allow the party assuming physical possession to obtain refills of that medication.

**10. Medical Provider Information.** Both parties shall, when requested, provide information to the other party regarding the names, addresses, telephone numbers, and any other necessary facts concerning the providers of any medical or health care to the child/children.

**11. Out-of State Travel.** Neither party shall remove the children from the State of [current residence] without leave of Court or by express written agreement of the parties. Notwithstanding the foregoing, either party may temporarily take the children to another state for vacation or for other good reason, upon reasonable notice to the other parent. In the event either party shall remove the children from the state of [current residence] for vacation or other good reason as contemplated herein, the removing party shall notify the other party of an address and telephone number where that party and the children may be reached in the event of an emergency.

**12. Complaints and Conflicts.** If any conflicts arise between the parties as to any of the provisions of this Joint Parenting Agreement or its implementation, the complaining party shall first notify the other party of the nature of the complaint, and both parties shall make a reasonable attempt to negotiate a settlement of the conflict. Wherever practicable under the circumstances, a complaint shall be made in writing, and given to, or mailed to, the other party. The party receiving the complaint shall, when practicable, reply to the complaint in a similar manner in written form. If the parties are unable to resolve their conflict within a reasonable period of time, the parties agree to mediation of their conflict by [Mediator's name] in all matters that do not involve any immediate danger to the physical, psychological, or emotional health of the children. Nothing contained in this provision shall be construed as, nor is it intended to be, an abrogation, waiver, or release of either party's rights, pursuant to [insert reference to statute or rule].

**13. Invalid Provisions.** If any Court of competent jurisdiction should determine that any portion or portions, or provision or provisions, of this Agreement are void or unenforceable, that portion or portions, or provision or provisions, shall be stricken from this Agreement, but the balance of this Agreement, and the terms and provisions thereof, shall remain in full force and effect.

**14. Periodic Review.** This Agreement shall be reviewed periodically by the parties, as may be necessitated by the age, school, and extra-curricular activities of the children.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the day and date first above written.

JOHN DOE \_\_\_\_\_  
JANE DOE \_\_\_\_\_

**§2:27 Parenting Plan Agreement: Sole Parenting with Consultation and Other Parental Rights for Non-Custodial Parent**

This parenting plan agreement gives one parent legal and physical custody and spells out a time sharing schedule that gives the other parent alternating weekends, holidays, and summer vacation time.

**PARENTING AGREEMENT**

THIS AGREEMENT, made and entered into this \_\_\_ day of \_\_\_\_\_, 20\_\_\_, by and between JOHN DOE (hereinafter referred to as “father”) and JANE DOE (hereinafter referred to as “mother”) is intended by the parties to be a Joint Parenting Agreement, as contemplated by and provided for in [legal authority].

**RECITALS:**

The parties agree that mother shall have sole custody of their three (3) minor children, JOSEPH DOE, born (date), JEFFREY DOE, born (date), and JOHNNY DOE, born (date); and

The parties have further agreed that the residential circumstances of each parent favor this award of custody.

**NOW, THEREFORE, THE PARTIES HEREBY AGREE AS FOLLOWS:**

**1. Sole Custody.** The parties have carefully weighed and considered the question of the custody of their minor children. In doing so, they have been guided solely by considerations touching upon the children’s welfare. The parties acknowledge and agree that mother shall have sole custody of their minor children, JOSEPH DOE, born (date), JEFFREY DOE, born (date), and JOHNNY DOE, born (date).

**2. Decision Making.** The parties agree that all decisions affecting the best interests and welfare of JOSEPH, JEFFREY, and JOHNNY on issues involving their health, education, summer, and extra-curricular activities shall be made by mother. However, mother agrees to provide information to, and receive input from, husband in connection with these issues.

**3. Parenting Time Schedule.** The parties further agree that father shall have visitation with the children, JOSEPH, JEFFREY, and JOHNNY, as often as practical—given the schedules of the father and the minor children. The parties believe that frequent contact between the children and their father is in the children’s best

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interests, and will facilitate their upbringing, and is, therefore, to be encouraged. The parties further agree that the father shall have the following minimum parenting time with JOSEPH, JEFFREY, and JOHNNY:

- a. Alternating weekends from after school on Friday until 6:00 p.m. Sunday. Father shall pick up children at school and return them to mother's home;
- b. Additionally, father shall be entitled to one additional weekday (Monday, Tuesday, or Thursday) each week, which he shall pick by the twenty-seventh (27th) of the month prior to the next month, notifying mother of same by email on the twenty-seventh (27th) day of each month. This visitation shall also be from after school until 6:00 p.m., unless on a Monday when the boys have Scout meeting, in which case, husband shall return them immediately after the meeting at 8:30 p.m.
- c. The following legal and religious holidays on an alternating basis, with mother to have the first of said holidays: Thanksgiving Day through the weekend; Independence Day; Memorial Day; Labor Day; Easter; and the Christmas holiday to be divided into two (2) periods, the first period to commence at 4:00 p.m. Christmas Eve and end at 10:00 a.m. Christmas Day, and the second period to commence at 10:00 a.m. Christmas Day until 8:00 p.m. Christmas Day night, with the parties to each have the children for approximately one-half of the children's Christmas vacation from school, and one-half of the children's spring vacation from school;
- d. The parties shall each have the children on his or her own birthday and on Mother's Day and/or Father's Day, as may be appropriate, and shall alternate the children's birthdays, with father having the children during odd-number years;
- e. Each party shall also have exclusive parenting time with the children for a period of up to two weeks each summer in either July or August, the exact month of which shall be agreed upon by the parties on an annual basis, and which shall be the subject of written notices between the parties to be delivered via email annually by May 15. Wife shall have the right to first choice in even-number years, and husband shall have the right to first choice in odd-number years; and
- f. Holiday, birthday, and Mother's and/or Father's Day parenting time, as specified hereinabove, shall take preference over weekend, Summer and vacation parenting time, and in the event husband is to have the children for a holiday which falls on a weekend wife is to have the children, or vice versa, the party entitled to have the children for the holiday shall have the children for said holiday, and the parties shall commence a new sequence of alternating weekend parenting time the following weekend.

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**4. Mutual Cooperation and Respect.** The parties agree and acknowledge that it is in the best interests of the minor children that both parents instill and generate an affection on the part of the minor children for their parents, and, in order to accomplish this, it is necessary that each party assume the responsibility of frequent association with, and attention to, the children, and further, that each party refrain from making any insulting, derogatory, or deprecatory remarks or comments about the other to, or in the presence of, the minor children. The parties shall also cooperate in accommodating the other who may wish to have the children for some special event or occasion.

**5. Access to School and Medical Records.** The parties agree that each party shall be afforded access to the school and medical records of JOSEPH, JEFFREY, and JOHNNY. The parties further agree that, to the extent required by either a school district in which said minor children are enrolled, or a provider of medical services to said minor children, either party shall be authorized to (i) have access to information concerning JOSEPH, JEFFREY, and JOHNNY, and/or (ii) release information concerning JOSEPH, JEFFREY, and JOHNNY to any third party.

**6. Notification of Children's Activities.** The parties agree that wife will timely inform husband as to all school functions, meetings, and other activities in which JOSEPH, JEFFREY, and JOHNNY are involved, so as to enable husband to attend said events and be an integral part of said minor children's involvement in same.

**7. Notification of Serious Illness.** Each parent shall promptly inform the other of any serious illness of JOSEPH, JEFFREY, and JOHNNY which shall require medical attention while said minor children are in the physical possession of that parent. Emergency surgery necessary for the preservation of life or to prevent further serious injury or condition may be performed without consultation with wife, when necessary for the preservation of life or to prevent further serious injury; provided, however, that if time permits, wife shall be consulted, and, in any event, informed as soon as is reasonably possible.

**8. Notification of Other Health Problems.** Both parents shall inform each other of any medical or health problems which arose while they had physical possession of JOSEPH, JEFFREY, and JOHNNY, when the information of said medical or health problem would aid the other parent in the care and treatment of said minor children. Both parents shall provide each other with any medications which JOSEPH, JEFFREY, and JOHNNY are taking at the time of the transfer of physical possession and with sufficient information to allow the parent assuming physical possession to obtain refills of that medication.



**9. Notice by E-Mail.** The provision of notice hereunder shall be via email, only, except in the case of an emergency.

**10. Out of State Travel.** Neither party shall remove JOSEPH, JEFFREY, and JOHNNY from the State of [State of residence] without leave of Court or by express written agreement of the parties. Notwithstanding the foregoing, either party may temporarily take said minor children to another State for vacation or for other good reason, upon reasonable notice to the other parent. In the event either party shall remove JOSEPH, JEFFREY, and JOHNNY from the State of [State of residence] for vacation or other good reason as contemplated herein, the removing party shall notify the other party of an address and telephone number where that party and said minor children may be reached in the event of an emergency.

**11. Invalid Provisions.** In the event any court of competent jurisdiction should determine that any portion or portions, or provision or provisions, of this Agreement are void or unenforceable, said portion or portions, or provision or provisions, shall be stricken from the face of this Agreement, but the balance of this Agreement, and the terms and provisions thereof, shall remain in full force and effect.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the day and date first above written.

JOHN DOE \_\_\_\_\_  
JANE DOE \_\_\_\_\_

## 12 Tips for Making Your Parenting Plan Work

### §2:28 #1 Stick with the Schedule

Seeing the kids whenever you feel like it or whenever you have the time is not going to work. Unlike you, children must have structure in order to feel secure and develop normally. Simply showing up to see your kids at odd times causes stress on the children and their other parent. You must make time for your children based upon what they need, not what you need.

Stick with the parenting schedule as if it is the most important thing in your life. Your children are expecting you. Think about how they feel when they are all packed up and ready to go and you show up two hours late or not at all. What does that tell your children about how much they matter to you?

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Imagine how they are affected when you don't get them home until after midnight and they have to get up six hours later for school?

If you know you will be late, let your ex-spouse and children know immediately. Better yet, plan ahead, reschedule activities that interfere with your parenting schedule, and don't be late.

### **§2:29 #2 Realize You Cannot Control Your Ex-Spouse's Parenting**

Divorced parents often differ in the parenting styles and opinions on how children should be raised. Differences of opinion on everything from diet to discipline and from hairstyles to hygiene are common. Some parents run a tight ship; others prefer a more relaxed environment. Differences in parenting styles are apt to become even more pronounced once you are in separate households.

In the huge majority of cases, when one parent describes the other parent as inept, it is simply a difference in parenting styles. Ask yourself if you actually believe the other parent would hurt your children. If the answer is no, then you need to relax and learn to accept what you cannot change.

For example, you can't control what your spouse feeds or doesn't feed your children, so long as she doesn't let them go hungry. But if good nutrition is your concern, think about what you can do. You can make sure that your children are fed properly when they are with you. You can pay for their school lunches or even school breakfasts. You can send vitamins with them and follow up to make sure they are taking them. If the children are really in danger, a court will be willing to intervene. Otherwise, let it go and do the best you can while they are with you.

If you couldn't change your spouse while you were married, you certainly can't change him now. The only thing you can control is yourself and how you parent. Unless your spouse is guilty of child abuse or neglect, no court is going to interfere in his parenting of the children while they are in his care. If he isn't providing what you think the children need, then it is your job to see that they get it while they are with you. Other than that, you do not have control of the situation.

### **§2:30 #3 Plan Now for Sick Days and Emergencies**

Decide now who is going to be called when your child is sick at school or there is an emergency. The job belongs to whoever can best minimize the economic impact on their finances. If mom is salaried and can make up the time whenever,

and dad works on an hourly basis and can't get away without getting in trouble, then it's mom's job. If dad is laid off due to winter weather, then it's his job. Make sure the school has contact information for both of you.

### **§2:31 #4 Try a Dual Calendar System**

Get two calendars. Highlight dad's days of parenting in blue and mom's in pink, or let your children choose two different colors. Each parent should have an identical calendar showing parenting time to put up in his or her home where the children can see it. Even very young children will be able to see in advance when they will see dad or mom next. Like regular meals and regular bedtimes, the calendars add to the sense of structure children need to feel secure.

### **§2:32 #5 Write to Each Other if Direct Communication Is a Problem**

Try keeping a kid's log. This is a notebook that goes back and forth with the children. Use it to communicate important information about your children to your ex-spouse if direct contact is a problem. Write in it anything you want your ex-spouse to know about the children, their activities, and any problems. Read what your ex-spouse has written and write a response so your ex-spouse knows you have gotten the message.

Alternatively, you can email each other each time the children switch homes or more often to report on their progress and needs.

Don't give your children verbal messages to pass on to your ex-spouse. If you cannot speak directly to your ex, then put it in writing, and do not share the contents with your children. You can make the kids mail carriers, but don't make them messengers. Communication with your ex-spouse may not be easy, but it's absolutely necessary for your kids.

### **§2:33 #6 Share School Notices and Schoolwork**

Get a large manila envelope for each child. Write the child's name on it. Put into the envelope copies of any notices you receive from your child's school or teacher that your spouse should be aware of. Include some of the child's schoolwork and artwork so the other parent can keep up with the child's progress.

**§2:34 #7 Stop the Transfer Wars**

Is there a battle every time the children switch homes? Eventually, your spouse may decide to cut back or even stop seeing the children. Although that might seem a good outcome to you, it's a disaster for your children. Moreover, a parent who stops seeing the children sometimes decides to stop paying child support, which is a disaster for both you and your children.

Avoid engaging your spouse during transfers. If necessary minimize your contact with him or her. Agree that the exchange will take place at the curb and be as perfunctory as possible. Some parents even decide to make the switch at a neutral spot. One idea is the supermarket during the weekly shopping expedition.

During the exchange if what you have to say isn't about the kids, don't bring it up. If it's about the kids and you can't be civil, put it in a note.

**§2:35 #8 Defuse Anger by Detaching**

Anger is the most common reason that parenting plans fail. The best way to solve the anger associated with the shared parenting is to detach yourselves from each other emotionally. Try to see your former spouse, not as a failed life partner, but as your children's other parent. One technique that may work is to treat your ex like a business associate. Think of each contact with him or her about the children as a business meeting. Develop an agenda and stick to it.

**§2:36 #9 Don't Use Your Children as Spies**

Don't pump your children for information about mom's new boyfriend or dad's latest expensive purchase. You can listen to what they have to say, and certainly follow up on hazards to their health. However the real danger is that you may make the children feel like traitors to their other parent. Hurt the relationship between your children and their other parent, and you will hurt your children.

**§2:37 #10 Don't Overreact to Decompression**

Children who go from one home to another may need time to adjust to the differences, unwind, and prepare time for the next day.

“Decompression” happens when children change households and go from one parenting style to another. It occurs very commonly when children go from a household with little or no structure to one with that is highly structured. In the less structured household, your daughter may feel insecure. To compensate, she may try to create structure and actually assume control of when and how things are done. When she comes back to your house, she no longer needs to be in control, so she is momentarily disoriented by her change in roles. This causes her to act out, defying your structure when she is accustomed to creating her own.

The best way of handling the decompression is to avoid overreacting to it. Send the child to a secure, familiar place such as her bedroom to engage in a quiet activity like reading. It’s not a punishment, just some down time. A couple of hours in her own space will usually allow enough time for her to adjust.

### **§2:38 #11 Pay Your Child Support**

If you resent paying child support because you think of it as money you are giving to your ex-spouse, you need to adjust your thinking. Every time you think it’s for your spouse, remember it’s for your kids. If writing the check makes you mad, have it withheld from your pay and transferred to your ex.

### **§2:39 #12 Keep a Parent’s Log**

A parent’s log is a record of the interaction between parents. It can be used to record when things work, when they don’t, or even areas where improvement could be sought. Parent’s logs serve several purposes. First, writing down what works will encourage you. When something goes wrong, by reading the log you can remind yourself of successes, and give yourself a pat on the back for everything you did well. Second, the log can provide you with an emotional release. You can dispel any anger you feel for your ex-spouse in a non-destructive manner. And finally, your log may serve as evidence. In a “he said, she said” arena, the parent who presents an organized and concise representation of events may prevail.

There is a line between bad parenting and criminal activity. Appropriately, courts rarely get involved in situations in which they are required to assess the difference between what is good parenting and what is bad. Courts only get involved when the actual, physical welfare of your children is an issue. And those situations require evidence for the court to take action. One of the forms that evidence can take is your log.

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What kind of things should you log that might be serious enough to seek court intervention? You'll need to use some common sense. A judge will probably not care that the kids had cold pizza for breakfast, stayed up a half-hour beyond their bed time, or went to school wearing mismatched socks.

But a judge probably will care if the children are never buckled into their car seats, or are left unsupervised, or if your spouse smells of alcohol when dropping them off. These situations endanger the children. Keep a record of them. The judge is also likely to care if your spouse leaves the children in the care of another family member or babysitter for most of the time he or she is supposed to be spending with them. If your spouse isn't engaged in the lives of your children, the court may find any of his or her demands related to parenting without basis.

### **When You Can't Agree on a Parenting Plan**

#### *Mediation*

#### **§2:40 Mediation Is Encouraged and May Even Be Required by Courts**

Courts encourage divorcing parents to resolve the difficult issue of post-divorce parenting between themselves. Initially, many parents dispute custody of the children. Fortunately, these disputes are most often resolved through negotiations with the help of lawyers. When negotiations are unsuccessful, parents next turn to mediation.

Many courts require divorcing parents to attempt to settle their parenting dispute through mediation before taking the issue to court. In some cases, court intervention may be unavoidable, for example when a parent is mentally impaired, when abuse or neglect is suspected, or when one parent attempts to alienate the children from the other or threatens to take off with the children. Otherwise, courts want you to understand that you and your spouse must take responsibility for what is going to happen with your children in the future. A less-than-perfect agreement that is negotiated through mediation is usually better than having a complete stranger, who barely knows you and probably will never even see your children, decide what is going to happen to them.

### **§2:41 How Mediation Works**

Mediation is gaining broad acceptance in the resolution of custody disputes. The parents meet with a mediator who has completed a significant (40 hours plus) amount of mediation training, and also has a body of experience and expertise in the family law field. The sessions usually involve only the parties and the mediator. Their lawyers are available to provide preparation and advice from the sidelines, but do not usually attend the sessions. It will typically take two to three one-to-two-hour sessions to achieve success in a custody dispute. For more about mediation, *see* Ch. 7.

### **§2:42 Preparing for Custody Mediation**

The goal of the mediator is to get you and your spouse to come to an agreement, not necessarily to do what is in the best interests of your child. Your lawyer can acquaint you with the mediation process, its positives and negatives, and help you develop an approach to the process and a reasonable settlement position with respect to the parenting issues presented.

Proper preparation for mediation requires you to develop specific parenting plans, and to identify items that are negotiable and items that are deal breakers. You may even find it helpful to role play with your lawyer the contemplated mediation to get a sense of what to expect and how to react.

## ***Therapeutic Interventions***

### **§2:43 Counseling and Education**

Before or in conjunction with mediation, you and your spouse may find various therapeutic interventions helpful. These include divorce counseling with a mental health professional, individual counseling, and parenting effectiveness courses. The court may require you to participate in some of these interventions or your lawyers or mediator may refer you to them.

### **§2:44 Collaborative Divorce May Be Another Alternative**

In “collaborative divorce,” the parties retain independent counsel, and enlist the services of psychologists, counselors, therapists, and financial advisers to develop,

in a “collaborative” setting, a global agreement on all of the divorce issues. This growing trend generally requires that if the parties are not able to reach an accord, the lawyers and professionals will not be involved in the subsequent divorce litigation. The parties will be required to hire new counsel and experts.

As the costs of divorce litigation continue to soar, collaborative divorce will no doubt be used more and more by parents who are willing to set aside individual agendas for the greater good of the family as a whole. For more on collaborative divorce, *see* Ch. 7.

### ***Court-Appointed Investigators and Professional Interventions***

If mediation and therapeutic interventions fail to produce a parenting agreement, courts turn next to other professionals for input, in the hope that they might facilitate settlement or assist the court in making the decision.

#### **§2:45 Guardian ad Litem and Social Service Investigations**

A guardian ad litem is an attorney who is especially trained and experienced in the practice of family law. The court appoints a guardian ad litem to conduct an investigation. The guardian ad litem will interview the parents, children, and other people who know the family. These people may be teachers, coaches, pastors, priests, rabbis, imams and just about anyone who has ever spent any time with you, your spouse, or your children. When the investigation is complete, the guardian ad litem will make a recommendation to the court on the contested parenting issues, ranging from legal custody to physical custody to the actual living arrangements and time sharing schedule for the children.

Instead of a guardian ad litem, a court appointed social services worker may perform the investigation. The report of the guardian ad litem or other professional offers yet another opportunity to attempt to reach a settlement. Litigation in general, and custody litigation in particular, has decidedly negative impacts on parents and children. The hope of settling these very difficult and important issues should never be abandoned. You should leave no stone unturned in your efforts to settle your custody and parenting issues outside of court.



### **§2:46 Downside to Guardian ad Litem Investigations**

The appointment of a guardian ad litem has some drawbacks. It tends to keep the parents as legal enemies. It focuses the parents on past grudges, arguments, and disappointment, rather than the future. Finally, it involves the family and the children in an intrusion by a stranger that reveals to the children that there is parental conflict. These are all good reasons to try to reach a settlement before matters get this far.

### **§2:47 Therapists and Counselors**

If you both agree, therapists and counselors who have worked with you or your family might be called on to offer opinions toward resolution.

## ***Forensic Custody Evaluations***

### **§2:48 What Is a Forensic Custody Evaluation?**

After a guardian ad litem or social services investigation, the final step before trial in some contested custody cases is a forensic custody evaluation by a licensed clinical psychologist. On its own initiative or in response to a request from one or both parents, the court may appoint a psychological professional to conduct an evaluation of the parents and their children.

The outcome of the psychological evaluation often leads the way to renewed efforts at settlement. Given the substantial cost of custody litigation, a parent facing an adverse recommendation from a psychological professional will often agree to a settlement.

The forensic custody evaluator's report is usually long, detailed, and includes observations and findings made not only from clinical observations of the parents and their children, but results from batteries of psychological testing administered to the parents and often, the children as well.

### **§2:49 Does Your Case Require One?**

Not every contested custody case requires a forensic custody evaluation. Most judges take the position that a psychological evaluation is not required simply

because custody is at issue. However, when an evaluation is performed, judges typically place a lot of weight on the results. Forensic custody evaluations should be used sparingly. As a general rule, they are most helpful when a parent exhibits indications of mental conditions beyond the usual grief process that accompanies a divorce case.

### **§2:50 Weigh the Costs against the Expected Benefits**

These examinations are expensive. The cost of a forensic custody evaluation in a metropolitan area often exceeds \$15,000 to \$20,000, just to render a written report. You and your lawyer need to discuss the anticipated costs in detail before deciding whether to undertake the evaluation. A report that you can't get because the expert hasn't been paid is of little use to you. The significant costs of these examinations need to be weighed against the benefit to be obtained from the expert's testimony.

### **§2:51 Preparing for a Psychological Evaluation**

Certainly, when interviewed by the evaluator, you must tell the truth. However, you can do more to exert some influence over the process by properly preparing for the psychological evaluation.

The psychological evaluation process can be one of the most stressful exercises in an extremely stressful process. However, this process can turn the course of the litigation and perhaps head you in the direction of renewed settlement negotiations instead of protracted litigation. Take the time and make the effort to properly prepare for the evaluation. It might be the most important preparation you can make during the divorce litigation.

### **§2:52 Should You Waive the Doctor/Therapist Privilege?**

You will need to deal with the thorny issue of whether to provide the evaluator with releases to talk to doctors and prior or current treating therapists. There is no privilege between you and the children's teachers. They can testify about whatever you have told them. However, consider carefully whether you wish to waive the doctor-patient or therapist-patient privileges.

Your refusal to provide the requested releases might affect the evaluator's final report and recommendations. However, the evaluator's inability to talk to your doctors may be less of a problem than a report that includes your prior suicidal thoughts discussed in therapy and unknown to anyone outside the therapist-patient relationship. Medical treatment or testing for sexually transmitted diseases can also provide a fertile field for exploration by the evaluator and opposing counsel. You need to be completely candid with your lawyer. Tell him or her about these issues before you make the initial appointment with the evaluator.

### **§2:53 Get Organized to Control Costs**

You can help control the costs of the evaluation by being organized. The more organized you are, the more you can keep costs down.

Prepare a list of people you want the psychologist to talk to before your first meeting, complete with phone numbers and a brief statement as to why you believe that each person has something important to add to the process. Provide the evaluator with copies of relevant documents, such as school records, report cards, medical records, and police reports.

### **§2:54 Psychological Testing for You and Your Children**

You will likely be given a battery of psychological tests, such as the MMPI-2, the MCMI-II and III, Sentence Completion, Draw a Person, etc. With respect to the MMPI and MCMI tests, do not try to overanalyze the questions; simply pick the answer that is mostly true or mostly false, as appropriate. Honesty in these tests is important, because efforts to paint oneself in an overly positive light will be detected and pointed out by the evaluator.

The children, too, are often tested, most commonly by the Bricklin Perceptual Scales and the Perception of Relationships Test (PORT). These tests are usually not administered to children under four years of age, and you definitely do not want to try to manipulate the children prior to testing. You can, and should, however, set up appointments between the children and the evaluator with the children's schedule in mind. It is not smart to schedule an appointment at a time when the children usually nap, or have just returned from a visit with the other parent. Do not bring sick or tired children to an appointment with an evaluator.

## **§2:55 Develop Two or Three Themes to Share with the Evaluator**

In any given custody case, there are usually many reasons why you feel you should be awarded custody. One effective way to prepare for the evaluation is to develop two or three major reasons, or “themes” as to why it is in the children’s best interest that they be placed in or remain in your custody. Focus on these themes and build your case around them. Follow Johnny Mercer’s advice and “accentuate the positive.” Hammer the themes of your case in positive terms, by concentrating on why you are good, not why the other parent is bad. Avoid cataloging your complaints about your spouse. If your spouse is truly bad, this should become apparent to the evaluator during the evaluation process.

Avoid hyperbole, hysteria, and histrionics. Also, long rambling recitations of the other parent’s claimed inadequacies usually turn the evaluator off. Clearly, in some cases, there are real issues of abuse, neglect, or a simple failure to be around when the children have had needs. In these cases, try to be as objective in your reporting of these problems as you can without dwelling on a litany of negatives. In most cases, custody contests involve two people who have divergent, but not evil, ideas about what is in the best interests of their children. Keep this in mind, and put your best foot forward, being careful not to step on the foot of your spouse.

Not all themes can be positive. Mental health/illness, domestic violence, anger management issues, criminal problems, substance abuse, parental alienation, and interference with contact with the children are difficult to place in positive terms. However, these types of issues are usually well-documented by other people. It’s best that this documentation comes from these sources, and that you not dwell on these obvious personality faults. Themes such as irresponsibility, putting individual needs above the children’s, competence to parent, absence from the home, or delegating parenting to others, explicitly or by default, are easier to manage.

## **§2:56 Paint Mental Pictures**

Remember to always think of the big picture, and focus on why you are a better parent, not why the other parent is a bad parent. To that end, try to paint mental pictures or images for the evaluator. To tell the evaluator that you should have custody because it’s in “the best interest of the children” is not really very effective. What does “the best interest of the children” look like? It is much more effective to say that “While my husband worked two jobs, I stayed home in our little apartment with our two small children and did the cooking and cleaning, etc.”

Most evaluators hear a lot of stories. Try to tell a truthful but engaging version of your lives by being descriptive, and keep in mind that there should not be any “whining” in the evaluation process. You can always slip in the bad conduct of your spouse in an almost apologetic way: “He worked a lot, and needed to unwind when he got home, so I suppose that is why he drank so much.”

**§2:57 Keep in Touch with Your Lawyer**

Lastly, remember to stay in touch with your lawyer at every stage of the process, so he or she can find out how the evaluation is proceeding and be sure that the evaluator is not doing anything unusual. For instance, there are protocols for the manner and order of administering psychological testing. Your lawyer will want to be sure they are followed. This debriefing process can prove a useful source of material for cross-examination of the evaluator, should that be necessary by virtue of the outcome of the evaluation.

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# **Chapter 3 - Money and Budgets**

## **Budgeting Essentials**

### **§3:01 Why You Need a Budget**

One big concern most couples have as they separate is how they will manage to pay the bills. Money worries can cause significant anxiety and can contribute to more conflict between you and your spouse. Conflict is bad for your children and bad for your divorce. The antidote to financial anxiety is information.

Early on in the divorce process, you need to develop a budget. Financial awareness is essential to reducing stress and putting you in the problem-solving state of mind necessary to achieve a satisfactory settlement.

A budget is an essential step in your divorce because:

- Courts require both spouses to disclose all their assets, liabilities, and income.
- The budget can be used to determine one spouse's need for alimony and child support payments during and after the divorce and the other spouse's ability to pay.
- The budget will show whether either spouse can afford to keep major assets such as the family home.
- Finally, the budget will reveal the overall financial condition of the spouses. Sometimes financial counseling is advisable. If the couple have more debt than they can repay, negotiation with creditors or even bankruptcy may be necessary.

### **§3:02 Two Budgets for Each Spouse Are Needed**

A current budget is used for your income and expenses during the divorce. A future budget estimates your anticipated post-divorce financial situation. If you will be in financial distress during the divorce, your budget will make the situation evident. It may be possible to establish temporary support payments to meet your needs. If the divorce will put both spouses in financial trouble, then protection from creditors can be sought through bankruptcy.



### **§3:03 Accepting the Financial Reality of Divorce**

During your marriage, you and your spouse were supporting one residence with your incomes. During the divorce and for a while after it that same amount of income will be supporting two residences. In addition, you and your spouse lost economies of scale when you separated. There is some truth to the saying that, “Two can live as cheaply as one.” In the huge majority of divorces, the standard of living of the parties goes down.

You may not feel that this is a fair result, especially if you did not want the divorce. But you must face the reality of the situation regardless. Resources are limited and you both must adapt to match costs to those resources. Your standard of living has to adjust.

### **§3:04 How to Handle Financial Distress**

If your budget reveals that you don't have enough income to cover your monthly expenses, you need to decide what to pay and what to not to pay. People who are accustomed to paying their debts on time and being financially responsible may have a hard time adopting the survivor mode often required by a divorce. Embarrassment and fear of being labeled a deadbeat or poor credit risk may lead you to some irrational choices. For example, parents have been known to pay credit card bills even when they don't have enough money for food.

In deciding what to pay for, think of it this way: first take care of your family; next your possession; and finally your credit rating. You cannot replace your children or other people who depend on you financially, and you most certainly do not want them to suffer. You can replace assets if they are lost by failing to make payments on them. And credit ratings can be rebuilt if destroyed.

The physical, emotional, educational, medical, and mental condition of all parties, including the children should be protected first. Food, shelter, and clothing come before any other consideration.

The protection of possessions comes after the protection of people. These expenditures include payments on the home mortgage and vehicles. Credit cards and other unsecured debt should be paid last.

Of course, sometimes the decision isn't so easy to make. For example, you may need a car to get to work and make a living. In that case, you may want to consider

replacing a newer luxury vehicle with a used car that you can buy for cash. Public transportation or car pooling may also be an option.

## **Creating Your Budgets**

You can use the Budget Worksheet in §3:26 below as guides to creating your current and post divorce budget. The discussion below follows and explains each line item on the Budget Worksheet.

### ***Income Line Items***

#### **§3:05 Earnings**

Include your total earnings before taxes and other deductions. These comprise your gross income.

#### **§3:06 Alimony (as an income item)**

Alimony will be an income item in your budget if your spouse pays alimony to you. Initially you won't know the amount. When your needs are determined, this line is completed.

#### **§3:07 Child Support (as an income item)**

Child support will be an income item on your budget if your spouse pays child support to you. Initially you won't know this amount either. Once your attorney has the income information for both you and your spouse, this item can be computed in accordance with the child support formula.

#### **§3:08 Other Income**

This line is for income from other sources, such as investments, pensions, social security, trusts, annuities, unemployment compensation, and others. The Income Statement in §3:25 below will help you identify all your sources of income. It is useful for both budgeting and determining your income for child support.

## ***Expense Line Items***

### **§3:09 The Three Cost Components**

Your budget expenses will be based on three basic components: historical costs, current costs, and anticipated future costs.

Historical are past costs that were incurred before you and your spouse separated. Historical costs are used to estimate some of your current and future costs. For example, if you are staying in the family home with the children after the separation, the utilities costs for you will probably be similar to the costs before your spouse moved out. These past costs can be used to anticipate current costs that will be incurred during the divorce process and future costs for utilities if you remain in the home after the divorce is final.

Costs incurred for one spouse but not the other are not included in the budgets of both. For example, the costs incurred for your spouse's hobbies that you don't share (a golf club membership or arts and crafts supplies) are not included in your budget.

### **§3:10 Housing**

#### **Mortgage Payment / Rent**

Your biggest housing cost is your monthly mortgage or rent. If you and your spouse own a home with a mortgage, the mortgage expense should be included on the budget of just one of you. It is usually best to make one party responsible for the payment (as opposed to splitting it) to avoid confusing the lender and to easily fix responsibility and consequence if the payment is not made. Your post-divorce budget will estimate future rent or mortgage payments.

#### **Utilities (heat, electricity, water, other)**

If you remain in the family residence, you should use the historical costs for utilities in your current budget figures. The post-divorce utility figures will be the same if you are going to keep the house. If you will be moving into a different residence, you will need to estimate utility costs. Utility companies can often provide information on costs on prospective rentals or houses that are going to

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be purchased. They may also be able to provide general averages for homes or apartments in your area.

### **Telephone**

The costs for basic telephone services are usually about the same within the same locale. However, variable costs associated with phones can vary significantly from user to user depending on long distance charges. For example, if you have family living on the other side of the country, your long distances charges (at least for a land line), will probably be higher than your spouse's.

Historical phone usage can be a very good indicator of current and future phone costs. Taking some time to determine who needs the more costly services can make the budget figures more accurate.

The pervasiveness of cell phones and the seemingly infinite number of associated plans can add a layer of complexity to budgeting for this item.

### **Housing Maintenance**

Historical maintenance figures for the house may not be adequate if one spouse actually performed most of the maintenance and no longer will be doing so. For example, if a husband had performed all of the maintenance on the family residence during the marriage, his annual maintenance costs could be obtained from charges or checks written to the local hardware store. However, if the wife will stay in the home and she isn't able to do this maintenance herself, her budget figures would include both the cost of materials and the cost of someone to actually perform the maintenance.

Costs to repair significant physical defects to the home are not usually included in the budget. Instead they are used to adjust the value of the home for purposes of dividing the marital estate.

### **Other**

Housing costs that are not addressed on other summary lines can be entered on this line. Examples can include property taxes if not included in a mortgage payment, Internet costs, and neighborhood association dues.

### **§3:11 Child Support (as expense item)**

As indicated above, child support is an income item to one spouse and an expense item to the other. Amounts entered on this line are expenses of the party who is paying child support.

### **§3:12 Groceries/Meals**

The most common source of budget figures for this category is your historical costs. Quick, but not necessarily the most accurate estimates of cost entail determining the total cost of food for your entire family and simply dividing the cost by the number of people in the family. For example, if your family spent \$6,000 on groceries and meals during the year preceding separation, and you are budgeting food costs for yourself and your two children, then the formula would be the total cost divided by the total people times the number of persons being budgeted for:  $\$6,000 \div 4 \times 3 = \$4,500$ .

A factor that can complicate this estimate process is an individual who consumes on the average more than the rest of the family (e.g. quantity, expensive food, liquor). The budget process can also be affected by individuals who are unable to cook for themselves and must eat in restaurants.

It should also be noted that some suppliers of food and beverages also supply personal care items, beauty products, and car maintenance. Consequently, it is very easy to get hopelessly lost in the minutiae. To avoid this, keep in mind what you are trying to do: provide a budget that is fair and reasonable by the use of averages and generalizations. Budgeting for every expenditure that has happened in the past or might happen in the future and estimating the associated expense is a hopeless endeavor.

### **§3:13 Daycare**

Averaging historical daycare costs might be the best means of determining current and prospective amounts for budgeting purposes. However, children's needs change. If changes in circumstances of the children, such as going to school, are imminent, they should be taken into account in the budgeting process. If you have been at home with the children but expect to return to the workforce as a result of divorce, you should contact daycare providers to anticipate costs in this area. Daycare can be an extremely significant cost. Make sure that you include a realistic figure.

### **§3:14 Clothing / Personal Care**

Estimating the costs of clothing and personal care can be difficult because the expenditures reflect components of necessity and also standard of living. For example, if you have been spending \$1,000 per month on clothing for yourself, that might not be feasible during or after your divorce. The general theory of budgeting in this circumstance is to include a figure that would meet necessity first. It can be adjusted later if resources allow a higher expense.

### **§3:15 Transportation**

#### **Auto Lease / Note Payment**

These costs usually include a car loan payment or lease payment. If a car needs to be replaced, the anticipated replacement costs can be used. Car payments and purchases can raise standard of living issues. That is, while someone in the throes of a divorce may need a car, he may not need a \$75,000 Corvette to support his midlife crisis. The budget may reveal that neither party can afford an expensive vehicle so a more modest car should be purchased. A court will be less than sympathetic to a spouse who purchases a luxury vehicle and tries to avoid or reduce support payments.

#### **Public Transportation**

In lieu of private vehicle ownership, public transportation may be an alternative, especially in urban areas where public transportation is readily available. If public transportation is readily available, and a spouse is regularly using it, the question might arise as to whether vehicle ownership is a luxury or a necessity.

#### **Fuel**

The determination of a budget cost for fuel may be difficult if gas prices are fluctuating. Even so, the best estimates of current and prospective costs are still historical values. Costs for fuel can be determined from credit and debit card charges or checks. If you and your spouse buy gas with separate credit cards, estimating fuel costs for each of your vehicles is relatively simple. If you charge gas on the same card, you can use a ratio of the total costs to estimate a split. For example, if the vehicles get similar gas mileage and are driven a similar number of miles then a 50/50 split might be appropriate. Another way to estimate gas costs is to figure out how many times you fill up per month and multiply that figure by

the approximate cost. This type of estimate may be close enough for the budget process.

### **Maintenance / Repairs**

Routine care of a vehicle usually includes oil changes. However, it should also consider replacement of components that routinely wear out such as tires, air filters, windshield wiper blades and others. Budgeting for the costs necessary to fix vehicles when they break is notoriously difficult. However, there are some general guidelines that may be useful. Repair costs for vehicles under warranty may be very small or non-existent. For cars out of warranty, you may consider that \$50.00 to \$100.00 per month may be adequate. Historical repair costs may also give an indication of the costs that may be expected to keep a particular vehicle running. However, catastrophic repairs such as ruined engines or transmissions may not be predictable and represent a real risk to the integrity of any budget.

### **Registration / Taxes**

The cost of registration and the associated taxation of new vehicles may be significantly different (higher) than re-registering a vehicle. After the first year, however, historical cost can normally be used to predict current and prospective costs. Usually, the costs are paid annually. You can convert the annual figure to a monthly cost by dividing by 12.

### **Insurance**

Companies providing insurance for vehicles often provide discounts for multiple vehicles. Therefore, while you can use historical costs to predict current costs, costs after the divorce should be determined by contacting your insurance company for single vehicle coverage.

### **Other Vehicle Costs**

Other necessary costs of transportation should be included in budgeted figures. For example, the costs of road tolls, parking, and ferries may be significant costs that should be included.

### **Children's Vehicles**

If you have older children, you may be financing the operation of one or more vehicles for them. To avoid future conflicts, the divorce process should indicate

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who is going to be responsible for these costs. The budget process of the responsible parent should include these costs.

### **§3:16 Medical Expenses**

Health insurance, hospitals, doctors, dentists, opticians, and prescriptions are some of the costs that are normally considered under medical. As might be expected, predicting the future health of family members is virtually impossible. There is no predicting when a family member will have an accident, sports injury, or fall ill. However, there are some costs that should be accounted for.

Your current budget will include the costs of health insurance. Future costs will include health insurance for single coverage for the parent who is not covering the children and family coverage for the parent who is.

If the family has regularly met its insurance deductible, then this amount should be included in the budgeted figures of the parent who will be responsible for paying the deductible.

If a family member is receiving regular medical care for any condition, historical costs can be averaged and used for budgeting purposes. For example, if a family member is on a regular drug regimen, then the associated costs should become a line item. Eyeglasses are another example. Budgeting for the replacement costs will help to ensure that the eyewear can be replaced when necessary.

### **§3:17 Life Insurance**

Current payments for life insurance will be budgeted for whatever costs are expected to be incurred during the divorce process. Cancelling the policies is not usually a prudent decision. The family members whom you decided to protect with the insurance during your marriage still need protection even though a divorce is in progress. Budgeting figures for future coverage will normally be obtained by contacting an appropriate carrier.

### **§3:18 Recreation / Entertainment / Vacation**

Perhaps the most difficult of all of the budget items to deal with is the allowance for luxuries. Tightening the allowance may be necessary, but it can be difficult to accept. For example, you may have to replace your \$350 per month health



spa membership with a \$50.00 per month gym membership. You may have to abandon plans for a European vacation. While it's possible that your finances are strong enough that your lifestyle won't change after the divorce, this is usually not the case. Normally, the standard of living of all parties goes down after a divorce. Consequently, you may not be able to use historical expenditures. Common sense, in light of the rest of your budget is a better guide.

### **§3:19 Student Loans**

Student loans are usually entered into budgets at their current rate of minimum payment. You or your spouse may have been actively attempting to pay off your debts and consequently you made more than the minimum monthly payments. During the course of the divorce, because finances may be strained, the amount budgeted should be the minimum. The post divorce budgeted amount can be the minimum or can be based on your ability and desire to pay the loans off early.

### **§3:20 Gifts**

Gifts for birthdays, weddings, graduations, and similar occasions are expected by friends and family. Maintaining normal social contacts and relationships is important during and after divorce. Consequently, gifts should be budgeted for if possible. As with other budget items, you may need to recognize that your ability to pay for discretionary items has declined and gifts will need to be more modest.

Sometimes parents attempt to buy the affections of their children through extravagant gifts. Resist this urge. "Toy Wars" are confusing to the children and detrimental to the effective co-parenting. Solutions include capping the amount to be spent on Christmas, for example, or agreeing that all gifts are represented as being from Santa or mom and dad jointly.

### **§3:21 Charitable Contributions**

Gifts to charitable, social, or religious organizations are usually discretionary. Consequently, donations are typically put on hold during the divorce. They can resume once you have a good handle on your new financial situation and what you can afford. If you have made a pledge that is legally binding and enforceable, include it in your budget.

**§3:22 Miscellaneous**

You can't hope to predict all necessary expenditures and you shouldn't try. This line item is a catch-all that is provided to simplify the process. The amounts for miscellaneous items will depend on the circumstances. A single person living alone may have fewer miscellaneous expenses than a person living with two children. Don't use this category to pad your expenses or to make up for lack of adequate research in completing the previous items.

**§3:23 Savings / Emergencies**

Savings and/or provisions for emergencies are not normally included in the current budget. Making deposits to savings is a discretionary activity and simply may not be possible during a divorce. Emergencies occurring during the divorce will be addressed as part of the divorce process. Consequently budgeting for them is unnecessary. The post divorce budget, however, should include provisions for savings and emergencies and will be in line with your financial ability.

**§3:24 Taxes**

FICA, Medicare, federal, and state taxes are mandatory obligations that should be a part of the budget process. However, it's best to base them on tax tables or historical amounts. Withholding for state and federal taxes can be adjusted by the income earner and may not represent the actual taxes that he or she will be expected to pay.

## Budgeting Forms

### §3:25 Income Statement

STATEMENT OF INCOME as of \_\_\_\_\_

#### Gross Monthly Income

|                                   |           |
|-----------------------------------|-----------|
| Salary/wages/base pay             | \$        |
| Overtime/commission               | \$        |
| Bonus                             | \$        |
| Draw                              | \$        |
| Pension and retirement benefits   | \$        |
| Annuity                           | \$        |
| Interest income                   | \$        |
| Dividend income                   | \$        |
| Trust income                      | \$        |
| Social Security Payments          | \$        |
| Unemployment benefits             | \$        |
| Disability payments               | \$        |
| Worker's Compensation             | \$        |
| Public Aid/Food Stamps            | \$        |
| Investment income                 | \$        |
| Rental income                     | \$        |
| Business income                   | \$        |
| Partnership income                | \$        |
| Royalty income                    | \$        |
| Fellowships/stipends              | \$        |
| Other income (specify)            | \$        |
| <b>TOTAL GROSS MONTHLY INCOME</b> | <b>\$</b> |

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### Additional Cash Flow (monthly)

|  |           |
|--|-----------|
| Maintenance Received (payments received pursuant to Court order or voluntarily in this or other actions) | \$        |
| <b>TOTAL ADDITIONAL CASH FLOW</b>  | <b>\$</b> |

|  |           |
|--|-----------|
| <b>TOTAL MONTHLY GROSS INCOME FROM ALL SOURCES</b> | <b>\$</b> |
|--|-----------|

### Required Monthly Deductions

|  |           |
|--|-----------|
| Federal Tax (based on ____ exemptions)   | \$        |
| State Tax (based on ____ exemptions)   | \$        |
| FICA (or Social Security equivalent)   | \$        |
| Medicare Tax   | \$        |
| Mandatory retirement contributions required by law or as condition of employment | \$        |
| Union Dues (Name of Union: _____)  | \$        |
| Health/Hospitalization Premiums  | \$        |
| Prior obligation(s) of support actually paid pursuant to Court order             | \$        |
| <b>TOTAL REQUIRED DEDUCTIONS FROM MONTHLY INCOME</b>                             | <b>\$</b> |

|                           |           |
|---------------------------|-----------|
| <b>NET MONTHLY INCOME</b> | <b>\$</b> |
|---------------------------|-----------|

## §3:26 Budget Worksheet

### BUDGET

#### Income

| Income                               | Monthly   | Annual    |
|--------------------------------------|-----------|-----------|
| Gross Income (earnings before taxes) | \$        | \$        |
| Maintenance                          | \$        | \$        |
| Child Support                        | \$        | \$        |
| Other                                | \$        | \$        |
| <b>TOTAL INCOME</b>                  | <b>\$</b> | <b>\$</b> |

CHAPTER 3 - MONEY AND BUDGETS

**Expenses**

| <b>Housing</b>                              | <b>Monthly</b> | <b>Annual</b> |
|---|----------------|---------------|
| Mortgage Payment                            | \$             | \$            |
| Rent  | \$             | \$            |
| Utilities (heat, electricity, water, other) | \$             | \$            |
| Telephone                                   | \$             | \$            |
| Other                                       | \$             | \$            |
| <b>TOTAL HOUSING</b>                        | \$             | \$            |

| <b>Transportation</b>       | <b>Monthly</b> | <b>Annual</b> |
|-----------------------------|----------------|---------------|
| Auto Lease / Payment        | \$             | \$            |
| Gas                         | \$             | \$            |
| Repairs                     | \$             | \$            |
| Registration                | \$             | \$            |
| Insurance                   | \$             | \$            |
| Taxes                       | \$             | \$            |
| Other                       | \$             | \$            |
| <b>TOTAL TRANSPORTATION</b> | \$             | \$            |

| <b>Medical</b>       | <b>Monthly</b> | <b>Annual</b> |
|----------------------|----------------|---------------|
| Health Insurance     | \$             | \$            |
| Deductible           | \$             | \$            |
| Doctor / Dentist     | \$             | \$            |
| Optical              | \$             | \$            |
| Prescriptions        | \$             | \$            |
| <b>TOTAL MEDICAL</b> | \$             | \$            |

| <b>General</b>             | <b>Monthly</b> | <b>Annual</b> |
|----------------------------|----------------|---------------|
| Food / Beverage            | \$             | \$            |
| Daycare                    | \$             | \$            |
| Clothing / Personal Care   | \$             | \$            |
| Child Support              | \$             | \$            |
| Life Insurance             | \$             | \$            |
| Recreation / Entertainment | \$             | \$            |
| Vacation                   | \$             | \$            |
| Student Loans              | \$             | \$            |

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| General               | Monthly   | Annual    |
|-----------------------|-----------|-----------|
| Gifts / Contributions | \$        | \$        |
| Miscellaneous         | \$        | \$        |
| Savings / Emergencies | \$        | \$        |
| <b>TOTAL GENERAL</b>  | <b>\$</b> | <b>\$</b> |

| Estimated Taxes    |     |      | Monthly   | Annual    |
|--------------------|-----|------|-----------|-----------|
| FICA               | [1] | 6.20 | \$        | \$        |
| Medicare           | [1] | 1.45 | \$        | \$        |
| Federal            | [1] |      | \$        | \$        |
| State              | [1] |      | \$        | \$        |
| <b>TOTAL TAXES</b> |     |      | <b>\$</b> | <b>\$</b> |

|                       | Monthly   | Annual    |
|-----------------------|-----------|-----------|
| <b>TOTAL EXPENSES</b> | <b>\$</b> | <b>\$</b> |
| <b>BALANCE</b>        | <b>\$</b> | <b>\$</b> |

[1] Applied to salary as percentage (e.g. 2,000 x .0620 = 124)

# **Chapter 4 - Child Support and Alimony**

## **Child Support**

### **§4:01 Child Support Guidelines**

Both parents have a duty to provide financial support for their children. Child support is calculated according to statewide guidelines that provide a formula. Software programs are available to perform the calculations.

Among the factors the support calculation takes into account are:

- The income each parent earns or is capable of earning.
- Other non-earned income each parent receives.
- The number of children the parents have with each other.
- The amount of time each parent spends with the children.
- Support provided to children from other relationships.

Once you and your spouse have completed your budgets, disclosed your income [see Ch. 3], and decided on a parenting plan [see Ch. 2], your lawyers will be able to run the calculations and let you know the guideline support amount.

### **§4:02 Hidden Income**

One issue that can arise in calculating child support is whether a parent has fully disclosed his or her income. There are many ways to understate the true amount of income. Business owners especially can understate income by paying themselves a low salary or charging personal expenses against the business. When hidden income is suspected, it may be necessary to hire a forensic account to look into the parent's tax returns and financial records.

### **§4:03 Deviation from Guidelines**

You and your spouse can agree to a child support amount equal to or greater or lesser than the guideline. You may even agree to no child support. However, the court will likely want a reason for the deviation. The court will not approve an agreement for child support below the guideline if the agreement will not adequately provide for the children's needs; the recipient has not been fully informed about his or her rights to support; or the agreement appears to be the result of coercion. The court will not allow a deviation that seriously impairs the



ability of the parent to whom support is owed to maintain minimally adequate housing, food, and clothing for the children.

If the recipient spouse is receiving public assistance, the court will not approve support below the guideline amount unless the public assistance officials agree.

If child support is decided by the judge after a trial, the judge may order support that deviates from the guidelines if the deviation is in the best interests of the child and the amount of support indicated by the guidelines is unjust or inappropriate under the circumstances. For example, the judge could require support above the guideline amount when a child has special needs. On the other hand, a judge could order support below the guideline amount when the parent has an extraordinarily high income and the guideline amount would exceed the children's needs.

#### **§4:04 Modification of Child Support**

Child support is not fixed permanently. The amount can be increased or reduced as circumstances change in the future. For example, a change in the amount of child support may be appropriate if either parent has a significant change income or change in the amount of time the child lives with that parent, or if the child's needs change significantly. You and your spouse can agree to a change in the amount of child support. If one of you wants a change but the other does not agree, the parent seeking the change will need to return to court.

#### **§4:05 When Child Support Begins and Ends**

Generally, child support begins from the day the divorce is filed and must be paid until the child turns 18 and has graduated from high school. Parents can agree to continue child support through college and the agreement can be enforced in court. If a child is disabled and unable to support himself or herself, the court may order child support to continue beyond age 18.

## **Alimony**

#### **§4:06 Purpose**

Alimony (also referred to as spousal support or maintenance) is paid by one ex-spouse to the other after the termination of the marriage. Temporary alimony may

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be paid during the divorce. The purpose of alimony is to help the lower income spouse maintain his or her standard of living and to become self-supporting within a reasonable time, if possible.

### §4:07 Determination of Amount

Unlike child support, there is no mathematical formula for calculating the appropriate amount of alimony. You and your spouse can agree on an amount and duration for alimony or that no alimony will be paid. Your divorce and post-divorce budgets can provide useful information on one spouse's need and the other party's ability to pay support.

If you cannot agree on alimony, the court will decide by considering a number of factors.

### §4:08 Factors Courts Consider

The following is a list of typical factors considered by courts in deciding whether to order alimony, how much to order, and for how long a period.

**Disparity in Incomes.** Often marriage partners have significant differences in their ability to make money. These differences can be due to disparities in education, intelligence, motivation, sex, or time absent from the workforce to raise children.

**Length of Marriage.** Alimony is less likely in a short marriage. Many courts use a sliding scale approach, employing a formula where the number of years of maintenance awarded is related to the number of years of the marriage. In longer term marriages where the parties are at or approaching retirement age, the court may order alimony to get the payee spouse to a point where Social Security benefits kick in.

**Job Market Reentry.** When the marriage has been short and the spouse seeking maintenance is employable or can be employable with some training, support may be awarded only to provide the spouse with enough time and money to become self-supporting. In these cases, plans of rehabilitation including costs and estimates of time are considered in the determination of alimony.

**Example:** The wife, a nurse, has been out of the workforce for ten years. To have her license reinstated, she will need \$6,000 in education fees and two years. Alimony could be provided to

cover the costs of re-education and to support the nurse during retraining.

**Loss of Career.** If a spouse surrenders his or her career in deference to the career of the other spouse, an argument can be made that alimony should be paid to compensate the deferring spouse for this sacrifice.

**Example:** A wife surrendered her position as a high school principal when her husband had to relocate to advance in his career. In the new location, the only available employment for the wife was as a teacher. Arguably, the difference in pay between the positions is a financial loss that should be compensated for by means of alimony. These same types of arguments can be raised when a wife or husband leaves the work force to care for the children of the couple.

**Property Division.** The assets received by a spouse in the division of the marital estate may significantly influence whether or not alimony is awarded. If, for example, a spouse is awarded hundreds of thousands of dollars of income producing assets in the course of the divorce, he or she may have no need for alimony.

**Separate Wealth.** Related to the assets received in the divorce are considerations related to the overall financial condition of a spouse. If a spouse has separate property that makes him or her independently wealthy, the spouse is unlikely to be awarded alimony.

**Ability of Spouse to Be Self-Supporting.** If a person cannot provide for themselves through employment or the use of financial assets, alimony is appropriate. Courts are often reluctant to cast spouses onto public assistance if funds for spousal support are available.

**Physical Condition, Mental Condition, Age.** The physical condition, mental condition, and age of a spouse are considerations in determining alimony. A disabled spouse may have a difficult time entering the work force and consequently supporting himself or herself. In spite of laws and regulations disallowing it, age discrimination can be a very real barrier to older spouses attempting to reenter the workforce.

**Standard of Living During the Marriage.** A factor in the determination of maintenance is the standard of living that the couple was able to enjoy during their marriage. The argument indicates that, to the extent possible, the standard

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of living of the couple after the divorce should be similar to the standard of living that they enjoyed while they were together.

Maintaining the same standard of living after divorce is difficult for most couples. Divorce creates two economic units instead of one. Two economic units are more expensive to maintain than one economic unit. The loss of economies of scale and the duplication of costs ensure that even if the couple shared their total income equally, they would not be able to live as well divorced as when they were married.

Alimony arguments are often raised in conjunction with a spouse's desire to retain the family residence and the accompanying standard of living. For example, the wife contends, "I can keep the house if he pays me \$3,000 per month in alimony." In divorces with relatively high incomes or significant financial assets, this may be a reasonable assertion. However, in many cases (if not the majority) the family residence represents the most house the parties could buy at their income level and credit rating. This means that the couple's income was very possibly just meeting the obligations of living and buying the house. Arguing that one party can maintain the house for the other party and provide for himself or herself at the same time may be wholly unrealistic.

Consequently, while standard of living can be a consideration, it should not be the sole definitive factor.

**Child with Special Needs.** Alimony can be awarded to provide for a parent who is unable to work because he or she is caring for a child with special needs. Outside care for the child may not be available, or the cost of such care may equal or exceed what the parent could make in the work force. In such cases, the financially logical approach is to provide support for the parent so that he or she can care for the child.

**Ability to Pay.** The court will consider the financial situation of the payer spouse. An award of alimony that exceeds an individual's ability to pay makes little sense. The couple is likely to end up back in court with one trying to collect the alimony and the other trying to have it reduced or eliminated. The post divorce budget can be used to as a guide to setting alimony at an affordable level.

# **Chapter - 5 Property Division**

## I. The Property Settlement Process

### §5:01 What Is Your Marital Estate?

After you and your spouse have developed a parenting plan for your children [*see* Ch. 2] and figured out your budgets [*see* Ch. 3], you'll want to turn your attention to the division of your marital estate. Your marital estate is defined as everything you and your spouse own (your assets) and everything you and our spouse owe (your liabilities).

Marriages are economic partnerships and emotional partnerships. Like any other partnership, the parties are considered to have equal status in spite of the duties they may have performed during the marriage. Both parties are equally responsible for the debts of the partnership and both parties have equal rights to the assets of the partnership. Consequently, division of the marital estate usually begins under the assumption that the marital estate will be divided equally. Spouses sometimes agree to an unequal division for various reasons, for example to adjust for disparities in earning capacity, avoid alimony, or take care of a spouse with special needs.

### §5:02 Four Steps to a Successful Property Settlement

As part of your initial goal-setting [*see* Ch. 1], you probably have already thought about what assets you would like to keep. However, it's best not to begin the negotiations with your spouse prematurely. There is a logical process that you should follow to make sure all assets and liabilities are accounted for, you are negotiating from a fully informed position, and conflict is minimized.

Step 1: Each spouse fully discloses all assets and liabilities to the other.

Step 2: The spouses determine which assets and liabilities belong in the marital estate to be divided and which do not.

Step 3: The spouses agree on a value for each asset and liability in the marital estate.

Step 4: The spouses divide the assets and liabilities in the marital estate.

### **§5:03 Step 1: Disclose All Assets and Liabilities**

Before you and your spouse can divide your marital estate, you must first figure out what it consists of.

The first step is for each of you to fully to disclose to the other all of your assets and liabilities regardless of in which spouse's name they are held.

There are two key reasons why full disclosure by each of you is necessary.

- The court may impose a penalty on you if you don't, even if the failure is an oversight and not intentional. You could even be compelled to turn the concealed asset over to the other spouse if it subsequently comes to light. Total disclosure protects you and prevents one of you from later claiming that the other left something out of the marital estate.
- A negotiated settlement requires a minimum level of trust between you and your spouse. The discovery of hidden assets during the course of a divorce will minimize the chances of a peaceful resolution. A judge who learns that she is listening to a couple argue about a cookie jar or a pair of table lamps because one spouse tried to hide assets will have very little sympathy for that person.

Anything that has worth of any kind should be included in the disclosure of assets. Assets can be items that have physical substance (tangible assets), do not have physical substance (intangible assets), or have only sentimental value. The goal is to disclose any asset owned or controlled by either of you regardless of its source, value, or expected disposition.

### **§5:04 Step 2: Decide What's in and What's out**

You and your spouse can agree that certain items should be kept out of the marital estate and given to one of you (or to your children). Typically, the law provides that property and debts that you acquired before you got married and property that you received as a gift or inheritance during your marriage are not part of the marital estate.

For example, you and your spouse could agree that china passed down to you from your grandmother is to be kept out of the marital estate and given to you. You

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could also agree that student loans incurred by your spouse before you married are solely your spouse's responsibility.

These items do not need to be valued, since they are outside the marital estate and will not be divided.

Other reasons to exclude items from the marital estate and thus the formal valuation process include:

- The items have de minimus value when compared to the totality of the marital estate. The idea is to ferret out of the mass of personal property those items that can have a material effect on the value of the marital estate. Depending on the extent of your assets, you and your spouse could set an arbitrary figure, say \$500 or \$1,000 and simply agree to exclude all items obviously worth less than that amount. Then divvy those items up on your own or let one spouse take them. Alternatively, these types of items can be grouped together into categories, i.e., kitchen equipment, and a value assigned to the entire category.
- You and your spouse agree to offsetting distributions. You may agree to this solution for hard to value items used principally by one of you. For example, each could take his or her respective sporting equipment, or items used in a hobby.
- The items, though purchased by you, actually belong to and are used by your children, such as a child's car, for example.

### **§5:05 Step 3: Value the Assets and Liabilities**

After preliminary exclusions of the marital estate have been made, the values of the remaining assets and liabilities are determined.

It's usually a good idea to wait to start dividing things until reasonable values for all assets and liabilities have been determined. Beginning negotiations without facts means that you and your spouse will be negotiating from emotions. While emotion is always present and most certainly a factor, the decisions that have to be made must be based on financial facts.



### §5:06 Step 4: Divide the Assets and Debts

Everything that was accumulated during your marriage, including retirement benefits [*see* §§5:40-5:49 below], is subject to division. As previously mentioned, these divisions are most often equal.

There are two major methods that court’s use to divide marital estates. Community property states more or less require the equal division of marital estates. Other states require the equitable division of marital estates. These states indicate that whatever is determined to be fair in the circumstances is how the marital estate should be divided and the division need not be equal.

## II. Disclosure Forms

You can use these forms to ensure that you make a full disclosure of all assets and liabilities.

*See* Ch 3 for a form for disclosing your income.

### §5:07 Statement of Assets

The date of valuation is \_\_\_\_\_ unless otherwise specified.

#### Cash or Cash Equivalents:

| Description of Asset                 | Title in Name of | Date Acquired | Inheritance (I) or Gift (G) | Fair Market Value |
|--------------------------------------|------------------|---------------|-----------------------------|-------------------|
| Savings or Interest Bearing Accounts |                  |               |                             | \$                |
| Checking Accounts                    |                  |               |                             | \$                |
| Certificates of Deposit              |                  |               |                             | \$                |
| Money Market Accounts                |                  |               |                             | \$                |
| Cash                                 |                  |               |                             | \$                |
| Other (specify)                      |                  |               |                             | \$                |

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### Real Property:

(Provide address, type, and description, current fair market value, amounts of mortgages, loans, or liens)

| Description of Asset               | Title in Name of | Date Acquired | Inheritance (I) or Gift (G) | Fair Market Value |
|------------------------------------|------------------|---------------|-----------------------------|-------------------|
| Residence                          |                  |               |                             | \$                |
| Secondary or Vacation Residence    |                  |               |                             | \$                |
| Investment or Business Real Estate |                  |               |                             | \$                |
| Vacant Land                        |                  |               |                             | \$                |
| Other (specify)                    |                  |               |                             | \$                |

### Other Assets:

| Description of Asset  | Title in Name of | Date Acquired | Inheritance (I) or Gift (G) | Fair Market Value |
|---|------------------|---------------|-----------------------------|-------------------|
| Safe Deposit Box<br>(Provide name of bank; description of contents)   |                  |               |                             | \$                |
| Motor Vehicle(s), Boats, Trailers, etc.<br>(Provide year, model, maker, lien, debtor, amount)   |                  |               |                             | \$                |
| Business Interests:<br>Type of entity, i.e. Corporations, Partnerships, Sole Proprietorships<br>(Provide percentage interest and number of shares, name of business, type of business)  |                  |               |                             | \$                |
| Insurance Policies: Type of insurance, i.e. Life, Medical, Disability, Business Overhead, Property, etc.<br>(Provide name of insurer, policy number, name of insured, owner of policy, face amount, beneficiary, cash value, surrender value) |                  |               |                             | \$                |

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| Description of Asset  | Title in Name of | Date Acquired | Inheritance (I) or Gift (G) | Fair Market Value |
|---|------------------|---------------|-----------------------------|-------------------|
| Retirement, Pension Plans, IRA Accounts, Deferred   |                  |               |                             | \$                |
| Compensation, Annuities, 401(k), Profit Sharing, etc.: (Provide name and type of plan, trustee of plan, beneficiary, vested or non-vested, most current value)  |                  |               |                             | \$                |
| Stock Options, ESOPs, Other Deferred Compensation or Employment Benefits: (Describe fully)  |                  |               |                             | \$                |
| Income Tax Refunds: Federal and State (Identify tax year)   |                  |               |                             | \$                |
| Pending Claims for Personal Injury, Worker's Compensation, or Other Lawsuits Seeking Monetary Award: (Provide date of occurrence, nature and amount of claim, date lawsuit filed, case number, name of plaintiffs, name and address of attorney representing you) |                  |               |                             | \$                |
| Collectibles: Coins, stamps, art, antiques, etc   |                  |               |                             | \$                |
| All Other Property: Personal or Real, NOT PREVIOUSLY LISTED, valued in excess of \$500.00 (excluding normal household furniture and furnishings)  |                  |               |                             | \$                |

**§5:08 Statement of Debts/Liabilities**

STATEMENT OF DEBTS/LIABILITIES

| Creditor's Names | Purpose of Debt | Balance Due | Monthly Payment |
|------------------|-----------------|-------------|-----------------|
|                  |                 | \$          | \$              |
|                  |                 | \$          | \$              |
|                  |                 | \$          | \$              |
|                  |                 | \$          | \$              |
|                  |                 | \$          | \$              |

**III. Exclusions from the Marital Estate**

*Assets*

**§5:09 Not Everything Disclosed Must Be Divided**

Not all assets and liabilities that are disclosed need to be included in the marital estate to be valued and divided.

**Example:** A wife received a ring from her mother on her twenty-first birthday. The ring is a family heirloom, and the wife intends to give it to her daughter on her twenty-first birthday. The husband and wife married when the wife was twenty-four years old, and during the marriage the husband had nothing to do with the ring. The ring is not marital property. It is the wife's separate property and should not be shared with the husband. The ring was received before the marriage, it was gifted to the wife exclusively, and it was kept separate from the assets of the husband and the couple's combined assets.

**§5:10 Three Determining Factors**

Whether an asset or liability is part of the marital estate depends on:

- When it was acquired.
- Where it came from.
- How the couple treated it.

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Marital property includes all property that either of you acquired after your marriage, other than by gift to one of you or an inheritance. It includes your earnings and your spouse's earnings and any property you purchased with earnings regardless of how title to the property is held.

Non-marital or separate property includes:

- Property you owned before your marriage.
- Property given as a gift or inheritance to you and not also to your spouse either before or during your marriage.
- Income earned from separate property, such as interest or rent, regardless of when earned.
- Property purchased with separate property regardless of when purchased.

These are the legal rules that courts generally use to determine what belongs in the marital estate when the parties are unable to make their own agreement.

### **§5:11 Assets Acquired During Marriage**

Assets earned during the marriage are produced by the economic unit of the couple. Assets earned by the couple are divisible no matter whose name they happen to be in or whether or not they have been kept separate.

**Example:** Shortly after her marriage Jen opened an individual retirement account. The account was in her name only and her husband, Joe, never had anything to do with the account. At the time of the divorce, the account had a value of \$10,000. The asset is marital and subject to division because of the timing of the creation of the asset: during the marriage. For more on retirement accounts, *see* §§5:40-5:43 below.

### **§5:12 Commingling**

Although assets amassed before marriage are assumed to be non-marital, they may become marital if they are “commingled” or mixed up with marital assets to such an extent that they cannot be separated.

**Example:** Jane brought a \$10,000 savings account into her marriage. Technically, this is premarital property, and that status is an argument for exclusion from the marital estate. However, the savings account was used as a part of the down

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payment on the house Jane and her husband John purchased together. The \$10,000 has been “commingled,” and there is no way to separate one dollar from another in the equity of the house. Consequently, the \$10,000 is part of the marital estate and is subject to division.

In this case, the asset existed before the marriage, came from the wife, and was expended to purchase a joint asset. The first two factors indicate that the asset could be excluded from the marital estate. However the last changed the nature of the funds and made them part of the marital estate.

### §5:13 Gifts and Inheritances

Gifts and inheritances can be analyzed similarly. When you received the item does not play a crucial role in determining its status. Whether the asset was received before the marriage or during the marriage or after the date of separation is less important than the source of the asset and what you did with it. The source of a gift or inheritance is not the efforts of the economic unit of the couple.

A gift or inheritance to one spouse would tend to indicate that the asset is not marital. A gift or inheritance made to both the husband and wife is typically marital. A gift from one spouse to the other is also marital.

A gift or inheritance that is put into an account solely in the recipient’s name may indicate that the recipient intended to keep the asset separate from the marital estate. If however, the recipient purchased an asset, such as a vehicle, with the gift and put the title to the vehicle in both spouses’ names, the intent may have been to treat the asset as marital.

**Example:** During her marriage Jeanne’s aunt gave her \$10,000. Jeanne purchased a savings bond with the amount and never commingled the asset with the assets of the marriage. The timing indicates that the money is a marital asset in that it was received during the marriage. However, the source of the asset is not the marriage; it is the aunt. Consequently, the asset is not due to the efforts of the couple, which makes it excludable from the marital estate. And finally, Jeanne kept the money separate from the assets of the marriage. The evidence suggests that the funds should be kept separate from the marital estate and not divided.

### **§5:14 You Don't Have to Follow the Rules**

Outside of a court of law, whether an asset is part of the marital estate or not can be a matter of negotiation. Referring to the Example in §5:12 above, if the husband and wife agreed, the wife could be given credit for the \$10,000 she contributed toward ownership of the house. That is, if the house were going to be sold, she would receive \$10,000 more of the net proceeds than the husband.

## ***Liabilities***

### **§5:15 Three Determining Factors**

Here are three general rules for deciding whether or not a debt should be included in the marital estate:

- Debts incurred to supply necessities should be included in marital estate.
- Debts to provide luxuries that are incurred before you and your spouse separate should be included in the marital estate.
- Debts to provide luxuries that are incurred after you and your spouse separate should not be included in marital estate.

These rules make sense from an economic viewpoint. In marriage there is a single economic unit, the married couple. The assumption is that this single entity is making economic decisions that have the approval of both spouses. Consequently, debt incurred before you separate is assumed to be the result of a combined economic decision and therefore appropriately included in the marital estate.

Your separation creates two economic entities instead of one. It can no longer be assumed that you both approve of debt incurred by either of you after separation. However, separation of a married couple, more often than not, creates an economic disparity between the parties. That is, one spouse will usually have more resources than the other. The spouse without resources may have to incur debt in order to live. From an economic standpoint, the resources may exist to support both parties; but there is an economic imbalance between the parties that creates the debt. It follows then that the debts incurred for the support of either party after separation should be the responsibility of both parties.

The same is not true of luxuries. Debt incurred for goods and services that are not necessary to live are considered luxuries. Whether or not these items are

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included in the marital estate is a matter of timing. If the debt was incurred before separation, an assumption is made that the debt had the approval of both parties and the debt is included in the marital estate. If the debt was incurred after the date of separation, an assumption is made that there was not a mutual agreement to incur the debt and the debt is excluded from the marital estate.

Bear in mind that a judge may or may not follow these rules. Courts can differ even from county to county within the same state. However, these rules are based on sound economic principles, logic, and fairness, which is what you and your spouse should be aiming for in your divorce settlement.

### **§5:16 Exceptions**

After the general rules are applied, exceptions to the rules may come into play to make the division of debt fairer.

Examples:

- Jake incurred a Visa bill of \$4,000 for a ring he purchased for his girlfriend before the couple separated. The decision to incur the debt was certainly not a mutual decision by the couple even if the amount was incurred before the separation. The most equitable result is to exclude the debt from the marital estate.
- After the separation, Jason took his entire family, including his wife, to Disneyland incurring significant credit card debt. Since the amount was a luxury and incurred by one party the rule would indicate that the amount should be excluded from the marital estate. However, the couple decided that the luxury had been incurred for the benefit of the entire family and it was included in the debts of the marital estate.



## **IV. Valuing Assets**

### ***The Valuation Process***

#### **§5:17 Fair Market Value**

The standard of value applied for all assets in the marital estate is “fair market value,” which is how much the asset would bring if it were sold. Fair market value is usually considered to be the price a hypothetical willing buyer would pay a willing seller. The correct standard of value is not what you paid for the item or how much it would cost to purchase the item now.

#### **§5:18 How Complicated Will It Be?**

The complexity of the valuation process depends on what kinds of assets and liabilities you have and how well you and your spouse get along. If your marital estate consists only of a couple of vehicles and joint credit card debt, valuation will be simple. The value of the vehicles can be obtained from the Internet and values of the debts from your most current credit card statements. On the other hand, if you own a business or multiple rental properties and have a contentious relationship, the valuation process may require extensive work including the hiring of experts.

#### **§5:19 The Four Levels of Evidence**

You can think of the valuation process as a progression through a series of levels from the least expensive, but least credible, to the most expensive, but most credible.

The levels are:

- The spouses’ opinions. Each spouse offers an opinion of what he or she thinks an asset is worth.
- Market analysis. A person, such as a realtor, dealer, or broker, who is knowledgeable about the market for the asset offers a quote as to its value.

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- Appraisal. A professional appraiser is paid to assess the value of the asset.
- Sale. The most reliable determination of value of an asset for marital estate division purposes is its sale on the open market. If you sell a marital asset, the sales price minus the costs of sale is included in the marital estate.

If you are headed to trial, the higher the level of evidence, the more likely the court will accept the value presented. However, in settlement negotiations or mediation, the only level of evidence necessary is the level that satisfies you and your spouse. For example, if you agree on a value for your home, then that value is used. If you don't agree, then a higher level of evidence is required.

Your mediator or attorney may advise you to advance up the credibility scale when either or both of you do not have sufficient knowledge to offer your own opinion on value. You do not want to decide based on inadequate information because you could end up with an inequitable division.

How much effort and expense you want to devote to valuing an asset depends on its relative worth. For example, you don't want to devote much effort to valuing corkscrews and garlic presses and similar items that are worth a few cents to a few dollars. You could lump them together with all of the other kitchen gadgets and assign them a collective value of a few hundred dollars or agree to leave them out of the marital estate all together.

### *Valuing Tangible Assets*

#### **§5:20 Your Home**

The home you and your spouse shared could be the most difficult asset to address. You are likely to have at least four issues to contend with:

- Your home is probably your most valuable asset, making its disposition central to a property settlement.
- Houses are difficult to value. Property appraisal is anything but an exact science. Two appraisers can come up with significantly different values for the same home. In fact, the only sure way to determine the value of a house is to sell it.
- You and your spouse probably have a significant emotional attachment to your home. Your home is a place of comfort

and security, and an object of pride and status. In addition to money, one or both of you may have invested “sweat equity” to bring the home to its present condition.

- Your house creates substantial economic burdens. It costs money to insure and maintain. If your family has relied on two incomes, it may difficult for one of you to buy out the other’s equity and then pay the mortgage, taxes, insurance, and maintenance.

Three questions must be answered in the disposition of the house: 1) Do either you or your spouse want the house? 2) Can either of you afford it? 3) Can you agree on a value?

Answering these questions in order will lead to three possible solutions to the house: 1) The house will be sold and the proceeds divided. 2) You will agree on a value for the house, perhaps after getting an appraisal or competing appraisals, and include it in the marital estate for division. 3) You will not be able to agree on a value and the house issue must be referred to the court for a decision.

## **§5:21 Automobiles and Other Vehicles**

The valuation of automobiles is usually much simpler than valuing larger assets such as houses or businesses. You and your spouse can simply agree on a value. However, you may not have sufficient knowledge to do so. In that case, probably the best alternative is to take advantage of automobile valuation services such as National Automobile Dealers Association (N.A.D.A.) Guide or Kelly Blue Book. Both of these services as well as others are available on-line and are very easy to use. You and your spouse can obtain values from at least two services and then average them.

The values obtained from the various guides do not consider significant body damage or mechanical problems. To adjust the value for the condition of the vehicle, you can have a body repair shop or a mechanic estimate the cost of bringing the vehicle up to a fair or reasonable (not perfect) condition. Then use these estimates to reduce the value of the vehicle.

If you or your spouse is dissatisfied with the value obtained from one of the services, the next step may be contacting a dealer for a value quote. The dealer should understand that you want to know the vehicle’s fair market value. Otherwise the dealer may quote you what he or she will pay or allow as a trade-in for the vehicle. This value will be below fair market value, so the dealer can make a profit on the transaction.

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If you and your spouse still disagree on the value, you can move to a paid appraisal. Paying someone to appraise a vehicle when free and credible valuation sources are available is a questionable use of resources. However, an appraisal may be the only way (other than a sale) of determine the fair market value of custom or very high-end vehicles.

Recreational vehicles, such as campers, boats, all terrain vehicles, motorcycles, and snowmobiles can be valued in the same was as automobiles. That is, value can be determined by agreement. If you and your spouse cannot agree on a value, you can turn to valuation services on the Internet.

Many recreational vehicles have very large markets, and values can be readily assessed. The value of recreational vehicles can be significantly affected by damage or mechanical problems. As with automobiles, the cost of returning the equipment to reasonable condition is deducted before the amount is entered into the marital estate. Finally, you can ask a dealer for a quote or hire an appraiser.

### **§5:22 Household Furnishings**

Household furnishings include furniture, decorations, linens, and kitchen gadgets. These items retain very little of their original value. Because you need them to make a home, their value is not represented by their fair market value. For example, if you have a drawer full of kitchen gadgets such as spatulas, peelers, and tongs, the fair market value of the entire drawer may not exceed ten dollars if they were sold at a yard sale. However, the cost to replace the items may exceed a hundred dollars. This difference is at the heart of the conflict over these types of assets.

Valuation of household goods follows the same steps as other types of assets with an additional caveat. That is, you can agree on values for all of the household goods; you can research the values by referring to second hand stores or Internet sites, and you can actually have all of the household goods appraised by an independent authority. All of these steps are time consuming, arduous, and an actual appraisal can be expensive and out of proportion to the value of the items being appraised.

A far better solution to the problem is to divide the household goods by utility. For example, one person takes the linens from the master bedroom and the other person takes them from the guest bedroom. One person takes the every-day dishes, and the other can take the dishes that are used on special occasions. This

offset process avoids the necessity of valuing each and every asset and can be an extremely efficient method of resolving the problem.

Bear in mind that judges do not want to hear arguments on who should get the living room table lamps and take a very dim view of those who advance these arguments.

### **§5:23 Antiques, Art, and Collectables**

Stamps, coins, precious metals, ceramics, jewelry, and art, as well as a host of others are included in this category. Collections can be a point of contention because they can be extremely valuable or virtually worthless. Many variables are involved including the condition of the components and their current popularity.

A significant problem in reaching agreement on the value of a collection is confusion between cost and market value. Keep in mind that the value of a collection in the marital estate is what it could be sold for, not what it cost. Some collections that cost hundreds or thousands of dollars to amass may have little or no value on the open market. Not every investment succeeds. People can lose money collecting even when their intentions are the best and markets appear strong at the time of purchase.

### **§5:24 Hobbies, Tools, Equipment, Sporting Goods**

As in collecting, the problem in valuation of hobby items, tools, equipment, and sporting goods often is the confusion of purchase price with fair market value. Typically, hobbies are relatively expensive to get into, but the items purchased to conduct the activity do not retain their value.

Rather than attempt a formal valuation, one solution may be for you and your spouse to offset your hobbies. For example, you take your photographic supplies and equipment and your spouse takes his or her paints, brushes, and canvases. Then these items are excluded from the marital estate. However, this approach may not work because of highly disparate values of the activities or the presence of extremely expensive tools or equipment.

The handling of tools for marital estate valuation purposes depends on their value. Big ticket items may have readily identifiable markets and significant resale value. For example, cabinet-quality table saws can sell for thousands of dollars

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and retain a significant portion of their value. However, smaller tools such as small electrics or hand tools generally do not have a significant residual value.

### **§5:25 Pets**

A dog with marketable skills (e.g. hunting or tracking) or genetic lines favorable for breeding may have a market value. This value can be determined by the processes employed to value any other asset. That is, the parties can agree on a value, trade magazines or Internet markets can be used to determine a value, or as a last resort, an individual knowledgeable in the field can be engaged to assess the value of an animal.

However, in the vast majority of cases, the fair market value of pets is zero, although their emotional value may be enormous.

Two possible solutions for pets are:

- Let the pet go with the person to whom it is most closely bonded. Pets usually bond more with one individual in a family than equally to all family members. That member is usually the one who feeds the pet. Allowing the pet to go with the person to whom it is bonded will be less traumatic to the pet.
- Allow the pet to go with the children. Pets can be instrumental in easing the transition for children from living in one household to living in two for the children. If the pet is allowed to accompany the children when they change residences, they will have a familiar constant in both households.

## *Valuing a Business*

### **§5:26 Methods of Valuing a Business**

If you or your spouse owns a business, it will have to be valued. The valuation techniques applied to businesses can be similar to those applied to other assets. That is, if you and your spouse are knowledgeable, you can agree on a value. You can also refer to trade publications or Internet sites to determine values that are equitable. And finally, you can hire experts to determine the business's value. Of course, you could sell the business, but business owners rarely do so.

Most people are not knowledgeable about what affects the value of a business and, consequently, cannot fairly assess the value of their operation. Generally available information on businesses or professional practices may generate only “rules of thumb” that can yield suspect results when applied to the business in question. This makes use of a qualified business valuator the safest course of action in most cases. However, it may be possible to avoid a formal evaluation by a business valuator if you have a small business that is actually the equivalent of holding a job.

### **§5:27 Valuing a Small Businesses**

All businesses have a minimum value. The minimum value of businesses is usually the fair market value of its assets less its liabilities. This is essentially whatever the assets of the business could be sold for minus everything that the business owes to anyone. The worth of a large proportion of small businesses is this minimum amount.

The majority of small businesses are the equivalent of holding a job. That is, the owner earns an income similar to what he or she would be paid as someone else’s employee. The only difference in these situations is that the business owner possesses the assets and incurs the liabilities necessary to run the business. Normally, a business owner has to make more money than he or she would earn in an equivalent employment situation in order for the business to be worth more than the minimum value.

**Example:** A tile setter owns his tools and his truck and has no debts. He makes \$32,000 per year, and if he was working for somebody else, he would also be making \$32,000 per year. The value of the business is the fair market value of the tools and the truck. It is unlikely that anyone would pay more than that value. Any prospective purchaser would simply purchase similar equipment and compete or go to work for someone else.

### **§5:28 Deciding Whether You Need an Expert**

If you and your spouse own a small business, the following steps can help you determine whether it is worth its minimum value or whether you need a business valuator to value it.

1. Determine the minimum value of the business. First, value all of the business’s assets. The fair market values of the assets of

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the business are determined like any other asset in the marital estate. That is, you and your spouse can agree on a value, seek publicly available information, or hire an appraiser. Second, calculate the business's total liabilities. Third, subtract the value of the liabilities from the assets. The difference is the minimum value of the business.

2. Determine the business's income. You will need this figure both to value the business, and also for the determination of child support and alimony. If you and your spouse are both knowledgeable about the operation, you may be able to agree on the income. If one of you isn't knowledgeable, but understands business record keeping and accounting, he or she may be able to learn enough from reviewing company records to agree on income. Otherwise, you'll need to hire a financial expert.
3. Compare the earnings of the business owner to equivalent salaried positions. Average earnings for various types of jobs and professions are readily available. One source is the U.S. Department of Labor. The U.S. Department of Labor, Bureau of Labor Statistics (<http://www.bls.gov>). The BLS compiles these types of averages on a state-specific basis. A business that provides income for its owner that is similar to what the owner could earn as an employee probably has only minimum value. A business that provides a greater income than a comparable salaried position might have a higher value to a prospective purchaser. Hiring a business valuator for such a business is a good idea.

### *Valuing Financial Assets*

#### **§5:29 Checking Accounts**

The balance in checking accounts normally fluctuates with income from wages or other sources flowing in, and the payment of expenses or transfers to savings flowing out. The balance in a checking account often changes daily. The dynamic nature makes establishing a value over the months (sometimes years) required to get a divorce a challenge.



However, the average balance in checking accounts is often very small. Amounts are deposited, and, similar amounts are expended. Consequently, continually recomputing the balance is not cost effective.

There are several possible solutions:

- You and your spouse can establish a valuation date and balance the check book as of that date. You can then agree that this value will be used for valuation and division purposes in spite of changes to the value of the account that may occur after that date.
- You can use the average daily balance for a recent month as the value of the account.
- You could agree to leave checking accounts out of the marital estate due to their small balance, or because each spouse opened a separate account after the separation.

### **§5:30 Savings Accounts**

Savings accounts are normally not as dynamic as checking accounts; but the amounts involved may be significantly larger. Current statements from financial institutions are normally used to value them.

Determining where the funds came from and whether or not they are marital may be a problem. However, there is a strong possibility that saving accounts will not survive the divorce.

Divorce creates two separate economic entities (the ex-husband and the ex-wife) from one (the married couple). Creation of these separate economic entities requires resources. For example, two residences have to be purchased, and the household effects necessary to live have to be duplicated. In addition, the divorce process itself costs money. Often these expenses exhaust saving account balances.

When they do survive, savings accounts can be used to balance a marital estate division. The account is readily divisible and not subject to penalty when it is withdrawn. In other words, after you tentatively divide your non-cash assets and liabilities, cash in a savings account can be distributed between you to equalize the division.

### **§5:31 Cash and Cash Equivalents**

The valuation of cash is not a problem. It is the standard by which all other assets in a marital estate are made equivalent to for valuation and division purposes. The problem with cash is that it is highly mobile, easy to hide, and can be difficult to trace.

A cash equivalent is a financial instrument or holding with a financial institution that can be easily converted into cash. Examples of financial instruments are cashier's checks, bearer bonds, and government treasury securities. The valuation of securities or bonds usually poses no significant problem other than the fact that some of these instruments may be accumulating interest. Valuations can be obtained from any financial institution that regularly deals in this type of asset.

### **§5:32 Investment Accounts**

Specialty firms such as J.P. Morgan, Piper Jaffray, and Morgan Stanley invest funds on behalf of individuals. The firms assume responsibility for the invested funds (although not their performance). The accounts are valued by referring to the account statements.

These investments may or may not be cash equivalents. It may be possible to convert them quickly and easily into cash. Or they may require time to liquidate or incur losses when cashed in.

### **§5:33 Other Investments**

Some investments may not be handled by investment companies or be equivalent to cash. These investments require special handling. For example, one spouse may be a partner in a partnership that holds an apartment building as an investment. The partner may not be able to sell the investment to get cash to divide with the other spouse.

If the asset cannot be sold, then it has to be valued, and that value placed in the marital estate to be offset against other assets. This type of investment normally has to be valued by an expert.

Other examples include investments in stocks and bonds held outside of an investment company. If these investments are publicly traded, then reference to

common trade journals such as the Wall Street Journal can be used for valuation. If the amounts are not publicly traded, the advice of an expert will be needed.

## **V. Liabilities**

### **§5:34 Disclosure**

Any debt that either you or your spouse owes to anyone should be disclosed. It does not matter who incurred the debt or whose name is on it. If a debt was incurred by either spouse, the initial assumption is that it is part of the marital estate (a debt of both parties) and must be disclosed.

If you do not disclose a debt that you have incurred, you will be solely responsible for it. Failure to disclose a debt means your spouse will not share in it and you will not get credit in the marital estate division for having assumed the debt.

### **§5:35 Valuation**

Usually, there is no question as to the value of a debt, and the valuation process is as simple as referring to statements provided by the entity owed the debt. For example, a home mortgage has a pay-off of a set amount of dollars at any given date. Since the determination and valuation of liabilities is straightforward, and failure to pay liabilities can have adverse financial effects, the normal practice is to list all liabilities regardless of amount. This is in contrast to assets, which may be grouped for valuation, divided between spouses by use to them, or omitted as worth too little to bother with.

Liabilities are more durable than assets. Assets can be lost when converted to cash and spent. Creditors are unlikely to forget that they are owed money and will usually try to collect.

However, debts are sometimes forgiven. Bankruptcy forces the forgiveness of debt. Amounts owed to relatives may be forgiven. Unsecured creditors may settle for less than they are owed. These events can cause an inequitable division of the marital estate.

### §5:36 Bankruptcy

When your liabilities meet or exceed your assets, and the ability to pay off the liabilities is in significant question, an expert may be needed to assess the need for bankruptcy or to anticipate its consequences. If bankruptcy is the only recourse for a couple, then the timing of the bankruptcy should be carefully considered. Completing the bankruptcy before the divorce will usually provide the best chance of an equitable division of surviving assets and remaining liabilities. This is because the assets that will be protected from creditors in the bankruptcy will be known, and the liabilities that will not be forgiven will also be known. A bankruptcy that occurs after a divorce could create an inequitable division of the marital estate.

**Example:** As part of a divorce settlement, the husband took all of the unsecured debt, the house, and his pension, leaving the wife with very few assets, but no debt. Immediately after the divorce, the husband declared bankruptcy. The unsecured debt was all forgiven in the bankruptcy. The house and the pension plan were protected from creditors. The husband walked away with the house, his pension plan, and no debt. Had the bankruptcy been declared before the divorce, the wife would probably have secured an interest in the house and the pension plan.

### §5:37 Loans from Relatives

Normally there is very little trouble in valuing a debt or establishing its validity. The creditor sends monthly statements with the amount due and takes steps to ensure that regular and timely payments are made. However, this may not be the case when debts are owed to mothers, fathers, or other relatives. These obligations may in fact be gifts.

**Example:** A father provides \$20,000 for his daughter and her husband to put a down payment on a house. There is no note acknowledging the debt, no interest specified, the couple have not repaid any of the money, and the father has made no attempt to collect the debt. The father may never have intended to collect the debt. Alternatively, he treated it as a gift as long as he was provided due respect, got to see his grandchildren, and the daughter and son-in-law stayed married. In the latter situation, the father may change his position on the debt and assert his right to collect it in the midst of the divorce of his daughter and son-in-law. Naturally, this type of situation will complicate the divorce process.

The following characteristics indicate that an obligation is a true liability and should be included in the marital estate for resolution. The absence of these characteristics indicates that the liability is a gift and should be excluded.

- An agreement by both parties that the debt is marital.
- A written document defining the obligation.
- Fixed terms of repayment.
- Interest due on the obligation.
- Regular payments made on the obligation.
- Involvement of a third party, such as an escrow company, in the management of the debt.
- Collection attempts by the lender.

### **5:38 Unsecured Liabilities**

Amounts you owe to credit card companies, medical providers, merchants, vendors, and utility companies are known as unsecured liabilities. If you don't pay these debts, your creditors do not have an interest in an asset of yours that they can seize and sell for the money. Unsecured creditors rely on your promise to pay.

If you and your spouse are in financial distress, you may be able to get your unsecured creditors to give you more favorable terms. Unsecured creditors may be willing to deal because collecting an unsecured debt can be expensive. Also, unsecured creditors are behind other creditors in bankruptcy distributions and often get nothing when the debtor goes bankrupt.

These deals can range from reductions in monthly payments, to elimination of interest, to settlement of the entire balance for a significantly discounted amount. Negotiations with unsecured creditors can materially reduce the debt owed by the marital estate. If the deals are made before the marital estate is valued and divided, then neither spouse is put at a financial disadvantage.

However, suppose that one spouse receives a large share of the unsecured debt and also assets to compensate for taking on the debt. If that spouse negotiates significant reductions in the debt, then he or she has received a larger portion of the marital estate than is equitable. The best approach is to recognize the signs of financial distress and make deals with unsecured creditors during the divorce process.

### §5:39 Secured Liabilities

If you and your spouse have a secured liability, the creditor has an interest in an asset that secures the debt. If you don't pay, the creditor can take the asset and sell it to get the money you owe. For example, if you fall behind on your home mortgage, the bank can foreclose.

Secured debt is tied to a specific asset. In the property division, the asset and the debt on it should be kept together. The person who takes the car should be responsible for paying the car loan.

The reason for this is control. Divorce, to the fullest extent possible, should remove the control that the spouses have over each other. Separating assets from their associated debt allows the person with the debt to control the person with the asset.

**Example:** An ex-husband is responsible for paying the debt on an ex-wife's car as part of the divorce settlement. The ex-wife has moved on and has a boyfriend. The ex-husband sees the boyfriend driving the ex-wife's car and tells the ex-wife that he will stop making payments on the car if he ever sees the boyfriend driving the car again. The ex-husband has been granted inappropriate control over the ex-wife by the terms of the marital estate division.

Spouses often incur joint debt to purchase assets. This creates a problem when one assumes responsibility for an asset and the associated debt as part of the divorce. It may not be possible to remove the spouse who is surrendering the asset from the joint liability. While the courts may be able to divide assets and liabilities, they generally have no jurisdiction over lenders. They simply have no authority to require a lender to remove a person from an obligation. In addition, and, as might be expected, lenders are reluctant to remove anyone from responsibility for debt payment.

In some cases it may be possible for the person who takes the asset to refinance the debt on the asset based on his or her own financial strength. However, divorce is notoriously hard on individual finances, and the opportunity to refinance may not exist. This creates a contingent liability for the person who doesn't get the asset. He or she can be held liable if the other party does not pay. Sometimes the only solution for this situation is for the parties to simply recognize the existence of the contingent liability. Another possibility is to provide the spouse with the contingent liability additional assets to compensate him or her for the risk associated with the contingency.

## **VI. Retirement Plans**

### **§5:40 Steps in Dividing a Retirement Plan**

Retirement plans are marital assets, just like any other property acquired during marriage. Division of a retirement plan can have unique complications. In general, the steps in the division of a retirement plan are:

- The retirement plan is disclosed by the employee spouse.
- The plan is valued. Depending on the type of plan, an expert (or competing experts) may have to be hired to value it. If the spouses can't settle on a value, the court will decide how much the plan is worth.
- The portion of the plan that is marital property (i.e., that accrued during the marriage) is calculated.
- The spouses decide how the marital portion of the plan is to be divided between them, typically 50/50. If the spouses can't agree on how to split the plan, a court will decide each spouse's share.
- The employee spouse can "buy out" the other spouse's share of the plan by giving him or her other marital assets or separate assets. If a "buy out" isn't possible or desired, the plan benefits are actually divided.
- A court order, known as a Qualified Domestic Relations Order or QDRO, explaining how the pension benefits are to be divided may need to be sent to the plan administrator to complete the division.

### ***Defined Contribution and Defined Benefits Plans***

Savings or accrued benefits for retirement fall into two broad categories: defined contribution plans and defined benefit plans. Defined contribution plans are essentially savings accounts, and defined benefit plans are guarantees made by employers to pay certain sums in the future.

### **§5:41 Defined Contribution Plans**

A defined contribution plan is a plan into which specific employee contributions are made, often matched by the employer to some extent. A 401K plan is a defined contribution plan. The employee's benefit is defined by his contributions plus earnings on the contributions. Each employee has a separate, segregated account containing his contributions, the employer's contributions, and earnings on them. Actuarial calculations are unnecessary to value a defined contribution plan, as the account value is readily determinable.

The major benefit of a defined contribution retirement account is that income taxes do not have to be paid on the earnings that generate the deposits to the accounts. Rather, the employee spouse (the "plan participant") pays taxes on the funds when the amounts are withdrawn in the future, usually when the participant has retired. The tax rate of a retired person is usually much lower than that of an individual actively engaged in the workforce.

However, if the funds are withdrawn prior to retirement, the income taxes that were put off (deferred) until retirement must be paid immediately. In addition, penalties are assessed by the IRS on these withdrawals if the participant is younger than 59 1/2. The tax consequences and penalties can be significant.

If a defined contribution plan is to be divided on divorce, the penalties and tax consequences can be avoided. The participant instructs the plan to transfer the funds to the other spouse who then rolls them over into a deferred compensation account of his or her own. Each spouse will pay taxes on his or her share of the plan when the amounts are withdrawn.

### **§5:42 Defined Benefit Plans**

A defined benefit plan guarantees the employee a specific monthly benefit on retirement, based on predetermined formulas and actuarial assumptions. The employee (the "plan participant") does not have an account, per se, but rather the right to the periodic benefit on retirement. He or she is but one of many who share an indeterminate interest in the whole fund.

Defined benefit pension plans are complicated to value and require the services of an expert. Agreeing on a value for a defined benefit plan can be a challenge if each spouse decides to hire his or her own expert. Competing experts can come up with widely different values for the same plan depending on different assumptions they



make about the value of cost of living increases, expected interest rates, and the participant's anticipated retirement date.

### **§5:43 Determining the Marital Portion of a Defined Contribution or Defined Benefit Plan**

The formula for determining the marital portion of a retirement plan is:

$$\text{Months of Marriage} \div \text{Months of Employment} \times \text{Pension Amount} = \text{Marital Portion}$$

**Example:** A couple has been married for 64 months and the husband has been in his current position for eight years or 94 months. His defined contribution pension plan has a value of \$26,000. The marital portion of the pension is \$17,702 ( $64 \div 94 \times 26,000$ ). Assuming that the pension is to be split equally, the wife would receive \$8,851.

This formula is used for both defined contribution and defined benefit plans. However, the process for dividing a defined benefit plan is more complex. Unless the participant can buy out the other spouse's interest, the plan benefits will need to be divided in the future, not the present. *See §5:48 below.*

## ***Other Retirement Accounts***

### **§5:44 Stock Ownership Plans (ESOPs)**

In some cases, employers provide company stock to employees. If the stock is publicly traded, the valuation can be as simple as determining the market price for the stock as of the valuation date.

If the stock is not publicly traded (i.e., the company is closely held), valuing it can be problematic. Some closely held companies have never had a formal valuation of their stock performed. An expert will probably need to be hired to value the stock.

However, other companies have regularly valued their stock and passed the valuation on to their employees in a description of benefits. These types of valuations are often performed annually and can serve as an appropriate valuation of the marital asset.

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If the employee's total ownership in stock is small relative to the total shares of stock outstanding (e.g., less than 5%), accepting the valuation provided in the benefit statement may be appropriate. However, if the percentage is large (e.g., 50%), the owner of the stock has significant control over the company. This control has value that may exceed the declaration of value for benefit purposes. In these cases, valuation is best delegated to an expert.

### §5:45 Stock Options

Stock options can be difficult to value. A stock option is an offer of stock to employees at a specified price for a specified period of time.

**Example:** A company states to its employees, "You can purchase up to 100 shares of stock in our company for the price of \$100.00 per share. This offer is good for one year from the date of this offer."

If the market price of the shares of stock is \$85.00 per share, the employee would be unwise to participate. The shares are cheaper on the open market. However, if the market price of the shares of stock is \$125.00 per share, then participation is a real benefit, and the stock option has value.

Simplistically, the value is \$2,500.00  $[(100 \times \$125) - (100 \times \$100)]$ . However, the value can be affected by numerous factors including when the options were received or in some cases when they were exercised. Consequently, expert advice on the valuations of stock options should be considered when the amounts are material or the parties highly contentious.

Before seeking the advice of experts in the field of stock option valuations, you may want to consider a reality check. First, is the amount material? If the total possible exercised value of the options is small, it is more cost effective to estimate an amount for inclusion in the marital estate (or even eliminate them from consideration) than go through formal valuation procedures. Second, if the options cannot be exercised, they are of value to no one.

**Example:** A husband and wife had completed their post-divorce budgets. Money was tight. The husband held stock options that could have a benefit if exercised. The time period for participation ended in about six months. The husband claimed the options had no value, and the wife claimed that they did. The mediator who was assisting the parties in their divorce settlement asked the husband if he was going to exercise the options. He replied that he couldn't afford to and his budget confirmed as much. The mediator asked the wife the same question. She replied

that she couldn't afford to either and her budget showed that to be true. Since it was obvious that neither party could take advantage of the options, they were excluded from the marital estate.

### **§5:46 Deferred Payment Plans**

An employer could devise a plan to compensate employees in the future by making a series of fixed payments commencing when they retire. For example, a company could agree to a fixed amount of \$10,000 per year for ten years when the employee retires. There are other examples that could fall into this category. Because these plans are unusual, and the provisions may be complex, they may require the opinion of an expert for valuation.

## ***Retirement Plan Division***

### **§5:47 Defined Contribution Plans**

Defined contribution pension plans, as previously indicated, are fairly easy to divide between the parties in a divorce. Care must be taken to avoid unforeseen tax consequences. The division of these types of plans can be as simple as the participant instructing the pension plan administrator or financial institution to transfer funds to a retirement account established by his or her spouse. Some pension plan administrators or institutions may require an order from a court before any division or distributions are made. *See* §5:59 on Qualified Domestic Relations Orders, below.

### **§5:48 Defined Benefit Plans**

Defined benefit pension plans do not have funds that can be readily divided since they are promises to pay sums in the future.

One option for dividing the pension plan is for the plan participant to keep the entire plan and trade the other spouse sufficient assets to compensate for his or her interest in the plan. Pension plans can be valuable. Often, the family residence is the only asset with sufficient equity to enable an offset. This is a problem if the spouse who is to receive the residence cannot afford it. It is also a problem if the required payment to the spouse takes all of the current assets (such as cash) from

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the marital estate or requires the spouse with the pension plan to get a loan to pay the offset.

In some cases, an offset is possible; in others a reasonable payoff of the pension plan is not feasible. Then it will be necessary to divide the pension in the future instead of the present. When pension plans are to be divided in the future, a court order or QDRO will be needed. Several aspects of the plan should be considered in determining the non-participant spouse's share.

First, the percentage of the plan that will be awarded to the spouse must be determined. Assume that a husband and wife have been married for 20 years and the husband had been accumulating pension benefits for 25 years. The parties have agreed or a court has ordered that they divide the marital portion of the plan equally between them. The formula for the division of pension plan benefits is as follows:

|   |                             |
|---|-----------------------------|
| Months of marriage                      | $20 \times 12 = 240$        |
| Months of employment                    | $25 \times 12 = 300$        |
| Marital portion of pension              | $240 \div 300 = 80\%$       |
| Wife's percentage of pension            | $80 \times .5 = 40\%$       |
| Husband's total monthly pension benefit | \$1,500                     |
| Wife's portion of pension               | $\$1,500 \times .4 = \$600$ |

If the participant is still working and accumulating pension benefits, the number of months of employment will increase. This means that in order to preclude the other spouse from receiving benefits that are earned after the termination of the marriage, the percentage of months of marriage to months of employment must change.

Consequently, the court order or QDRO dividing the plan benefits will contain language similar to:

“The wife will receive 50% of the product obtained by multiplying participant's accrued benefit at retirement by the ratio of the months of Plan participation during marriage, which is 240 months, over the total number of months of Plan participation.”

This allows the percentage to change as benefits are accrued. In other words the numerator (240 months of marriage) will not change as the denominator (months of employment) goes up making the percentage of the total that the wife will get

go down. However, since the total amount of the pension is increasing, the wife will still get her fair share of the plan payments.

Another consideration in the assignment of future benefits is the longevity of the parties. On the average, women outlive men by approximately seven years. This means, for example, that if a pension is to be paid for the life of the husband, the surviving wife will be without pension benefits when the husband dies. As an alternative, the couple can agree (or a court can order) that a survivor benefit be purchased for the wife. This means that the total pension amount will be reduced in order to cover the cost of covering the wife for the rest of her life. The cost of the additional coverage can be born by both parties. In that case the survivor benefit is elected and the parties split the reduced pension amount. In other cases, it is reasoned that the wife is actually buying insurance for herself and that the reduction for the survivor benefit should only be assessed to her.

When a survivor benefit is not elected, a question can arise as to what happens to the non-participant's share if he or she dies before the participant. Since the benefit is dependent on the participant's life, it continues to be paid after the non-participant dies. If a provision is not made for the payments (e.g., the participant will receive them) they are made to the estate of the non-participant until the participant dies.

There are several advantages to dividing defined benefit pension plans in the future by means of a QDRO. First, the participant does not have to immediately come up with the cash or assets necessary to pay off his or her spouse. Second, speculations concerning the date of retirement become unnecessary. Third, cost of living increases that may be made by the pension plan do not have to be estimated. Any cost of living increases would automatically flow to the beneficiary's spouse by means of the division formula.

### **§5:49 Qualified Domestic Relations Orders (QDROS)**

A QDRO is a court order that instructs a pension plan administrator to divide the pension plan benefits to be received between an ex-husband and an ex-wife. A QDRO is normally prepared by the lawyer for the non-participant spouse.

Attorneys employed by the pension plan typically have written model QDRO language that they want to see in any order affecting their pension plan. Consequently, the lawyer writing the QDRO has to perform a balancing act. First, the lawyer must comply with state regulations, satisfy the lawyers of the pension plan administrator, and obtain the approval of the other spouse's counsel.

Usually the lawyer gets a sample of the plan's QDRO language, adapts it to state law, and gets the approval of opposing counsel. The lawyer then sends the QDRO to the plan administrator for preapproval before having the order signed by the court. The preapproval process avoids requiring the court to sign orders that do not meet the standards of the plan administrator. The preapproval process may require several amendments of the QDRO before acceptance.

When preapproval is obtained, the composing lawyer will then usually copy opposing counsel noting changes and the reasons behind the changes. After approval of the changes, the document is taken to court for the judge's signature. QDROS are usually not finalized until after the divorce is completed because plan administrators usually require the date of the divorce decree or even a certified copy.

## **VII. Overview of a Typical Property Settlement Negotiation**

### **§5:50 Laying the Foundations for Agreement**

It's best to begin negotiations by laying the foundations for agreement. The parties may begin by agreeing on the value of an easy to value asset, like a savings account. They then move through the valuation of the rest of the estate. By the time the parties are ready to begin actually dividing the marital estate, they have a foundation of agreeing on the valuation which should help them adopted a problem-solving attitude as opposed to an angry or defensive position.

The groundwork accomplished by building and valuing the marital estate will normally make the couple and their attorneys aware of the issues that they are most concerned about. Since the couple will be distracted by these issues, it is best to handle them first.

The division of marital assets can be negotiated and renegotiated on the road to a fair division, unlike the restrictions that are sometimes enforced by courts due to law or lack of imagination.

### **§5:51 The Home**

The couple may want to deal with their home early in the process. The home is likely to be the asset of greatest concern to most couples because of the emotions attached to it and the possibility of significant equity. If either or both spouses want to keep the home, they will need to first complete a budget. *See* Ch. 3. The budget will indicate whether either spouse can afford the home.

Once it has been established that one of spouse can reasonably assume possession of the house, the equity in it is credited to that person's share of the marital estate. The spouse taking the house will have to provide the other spouse with equivalent assets in compensation for his or her portion of the equity in the house.

In many cases neither party can maintain the marital home. If neither is willing or able to assume possession of the home, then a sale is another option. In this case, the couple can agree to split the proceeds from the sale equally or on some other ratio that both will perceive as equitable.

### **§5:52 Items Subject to Logical Division**

Once the home has been addressed, division of the marital estate will move onto other assets. A number of the assets (and associated liabilities) of the marital estate will be subject to a logical or natural division. For example, each spouse will take his or her clothing and toiletries and each will take his or her hobbies. The spouse charged with most of the transport of the children to and from school or to activities will take the family van and the other spouse will take the less child-friendly vehicle. A business should, logically, remain in the possession of the person who runs it on a regular basis or who has the best chance of making the business profitable.

### **§5:53 Retirement Plans**

Retirement plans are initially placed in the column of the individual whose earnings created them. However, these items may have extremely high value relative to the rest of the marital estate, and one spouse's plan may be worth significantly less than the other's. Thus, this assignment may ultimately need to be adjusted.

### **§5:54 Items of Sentimental Value**

The Items of sentimental value should go to the person for whom the articles have emotional value. For example, a scrap book of the children's formative years may have significant sentimental value to the person who compiled it and little to the other spouse. Family pets can be included in this category and should remain with the party who has formed an emotional bond with the animals.

### **§5:55 Remaining Tangible Assets**

After the high stress assets have been addressed and the logical asset divisions have been made, the rest of the marital estate can be dealt with. Examples of what might remain would be household effects, financial assets, and unsecured liabilities. As indicated in the section on household furnishings [*see* §5:22 above], the best way to dispense with these items is to divide them by utility. That is, the parties share the items that are necessary to live so that replacement costs are minimized.

### **§5:56 Financial Assets**

Financial assets that are equivalent to cash are usually the last assets to be divided in that they are easily transferable between the parties and can be used to equalize the marital estate division, or effect whatever type of division the couple deems to be equitable. The transfer of cash and cash equivalents between the parties normally does not cause problems.

### **§5:57 Property Settlement Case Study**

John and Jeanne James were committed to working out their property division without going to court. Despite some residual anger over the reason for their breakup (an affair that John swore was over but that Jeanne believed was ongoing), they were well advanced in the grief process and prepared to do the necessary work.

**Step 1:** As instructed by their attorneys, they completed their initial disclosures. These revealed that they owned a house with a mortgage, three cars with loans against them, and various household items and personal effects. John had a defined benefit plan from service in the Air Force. He had already retired from the



## CHAPTER - 5 PROPERTY DIVISION

service and was currently receiving benefits. In addition, both spouses had their own IRAs and savings accounts. They also had joint credit card debt.

**Step 2:** After their attorneys explained the concept of marital property to them, they agreed to remove certain items from the marital estate: a gun collection that had been left to John by his grandfather, a car that was purchased for their college age son, some camping and rafting equipment used primarily by their son that they decided to give him, and a diamond pendant that was to be given to their teenage daughter on her college graduation. They also agreed to remove some household items of minimal worth so they wouldn't have to be valued and to divide them up by utility.

**Step 3:** They next turned to valuing the remaining assets. They had agreed on a value for their home based on its purchase price, but their attorneys encouraged them to get an appraisal or at least a quote from a realtor. They decided to get a professional appraisal and were glad they did because their home turned out to be worth far more than they expected. They also had John's defined benefit plan valued by a pension expert and were shocked to discover it was worth so much. They used the Internet to determine a value for their vehicles and then went through the remaining items of personal property, doing appropriate market research to settle on a value. They only asset they had trouble valuing was a small art collection. They checked out the costs of having it appraised and decided they were excessive. They decided to remove it from the marital estate and divide it between them based on which pieces each liked best.

**Step 4:** Once they had agreed on a value for their assets, they began to negotiate, initially aiming for an equal division. Jeanne wanted the house and John was fine with letting her take it. Jeanne's budget showed that she could afford the house if she managed her money carefully. So the net value of the house (appraised value minus the mortgage) was put into Jeanne's column on the property settlement spread sheet.

They considered next John's Air Force pension. Jeanne wanted half. John thought the entire pension should go to him because his service had earned it. His attorney explained that the entire pension was marital property because the couple was married the whole time John was in the Air Force and a court would likely award Jeanne half. Reluctantly John agreed and half the value of the pension was entered into each party's column on the spread sheet.

They decided that each would keep the car they drove regularly along with its associated debt. The net value of each party's car was entered into the proper column.

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Next they went through the long list of household items and personal effects, each choosing what he or she wanted. The values were totaled and placed into the spreadsheet.

They agreed to keep their respective saving account balances and divide their credit card debt equally. The net result, shown on the spreadsheet below, brought them to a nearly equal settlement.

### ASSET DIVISION John and Jeanne James

#### ASSETS:

| Real Estate | Description            | Value   | Wife    | Husband |
|-------------|------------------------|---------|---------|---------|
| House       | 1313 Mocking Bird Lane |         |         |         |
| Value       | 265,000                |         |         |         |
| Debt        | 110,000                |         |         |         |
| NET         | 155,000                | 155,000 | 155,000 |         |

| Household Items and Personal Effects | Value  | Wife   | Husband |
|--------------------------------------|--------|--------|---------|
| See attached schedule for details    | 93,408 | 40,505 | 52,903  |

| Retirement Benefits     | Value   | Wife    | Husband |
|-------------------------|---------|---------|---------|
| United States Air Force | 357,000 | 178,500 | 178,500 |
| IRA (John)              | 168,000 |         | 168,000 |
| IRA (Jeanne)            | 47,500  | 47,500  |         |

| Vehicles | Description         | Value  | Wife  | Husband |
|----------|---------------------|--------|-------|---------|
| Car #1   | YY Volvo XKE        |        |       |         |
| Value    | 33,900              |        |       |         |
| Debt     | 6,500               |        |       |         |
| NET      | 27,400              | 27,400 |       | 27,400  |
| Car #2   | YY Studebaker Elite |        |       |         |
| Value    | 19,500              |        |       |         |
| Debt     | 13,500              |        |       |         |
| NET      | 6,000               | 6,000  | 6,000 |         |

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| Cash and Deposit Accounts | Value | Wife  | Husband |
|---------------------------|-------|-------|---------|
| Husband                   | 3,000 |       | 3,000   |
| Wife                      | 5,500 | 5,500 |         |

|                     |         |         |         |
|---------------------|---------|---------|---------|
| <b>TOTAL ASSETS</b> | 862,808 | 433,005 | 429,803 |
|---------------------|---------|---------|---------|

LIABILITIES:

| Installment Payment and Other Liabilities (Unsecured) | Value  | Wife | Husband |
|---|--------|------|---------|
| MasterCard  | 10,500 |      |         |
| Visa  | 7,500  |      |         |

|                          |        |       |       |
|--------------------------|--------|-------|-------|
| <b>TOTAL LIABILITIES</b> | 18,000 | 9,000 | 9,000 |
|--------------------------|--------|-------|-------|

|                                    |         |         |         |
|------------------------------------|---------|---------|---------|
| <b>NET VALUE OF MARITAL ESTATE</b> | 844,808 | 424,005 | 420,803 |
| Equalization (Wife to Husband)     |         | (1,601) | 1,601   |
|                                    |         | 422,404 | 422,404 |

**Alimony changes the figures.** Then Jeanne and her attorney brought up the subject of alimony. Jeanne believed she deserved alimony because John's income far outstripped hers. John was strongly opposed to paying alimony. Jeanne had a good job and was able to support herself. He had already given her half of his pension and that was enough as far as he was concerned.

Then Jeanne's attorney pointed out the difference in the value of their IRAs. Jeanne would never be able to put away nearly as much as John for retirement. John did see Jeanne's point, but still did not want to pay alimony.

John consulted with his attorney for possible solutions. One possibility was offering Jeanne some of the household items and personal effects John had chosen. But John really didn't want to give any of them up and Jeanne wasn't eager to take any of them. She wanted cash. Next John offered to give Jeanne the \$3,000 balance in his savings account plus \$25,000 from his IRA. Jeanne agreed. In the final settlement Jeanne got \$31,202 worth of assets more than John, but John did not have to pay Jeanne any alimony.

Jeanne's attorney wrote up their settlement agreement. After some back and forth with John's attorney to get the language just right, the parties signed it and

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submitted it to the court for approval. Jeanne's attorney also prepared a QDRO for John's pension plan, John's attorney approved it, the judge signed it, and Jeanne's attorney sent it to the plan administrator so that Jeanne could begin receiving monthly checks.

# **Chapter - 6 Taxes**

## **§6:01 Common Tax Questions Arising in Divorce**

The tax questions that come up most often in divorce fall into four general categories:

- What are the tax consequences of property transfers and sales incident to the divorce?
- How are alimony and child support payments treated?
- What filing status should the parties claim on their tax return(s) during and after the divorce?
- Which parent gets to claim exemptions and credits related to the children?

## **Property Transfers and Sales**

### **§6:02 Transfers of Property between Spouses**

As part of the property division, you may need to transfer your ownership interest in some assets to your spouse and vice versa. The transfers of assets and liabilities between spouses as part of a divorce are not taxable. The transfer is treated like a gift. As a general rule, the transfer should occur within a year after the divorce or be pursuant to a divorce judgment or settlement agreement.

### **§6:03 Sales of Assets**

Some of your assets may be sold and the proceeds distributed between the two of you as part of the property division. Unlike a transfer of ownership interests between spouses, the sale of assets may have tax consequences. For example, if a couple sells a property for \$100,000 that they purchased for \$80,000 they may have to pay taxes on the difference between the sales price and the purchase price. This difference is referred to as a capital gain.

If the property is the family home, some or all of the gain on the sale may be tax free. A taxpayer is entitled to exclude from income up to \$250,000 of gain on the sale of a principal residence, if the taxpayer:

- Owned and used the property as a principal residence for at least two of the five years preceding the date of the closing of the sale; and

- Did not exclude gain from the sale of another home during the two-year period ending on the date of the sale.

Spouses who file separate returns may each exclude up to \$250,000 of gain if they each meet the requirements. Spouses who file joint returns may exclude up to \$500,000 of the gain if each meets the requirements or if they satisfy special rules for joint returns. Divorcing taxpayers who do not meet the requirements may qualify for a reduced exclusion.

The rules governing when capital gains are taxable can be complex and advice from a tax expert is advised. When properties are going to be sold as part of the divorce process or are expected to be sold immediately after a divorce, the tax consequences should be determined in order to assess their effect on the equity of the marital estate and its division.

#### **§6:04 Distributions from Corporations**

In some cases, one or both of the parties in a divorce can own a part or all of a corporation. There can be significant tax consequences involved in transferring assets from corporations to divorcing parties in order to divide marital estates. Consultation with a financial expert is strongly advised if this type of arrangement appears likely.

### ***Alimony and Child Support***

#### **§6:05 Alimony Payments**

Alimony is normally included in the gross income of the recipient and is deductible by the payor. However, you and your spouse can agree to make alimony payments neither taxable to the recipient nor deductible by the payor. This agreement must be expressly set forth in your divorce judgment or marital settlement agreement.

The IRS has rules governing when payments made to an ex-spouse qualify to be treated as alimony. The payments must be cash paid under a divorce or separation decree or agreement. The ex-spouses must live in separate households and file separate returns. The obligation to pay must end with the death of the recipient and the payments must not be designated as child support in the divorce documents.

Once a proposed plan for alimony has been developed or a tentative agreement on the terms of alimony has been reached, your lawyers and tax advisors should assess the payments in light of current IRS regulations to ensure that they will get the tax treatment that you both expected.

### **§6:06 Tax Benefits for High Income Earners**

The deductibility of alimony actually results in the taxpayer's adjusted gross income being reduced by a dollar for every dollar of alimony paid. As a result, the high income earner realizes a tax savings of approximately one-third of the amount of the alimony paid. To put it another way, "Uncle Sam" actually pays one third of the high income payor's alimony obligation.

### **§6:07 Payments to Third Parties as Alimony**

Payments made to third parties for the benefit of a spouse or former spouse can qualify as alimony if they meet all of the other IRC factors. This means that one spouse may deduct amounts for some items that benefit the other spouse such as life insurance on the life of the payor when the recipient is the beneficiary, educational expenses paid for the recipient, and even mortgage and real estate taxes paid for the benefit of the recipient.

### **§6:08 Child Support**

Child support, unlike alimony, is neither taxable to the recipient, nor deductible by the payor. The parenting of the children should never depend on the associated tax consequences. You and your spouse should develop your parenting plan first and then deal with the tax consequences.

## ***Tax Exemptions and Credits Associated with Children***

### **§6:09 Exemption Allocated to "Custodial Parent" or by Agreement**

A parent can claim a dependency exemption for a child under 19 or a child 19 or older, but under 24 who is a full-time student for five months during the taxable year. In the absence of a contrary agreement or allocation by the court, the parent with whom the child lived for more than one-half the tax year is entitled to the exemption. In most cases, the divorcing parents agree on which of them will get the exemption. The parent who is allowed to claim the exemption (and the child tax credit that is assigned with it) can be designated by filing a Form 8332 with IRS or specifying the designation in the divorce decree.



Disputes over the right to claim a child or the children occur in nearly every case involving children, often before the parties have even considered the value to them of the exemption in dollars and cents. Keep in mind that the exemption amounts are phased out for high-income earners. Software programs can calculate the value of the exemptions and the related credits to the parties under multiple scenarios. It's wise to know how much the exemption will benefit you before you decide to fight over it.

As in the case of child support, the parenting plan should be developed first and the tax consequences considered later.

### **§6:10 Tax Credits**

There are two tax credits available to parents of certain dependent children. The child tax credit is a credit against tax liability available to parents of children under the age of 17. It is phased out for taxpayers who reach certain threshold levels of modified adjusted gross income, and these thresholds are set at relatively modest levels. In order to claim this credit, you must be able to claim an exemption for the child for whom the credit is claimed.

The second tax credit is the child and dependent care credit, which is also a direct credit against tax liability. The credit allows you to claim a credit for a portion of child care expenses, and does not require you to be able to claim an exemption for the child for whom the child care expenses are incurred. This credit is limited to child care expenses for children under age of 13.

### **§6:11 Deduction for Child's Medical Expenses**

Some tax benefits are not tied to the right to claim children as an exemption. One example is the right to deduct medical expenses paid on behalf of a child. Regardless of who claims the child as an exemption, the party paying deductible medical expenses for the child is entitled to deduct those expenses.

## ***Filing Status***

### **§6:12 While the Divorce Is Pending**

You and your spouse are entitled to file a joint return for the year if you are still married on December 31st. If a divorce judgment is entered prior to December 31st, you are barred from filing jointly for that year.

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Joint filing requires a degree of cooperation that can be difficult to achieve during a divorce, but for most couples it is the option that will result in the lowest tax bill. You can each file separately, but the tax rates for filing separately are significantly higher than those for joint filers.

Filing jointly is not always the better alternative. For example, if one spouse is paying temporary alimony during the divorce, he or she will not be able to deduct the payments from income, nor will the payments be includible in the income of the recipient spouse if the parties file jointly.

Another reason for filing separately may be concern about tax fraud. If you have doubts about the truthfulness of your spouse's income and expense deduction claims, it might be prudent to file separately. Generally, taxpayers who file joint returns are jointly and severally liable for any tax, penalties, and interest.

Therefore, when dealing with the best tax filing status to choose, a careful analysis of the various filing status possibilities should occur. Your divorce lawyer may refer you to a tax professional for additional advice.

### **§6:13 Innocent Spouse Treatment**

In some circumstances, the IRC gives "innocent spouses" relief from liability for understatement or underpayment of taxes. The requirements of the Code are complicated. If you have signed joint returns with your spouse and have concerns about the propriety of deductions, income reported, or any other matter indicating intent to understate or underpay income taxes, talk to your divorce lawyer. He or she may refer you to an independent forensic accountant to examine the returns and underlying data, and advise you about seeking innocent spouse relief.

### **§6:14 Post Divorce Filing Status**

Post divorce, one of you may qualify for head of household status. To qualify as "head of household," you must be divorced or separated under a decree of separate maintenance at the close of the taxable year, and have maintained the household for a dependent for more than six months of the calendar year. You must have paid more than one-half of the cost of maintaining the household.

# **Chapter 7 - Mediation and Collaborative Divorce**

## Why Try Mediation or Collaborative Divorce?

### §7:01 The Benefits of Settling Out-of-Court

The overwhelming majority of divorces are eventually settled out of court. Reaching an out-of-court settlement with your spouse has significant benefits:

- It is likely to be faster and cheaper than litigation.
- It is less confrontational than litigation.
- You and your spouse are more likely to abide by a settlement because you both have shaped its terms.
- You and your spouse will probably experience less conflict after your divorce if you reach a settlement, rather than go through a trial.

**Faster and cheaper.** The court system is clogged because too few judges are available to handle the high volume of cases. It can sometimes take as much as two to four years to bring a case to trial. Long waits to resolve family law cases take an emotional toll on the entire family.

Taking a case to trial is enormously expensive. You'll need to pay for depositions, experts, exhibits, and your attorney's time to prepare and try your case. Your spouse will incur similar expenses. Litigation expenses can eat substantially into the income and assets that are better used supporting you and your children.

**Greater compliance.** People generally find greater satisfaction in making their own decisions and compromises rather than having the decision made for them. Individuals who are actively involved in resolving their divorce issues are far more likely to move on with a positive outlook after divorce and to abide by the terms they have agreed on.

**Less conflict.** If you have children, even though your marriage might be over, you and your spouse will be connected as parents and grandparents for the rest of your lives. You will need to establish a civil, if not cordial, relationship with your former spouse. People who have assumed a significant role in the development of their post-divorce world are more invested in achieving successful, non-confrontational outcomes, than those who have had their future imposed on them by a judge. An agreement into which you both have had input is more likely to withstand the test of time and not generate post-judgment litigation. Once your

divorce is final, you do not want to return to court again and again until your children are grown.

### **§7:02 Methods of Achieving a Settlement**

You may be able to achieve a settlement through direct negotiations with your spouse or by negotiations through your attorneys. Many couples find that they need additional help and turn to mediation as an alternative. Collaborative divorce is another vehicle through which a settlement can be achieved.

### **§7:03 Is Mediation or Collaboration Right for Your Divorce?**

Mediation or collaborative divorce may be a good option for you if:

- You and your spouse need professional help sorting out the details of your divorce.
- You want to keep your divorce civil and avoid the drama and stress that typically accompanies litigation.
- You don't want to live with the uncertainty and loss of control by letting a judge decide.
- You want to avoid the expense of court hearings and trials.
- You want to keep the details of your marriage and divorce private.
- You are interested in a creative settlement that a judge might not have the time or authority to impose.

Collaborative divorce may be preferable to mediation if there is a power imbalance in your relationship. The primary goal of mediation is to get the parties to reach an agreement. The less strong-willed of the two can be disadvantaged particularly if the difference is extreme.

Mediation and collaborative divorce might not be appropriate in cases involving domestic violence, abusive behavior, or substance abuse issues.

## *Mediation*

### **§7:04 The Mediator's Role**

Mediation can be a useful tool for sidetracking and resolving even the most deeply entrenched positions, thereby saving you time, emotional effort, and countless thousands in attorney's fees and costs. Mediation allows you and your spouse to keep control over your future. While you negotiate the issues vital to your future, the mediator guides you to win/win solutions.

A mediator is a person who is trained and certified to assist divorcing couples in reaching an agreement before going to court. Some mediators are attorneys, others are therapists, and some are even CPAs. Mediators do not take either party's side and are not allowed to give legal advice, even when they are attorneys. They are only responsible for helping the couple reach an agreement and putting that agreement into writing.

### **§7:05 Issues that Can Be Mediated**

Mediation can be used to address custody issues, support issues, property issues, or all three. Sometimes mediation is required or ordered by the court before the case can go to trial. This is especially true when the issues to be resolved involve the children. Couples can also agree on their own initiative to try mediation.

### **§7:06 Goal of Mediation**

The goal of mediation is not necessarily to do what a judge would do, or achieve the outcome a judge would decree based upon the law and facts. The goal of mediation is to get you and your spouse to agree on disputed issues. Nevertheless, as you go through mediation, it's valuable to retain an attorney to advise you about your legal rights and responsibilities. Even though you can offer more or accept less than the law requires, you want to be fully informed when making these decisions.

### **§7:07 Choosing your Mediator**

There are several generally accepted mediation models. Some are essentially hands off. That is, the mediator is simply there to provide the neutral territory and act as referee. In others, the mediator is highly active in the process and

acts as a facilitator, constantly evaluating relative positions, equity, compliance with applicable laws, and seeking avenues of settlement. You want to choose a mediator whose style and methods best mesh with your needs. Your attorney should be able to offer you some suggestions for mediators based on his or her assessment of your case and both of your personalities.

Achieving a settlement may require assistance from experts other than a mediator. You may need asset valuations, pension plan valuations, child support calculations, psychological evaluations, business valuations, counseling, anger management classes, legal advice, financial advice, forms completion, and debt counseling. Naturally, no mediator is qualified to provide all of these services. Some mediators are well-connected in the expert community and can provide referrals for these services, which is another factor to consider in choosing a mediator.

### **§7:08 The Mediation Process**

Mediation is usually handled over a number of sessions to give the family time to come to terms with their transition. Mediation can be accomplished with or without attorneys present.

The initial session is usually an “Orientation Session.” It is designed to educate you about the mediation process and give you and your spouse a sense of whether you want to work with the particular mediator and whether mediation is likely to be successful in your case.

A typical mediation session lasts for about two hours, although some mediators will prefer shorter or longer sessions. Most divorces will require three or four subsequent sessions over a period of several months. However, some divorces can be done sooner and some take longer, depending on how well the spouses work together.

Working on a divorce is emotionally hard work. Spreading the sessions out over several months will give you time to assimilate new information, adjust your lives, and face the reality of the divorce. Providing time also allows the grieving process to advance. The further along you both are in resolving your grief over the loss of your marriage, the faster the divorce will progress. For more on grief and how it affects settlement, *see* Ch. 1.

Most mediation sessions are attended by both spouses and the mediator. Sometimes the mediator will meet privately with one spouse in what’s called a caucus to try to uncover the reasons why negotiations have stalled.

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**Example:** Jake and Joanne were trying to reach agreement on their family home. Both of them wanted it. An examination of their budgets showed that taking the home was not a realistic option for Joanne. She would have a very difficult time keeping up the mortgage payments unless Jake paid her significant monthly alimony, something he refused to do and a court would not likely award. Jake, on the other hand, could afford the home. Joanne adamantly refused to give Jake the home and insisted that, if she couldn't have it, it must be sold.

The mediator met with her in caucus and began by expressing genuine concern that keeping the home would put her in a position of constant financial distress. The mediator then asked Joanne for the real reason why she wanted it so badly. Joanne confided that after all the effort she had put into remodeling and decorating the home, she simply couldn't bear the thought of Jake's new girlfriend living in it. But she also couldn't bear to tell Jake the truth face-to-face. She was afraid she would break down and she didn't want him to see her in such a vulnerable state. The mediator asked Joanne if he could convey this information to Jake. Joanne agreed.

The mediator then met with Jake in caucus to explain Joanne's position. To move the negotiations forward and to keep his future relationship with Joanne civil for the sake of their children, Jake agreed to put the home up for sale and split the proceeds.

### **§7:09 Dealing with Parenting Issues**

Children and the related issue of child support normally entail high emotions and will often stymie mediation progress if they are not handled first. The very best way to handle children is to remove them from the equation as soon as possible. Children are not assets. Children are not bargaining chips. Threats associated with children are destructive and will significantly hinder the parties' ability to function as parents in the future.

A parenting plan should be developed first. It should be unrelated, except for the child support issue, to the economics of the divorce. Based on the parenting plan, a child support calculation should be performed. *See* Ch. 2 for more on parenting plans.

Once the parties have agreed on a parenting plan and the child support calculation is complete, it is best to segregate these issues from the rest of the divorce process. Allowing the parties to return to the topics incorporates them as components in



the division of the marital estate. For example, “I’ll let you have the kids one more night per week if you pay off the debt on my car.” Allowing this type of bargaining will reduce your integrity as parents. Dollars and other assets are only things. The emotions related to things, while they do exist, are nothing like the emotional impact of children. Mixing the two will elevate the emotional impact of things to the emotional impact of children. This will virtually guarantee to make a negotiated settlement incredibly difficult or perhaps impossible.

### **§7:10 Preparing for Mediation**

Before going to mediation, it’s a good idea to have a clear understanding of your goals. *See* Ch. 1 for more on goals. You won’t get to where you want to go unless you have some idea as to where it is you wish to end up. Even though you have goals, you will need to keep certain level of flexibility. A hard-line approach without some indication of a willingness to deal on some issues is the surest way to a quick and unsuccessful termination of the mediation process.

Your attorney can help you develop your game plan for mediation and identify any issues that are not negotiable (which should be few). Your attorney can assist you with strategies for handling your spouse’s or the mediator’s attempts to push you on non-negotiable topics. For example, you could say “I won’t do that, but I will…” and deflect the conversation back to a topic you are willing to give some ground on.

Your lawyer’s job is to assist you in determining which issues are of paramount importance, and therefore, have the least amount of negotiating room available, while identifying points of agreement or points that can be negotiated successfully. The mediator is trained to bounce off non-negotiable issues, and return to and attack them from different points and perspectives. Your lawyer can prepare you to deal with this approach.

Once again, successful mediation is most often achieved by parties who are prepared to convince their spouse and the mediator that while there is no room to negotiate on one issue, the door is open to compromise in another. It is entirely common for folks, when confronted with firm resistance to negotiation on a particular issue, to decide that their position on the issue isn’t worth the defeat of the mediation process. This is not, however, going to happen unless that person feels that compromise is a two-way street.

### **§7:11 Advantages of Mediation**

Mediation has numerous advantages. They include a decrease in post-divorce conflict, effective (peaceful) communication about the children and their needs, and a process to handle conflicts that arise in the future. Mediation also allows parents to be creative in handling parenting issues. For example, a court may not care (or have the time) to listen to the parents' ideas on a schedule for the children. The judge may simply allow the father every other weekend and maybe Wednesday evenings. However, in mediation, the parents can agree to change their parenting schedule weekly to accommodate the peculiarities of their jobs.

Matters of mediation do not become public record as they do in a court trial. Mediation is confidential, so the whole world doesn't know your private business.

Mediation is cost-effective. Money that would have been spent on depositions, motions, and trial preparation can be saved for your future.

Mediation sessions can be scheduled in a reasonable amount of time and at your convenience. You won't have to wait months or years for a court date.

Even if mediation is only partially successful, it can reduce the number of issues that will actually need to be litigated saving the court and your attorneys time, and you money. In short, mediation presents a useful tool to shortcut the litigation process and invest you and your spouse in your individual future success.

## ***Collaborative Divorce***

### **§7:12 Why Collaborative Divorce Was Developed**

The legal system is ill-equipped to deal with the emotional nature of the divorce case. The court system produces a winner and loser and a finality that doesn't match the reality of divorce. Labeling one spouse in divorce as a "winner" and the other as a "loser" is undesirable and unnecessary and certainly where children are involved, there is no "finality."

The inadequacy of the court system sparked the creation of the collaborative divorce model. Collaborative divorce offers an attractive alternative to couples who hope to achieve the greatest good for everyone in the family, especially their children.

### **§7:13 How Collaborative Divorce Works**

Collaborative divorce is founded these basic principles: (1) resolution of all issues without a court trial; (2) a mutual, free, and voluntary exchange of information; (3) maintenance of a climate of civility and respect; (4) a fair resolution that achieves the best interests of each family member.

Each spouse hires an attorney to provide him or her with advice and representation, but the parties' expressed intention is not to litigate, but rather to negotiate a settlement that treats everyone fairly. The spouses and their attorneys get together in a series of negotiating sessions called four-way meetings to work out the issues and arrive at a complete settlement agreement.

The attorneys commit to withdraw from further representation and not take part in litigation should the collaborative process be unsuccessful.

### **§7:14 The Collaborative Divorce Participation Agreement**

The collaborative process begins when both spouses and their attorneys sign a "Participation Agreement" incorporating promises to abide by the collaborative divorce principles and an agreement that the attorneys will withdraw if the collaborative process fails to produce an agreement.

The participation agreement also typically provides that neither party will attempt to take advantage of mistakes by the other or by the attorneys. This provision is intended to eliminate the "gotcha" moments that can occur in court and to make sure that the final agreement is fair and not based on incorrect information or law.

The parties agree not to disclose, or attempt to use in subsequent litigation, anything that is said or done during the collaborative process. This confidentiality provision encourages the parties to speak freely and candidly, and keeps the parties' personal and financial business out of the courtroom and away from the public eye. *See* §7:15 below for a sample participation agreement.

### **§7:15 Sample Collaborative Divorce Participation Agreement**

Below is a typical collaborative divorce participation agreement. It will give you an idea of the provisions that are usually included. The actual agreement you and your lawyers sign may be somewhat different and may be tailored to your particular circumstances.

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### Collaborative Divorce Participation Agreement

We,

\_\_\_\_\_, Party I

\_\_\_\_\_, Lawyer for Party I

\_\_\_\_\_, Party II

\_\_\_\_\_, Lawyer for Party II

agree, from this date, \_\_\_\_\_, forward to conduct the family law matter for which the lawyers have been retained in the process of Collaborative Law as follows:

**1. Commitment to avoid litigation.** We commit ourselves to avoid litigation as in the best interests of the parties, the children, and the family. We commit ourselves to the Collaborative law process and agree to use all alternative dispute resolution methods to resolve the family law matter justly and equitably.

**2. Conflict resolution by cooperative means.** We adopt the Collaborative law method of conflict resolution, which has been fully explained to the parties. This process does not rely on a court imposed resolution, but rather relies on an alternative dispute resolution mechanism. We agree to deal with honesty, cooperation, integrity, and professionalism to work toward the long term future well being of the parties, the children and the family.

We will maintain the highest standards of honesty and integrity and shall not take advantage of each other or of the miscalculations or mistakes of the other, but shall identify them and correct them.

**3. Minimize negative effects of dissolution of marriage.** Our goal is to minimize the negative economic, psychological, and emotional consequences of litigation to the parties, the children and the family.

**4. No court intervention.** We agree to settle the case without court intervention. We will ask the court, if the case is filed, to adopt this agreement as our stipulation and memorialize it as a court order.

**5. Open and full disclosure.** We agree to give full, honest, and open disclosure of all relevant personal and financial information, whether requested or not.

**6. Retention of experts and consultants.** If experts are needed, we will consult with them and retain them jointly, unless all parties and lawyers agree otherwise

in writing, all of whom shall be given a signed copy of this agreement. We agree to direct all attorneys, accountants, mental health or medical or dental professionals, appraisers and consultants retained by us to work in a cooperative effort to resolve issues without resort to litigation and that they shall give full, honest, and open disclosure of all information, whether requested or not.

**7. No guarantees.** We understand there is no guarantee that the collaborative process will be successful and that we will ultimately succeed in resolving our case without court involvement. We understand that we are still to advocate for our respective interests with the assistance of the lawyers.

**8. Understandings regarding role of lawyers and disclosures.** We understand that although our lawyers are committed to the Collaborative law process, each of them has a professional and ethical duty to represent his or her own client diligently and is not the lawyer for the other party.

We understand that each attorney who has entered into this collaborative process pursuant to this Agreement has full ethical responsibilities to his or her individual client regardless of whether he or she is attorney of record in the court case. We understand and agree that the lawyers have ensured that the parties understand the advantages and risks involved with the Collaborative Law Process. For example, we specifically understand that if the process fails, the parties are likely to incur additional expenses and delays because of the need to hire new lawyers who will not have the benefit of the information gathered in the collaborative law process.

We understand the requirement for a party to voluntarily make necessary disclosures to the opposing party and this has been clearly explained to the parties. We understand that consent should always be obtained prior to any specific disclosure. We understand that the lawyer must always allow the party to make final decisions, after consultation with the lawyer, as to the objectives of the representation. For example, if a party decides to no longer pursue this process, even against the lawyer's advice, the lawyer must abide by the party's decision. We understand that if the lawyer and the party no longer are in agreement to pursue the matter according to the collaborative law process, and a court action has been filed, the lawyer may move to withdraw.

We agree to pay our lawyers for their services as set forth in the fee agreements we each have executed with our respective lawyer. We agree that each lawyer will be paid. The first task is our commitment to ensure parity of payment to each of them. Any agreement we reach contemplates full payment of our lawyers and we agree to make funds available for this purpose.

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**9. Child(ren)'s issues.** We agree that amicable resolution of our disputes is in the best interests of our child(ren). We agree to insulate our child(ren) from involvement in our case and in any present or future disputes. We will attend individual counseling to deal with our emotional issues related to the breakdown of our marriage so that we will be in a position to act quickly to mediate and resolve differences related to the child(ren) to promote shared parental responsibility, joint decision making, and a caring, loving, and involved relationship between the child(ren) and both parents.

We will hire any experts in families and children to assist us and join us in any negotiation and mediation sessions to assist us to reach amicable solutions that meet the best interests of the child(ren). However, we agree not to seek a custody evaluation while we are in the collaborative law process.

**10. Good faith negotiations.** We agree that we shall use our best good faith efforts in the collaborative law process. We agree to be reasonable and follow reasoned interests in our negotiations and mediations. Even with full, complete and open disclosure and the assistance of jointly hired experts, as needed, to participate with us in the process, we understand that negotiations will be vigorous and our individual lawyers are independent from the other, each represents only one party in the process, and will advocate and protect his or her client's interests. Where interests differ, we agree to use our best efforts to compromise to reach amicable resolution of all issues. We agree to use our best efforts to create proposals that meet the fundamental needs of the other party, the child(ren), and the family.

**11. Withdrawal from the collaborative process.** We fully understand the reasons for possible withdrawal of our lawyers from the case as set forth above. We also acknowledge and understand and agree that the lawyers will withdraw as soon as possible upon learning that one of the parties has withheld or misrepresented information or has otherwise, by action or inaction, undermined or taken advantage unfairly of the process or the party or the lawyer. Examples include, but are not limited to, failure to complete agreed tasks and interventions, such as individual counseling, parenting classes, or mandatory disclosure as agreed and in the time frames agreed, as well as dissipation or secretion of marital assets, hiding, selling giving away of marital assets, failing to disclose assets or liabilities, whether designated as marital or non-marital, failure to participate in good faith and using best efforts, domestic violence, or actions to the detriment of the minor child(ren) or the parties or the family.

**12. Termination of collaborative law process.** We understand and acknowledge that the lawyers' representation is limited to the collaborative law process and that if this process does not reach amicable resolution, that neither of the lawyers will

ever represent either of the parties in court in a proceeding involving the parties. All of the disclosure, information, notes, memoranda, etc. gathered and compiled shall be considered inadmissible work product of the collaborative law process unless all parties and all lawyers to this process agree otherwise in writing. Each lawyer is prohibited from turning over his or her files to the parties and each is disqualified from representation of the client in any court proceeding, unless all parties and all lawyers to this process agree otherwise in writing. In the event the collaborative law process terminates, all experts, consultants, financial or otherwise may not release their files, all of their work shall be deemed inadmissible as evidence, and they will be disqualified as witnesses, unless all parties and all lawyers to this process agree otherwise in writing. We understand the harshness of the prohibitions and the cost and expense that will be duplicated by the prohibitions and agree specifically to this termination process as in the best interests of the parties, child(ren), and the family, as a further impetus to amicable resolution using the collaborative law process. We agree that any court action taken by any party or any lawyer automatically terminates the collaborative law process.

We hereby agree to all of the terms and conditions herein, enter into this agreement freely and voluntarily, understanding and acknowledging the benefits and detriments of the collaborative law process to which we agree to be bound. We agree to comply with and use our best efforts to amicable resolution using the procedures set forth herein.

|                    |                    |
|--------------------|--------------------|
| _____              | _____              |
| Party 1            | Party 2            |
| _____              | _____              |
| Date               | Date               |
| _____              | _____              |
| Lawyer for Party 1 | Lawyer for Party 2 |
| _____              | _____              |
| Date               | Date               |

**§7:16 The Collaborative Team**

The collaborative divorce process is often a team effort. In addition to each spouse’s collaborative attorney, the spouses may decide to call in a financial specialist for advice and help with their property division and support issues, or a child specialist for help with the division of parenting rights and responsibilities, or both. In addition, each spouse may decide to work with his or her own divorce

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coach, a mental health professional who will help work through the emotional issues.

These experts work as neutral advisers, rather than for one spouse or the other. Their advice should be based on their true analysis and opinion, rather than a financial motivation to deliver advice that serves the purposes of the individual who hired them.

### **§7:17 Differences Between Collaborative Divorce and Mediation**

Collaborative divorce and mediation are both alternative dispute resolution methods that attempt to eliminate the contentious and expensive process of contested litigation, and allow the divorcing spouses to develop their own solutions. There are differences between the two.

- In mediation, a neutral mediator meets with the parties and attempts to work through all the issues to a satisfactory conclusion. In collaborative divorce, both parties have lawyers and possibly additional specialists to work as a team to reach a settlement.
- Spouses involved in mediation do not have to “fire” their attorneys and switch counsel if the mediation process fails. They will continue to represent their clients through a traditional court divorce. In collaborative divorce, if the negotiations break down, the attorneys will withdraw. The parties will have to hire different lawyers to handle their divorce.
- Mediation sessions often occur with only the spouses and the mediator present. Lawyers advise their clients outside of the mediation sessions. Collaborative lawyers attend all negotiation sessions with the couple and offer advice and propose solutions.
- The goal of mediation is to get the parties to say “yes,” regardless of the fairness or legal accuracy of the agreed-on outcome. The mediator is a facilitator, and cannot and does not give advice to the parties. The goal of the collaborative process is to treat everyone fairly and create an outcome that achieves that goal.
- Mediation does not require a mutual expression of respect and commitment to courtesy, and mediation sessions quite often involve a bit of “spleen venting,” before achieving a successful result.



# **Chapter 8 - Litigation**

## Your Deposition Testimony

### §8:01 What Is a Deposition?

A “deposition” is part of the larger process known as discovery. The idea behind discovery is to encourage settlement by requiring parties to disclose all of the information they have concerning the issues pending in the divorce. You will be required to provide documents, such as tax returns, paystubs, bank records, etc., during the discovery process. You may also have to answer written questions known as interrogatories. The deposition is the culmination of that process of disclosure.

A deposition is a sworn statement, taken in the office of one of the lawyers, before a court reporter who takes a transcript of everything that is said. Your spouse’s lawyer will ask you questions, and you will be required to answer those questions. In a discovery deposition, very few questions can be objected to, although often, questions that you must answer at your deposition cannot be asked of you should your case proceed to trial before the judge.

Depositions are not taken in every case. You and your lawyer will discuss whether it is necessary for your lawyer to take the deposition of your spouse, because there are expenses involved that might not be warranted given the facts of your case. Generally, if your spouse’s lawyer wishes to take your deposition, your lawyer will take the deposition of your spouse.

### §8:02 Why Is Your Deposition Being Taken?

Your spouse’s lawyer will have three separate and distinct goals in taking your deposition:

- To discover information.
- To commit you to a particular answer, so that it will be difficult for you to change your position later.
- To see what it takes to rile you and cause you to make a mistake or look bad. The lawyer can then try those tactics on you if you later have to testify in court.

You can expect your spouse’s lawyer to do whatever he or she can to throw you off guard such as, change topics and jump around to different issues, and be argumentative and obnoxious or repetitious. It is a test run for trial.

### **§8:03 Preparing for your Deposition**

A deposition is like a play, an artificial environment for which there are set rules and regulations. Your spouse's lawyer will likely begin by using a friendly conversational tone to get you to relax and let your guard down. But make no mistake, a deposition is not a conversation and your spouse's lawyer is not your friend. Expect some distractions, both intentional and unintentional, such as your spouse feverishly writing or making noises or grimacing. You'll need to ignore them.

Being a good witness is a learned skill. Before your deposition, your lawyer will meet with you to go over the rules and explain what you should expect. Your lawyer will also advise you on what questions you are likely to be asked and will take you on a dry run. Your lawyer will probably try on you some of the tactics you can expect from your spouse's lawyer so you can practice staying calm under stress.

Here are the most important rules for you to remember when testifying at your deposition:

- Listen carefully to the question and wait a moment before answering in case your lawyer objects to the question.
- Answer the question truthfully, but only if you understand it. If you don't, ask for the question to be repeated, or rephrased. You don't have to answer a question that you don't understand.
- Answer only the question asked and do not volunteer more information than the question requires.
- Before answering, think of which of the three purposes of depositions the question is seeking. If you recognize that the purpose of a question is to antagonize you, you are more likely to maintain your composure.

If you feel like you can handle more advice, read through §§8:13-8:18. These sections provide advice for testifying at trial, which is also useful for deposition testimony.

Your case won't necessarily need a trial just because you and your spouse both give depositions. In fact, parties often settle after seeing how they each perform on their deposition. The better you do at your deposition, the more likely you are to receive a favorable settlement offer.

## **Deciding Whether to Take your Case to Trial**

### **§8:04 Avoid a Trial if Possible**

The outcome of a divorce trial is very rarely satisfying to either side. Divorce litigation generates very few clear-cut winners and losers. It tends to be bitter and very personal. Before taking your case to trial, you should have in mind a specific goal that you hope to achieve. And you should understand that total victories, i.e., getting everything you want, are rare.

A settlement agreement, even when it doesn't give you everything you want or think you deserve, is almost always better than taking a case to trial. At least you had some input into the bad agreement and you know what you are getting. If you go to trial, you will be letting the judge, a complete stranger, decide what is going to happen to your children and everything you own. The judge will make this momentous decision after seeing you and your spouse sporadically, if at all, during the worst time of your lives, and after hearing a just few hours of testimony and some arguments.

You owe it to yourself and your children to make every effort to avoid a trial, and explore every opportunity for settlement. To be sure, some cases need to be tried because of factual disputes or legal issues that simply cannot be negotiated. These are few and far between, and almost always involve significant amounts of money.

### **§8:05 Especially in Custody Cases**

Custody cases should rarely be tried. Good parents, caring parents, understand that they brought children into this world, and that they have a responsibility to get them through their minority years as physically and mentally healthy as possible. They sit down with the help of a therapist, mediator, attorney, or whatever other professional they need and work out arrangements for custody that truly serve the best interests of their children, not just pay lip service to it. The trauma of divorce on a child is unimaginable by an adult because adults no longer remember what it was like to think like a child.

The adversarial legal system is the worst way to determine what is going to happen to your children; it is only one step above Solomon's suggestion of cutting the baby in half. There are no "successes" in custody cases, only survivors. Unless your case involves unusual circumstances that genuinely jeopardize the safety and

well-being of your children, reach a parenting agreement with your spouse. *See* Ch. 2.

### **§8:06 Do a Cost-Benefit Analysis**

When considering whether to go to trial, make sure to discuss the following questions with your lawyer:

- What particular goal or goals do you think are attainable at trial that settlement cannot achieve?
- Why do you believe that trial will succeed where negotiations have failed?
- How do you plan on convincing the court that the judge's recommendations for settlement should not be implemented in a final judgment?

Unless you and your lawyer can come up with satisfactory answers, you are better off settling.

The decision to go to trial should be based on objective criteria and a cost-benefit analysis. You may feel that your spouse's last settlement offer cheats you or that the judge is being stingy in his or her pretrial recommendations. While both may be true, you have to factor in the costs of trying the case, the likelihood of getting a better result, and the risk that you won't. The costs of trial could easily outweigh any gain you achieve.

For example, if your spouse offered a 55/45 split of the marital estate in your favor, and you think you should get a 60/40 division, determine what the 5% difference means in dollars and cents. Is it worth spending \$10,000 to try the case to recover an extra 5% when the entire marital estate is only valued at \$100,000.00? How will you feel if you get even less than your spouse offered?

Similarly, if the judge recommends support of \$1,000 per month for your 15-year-old, and you think the correct amount should be \$1,200 per month, how much time and money do you want to spend convincing the court to order the extra \$7,200 to be paid over the next three years until your child reaches 18 and is no longer entitled to support?

On the other hand, when significant money is at stake, cases should go to trial because the risk-benefit analysis indicates that the potential reward outweighs the costs.

**§8:07 Focus on the Economics in Making Your Decision**

Do your best to focus on the economic, not emotional, aspects of taking the case to trial. Going to trial based on emotional considerations, such as a desire to punish your spouse or prove a point, is a bad, and usually dangerous, thing to do. Taking the case to trial for emotional reasons is bad because it damages your post-divorce relationship with your ex-spouse, which generally means ongoing bitterness, post-divorce litigation, and continuing harm to the children.

Taking the case to trial for emotional reasons can be dangerous because judges often recognize the spouse's motivation. In an area of the law like divorce, where there are few black and white rules and the judge has large gray areas of discretion, the emotionally motivated litigant tends to fare poorly.

No litigant is going to be completely satisfied by the judge's decision, regardless of outcome. No decision goes precisely the way either litigant wishes. It is far better for two people to come to an agreement of their own than to have a stranger tell them what is going to happen to them and their children for the rest of their lives.

The decision of whether to go to trial is yours alone to make. Make sure it is an informed decision. By the time you are considering trial, your lawyer should have a good handle on the facts, issues, and applicable law, as well as the judge's inclinations. Although your lawyer cannot ever state with dollars and cents the certainty of the outcome, he or she ought to be able to give you an idea of the range of outcomes to expect from at trial. Your lawyer should also be able to give you a good idea of how much a trial will cost including attorney's fee, expert witness fees, deposition fees, and transcript fees.

Make sure you have all this information before you make your decision. Don't become one of the tens of thousands of people who embark on expensive divorce litigation every year without the faintest notion of what that litigation is going to cost them or a realistic idea of what they can expect to achieve.

## **If You Decide to Go to Trial**

### ***The Judge***

#### **§8:08 Understand the Judge's Role**

Divorcing couples often want to go to court because they misunderstand the role of the judge in family law proceedings. They believe that the role of the court is to mete out justice. That is, they believe, once the court hears all of the awful, despicable, horrid things his or her spouse has done, the court will decide everything in his or her favor. They also can believe that the judge will punish misdeeds that occurred during the marriage or the divorce. Actually, in this age of no-fault divorces, this is rarely the case.

The role of the court in a family law case is to end the dispute between the parties. The ideal situation arises when equity and justice are realized in ending a dispute. However, the main goal and design of the court is to simply end the hostilities. This usually means granting a divorce to the couple. Therefore, the judge only wants to hear those items that are necessary for him or her to grant the divorce. The judge is not going to care who did what to whom. As long as it wasn't a criminal act, it probably is not relevant. The judge is also normally under severe time and resource constraints. Arguing about who gets the food processor and who get the espresso machine, for example, will normally be considered a waste of the court's resources.

#### **§8:09 Issues That Might be Decided by the Judge**

Even if you decide to go to trial, you don't necessarily have to leave everything up to the judge. If you and your spouse can reach an agreement on some issues, these will not be part of your trial. Even a partial agreement is better than no agreement and will reduce the costs of your trial and possibly the animosity between you.

Depending on what you have been able to agree on, you can ask the judge to decide one or more of the following issues.

#### **Children**

- Is legal custody (i.e., decision-making authority) to be joint or sole?

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- If sole, which parent will have it?
- Is physical custody (i.e., where the children live) to be joint or sole?
- If sole, which parent will have it?
- What visitation/timesharing schedule will the parents have with their children?

### **Child Support**

- What is a parent's correct income available for child support?
- What amount of child support should be ordered?
- Should child support deviate from the state guidelines?

### **Property**

- Is a specific asset or liability part of the marital estate to be divided or is it the separate property of one spouse?
- As of what date is marital property to be valued?
- What is the value of one or more assets in the marital estate?
- How are the assets and liabilities to be divided?

### **Alimony**

- Is one spouse in need of/entitled to alimony?
- Does the other spouse have the ability to pay?
- What amount of alimony is appropriate?
- How long should alimony continue for?

## ***Witnesses***

### **§8:10 Deciding What Witnesses You Need**

You and your spouse will probably have to testify at your trial. Most of the time you will need additional witnesses to testify about facts beyond your personal knowledge or to provide some expertise to sway the court in your direction. To figure out what witnesses you need, your attorney will identify the facts you need to prove your case. Then, with your help, your attorney will determine who can establish these facts in court within the parameters of the rules of evidence.



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When expert witnesses, such as a real estate appraiser or forensic custody evaluator, are needed, it is sometimes possible for both parties and their attorneys to agree on one expert. This saves time and money. If you agree on one expert, you can reserve the right to secure a “second opinion” if the agreed on expert’s opinion is far different from what you expected.

Some common issues and witnesses who can address them are listed below. You won’t necessarily need all of these witnesses for each issue. You and your attorney will need to decide which witnesses can best present your position and fit within your budget. Every witness should have a purpose for testifying, and the witness should know what purpose his or her testimony serves.

| Issue  | Possible Witnesses  |
|--|---|
| Best interest of child (custody)             | Forensic custody evaluator, parties, family members, teachers, religious figures (priest, rabbi, Imam, pastor, etc.), coaches, neighbors, therapist, school counselor.  |
| Physical condition of a child/party          | Treating physicians, parties, school nurse, neighbors, co-workers, friends, family, independent examiner, keepers of medical records.   |
| Mental condition of a child/party            | Forensic custody evaluator, parties, therapist, school counselor, treating doctors/psychologists, keepers of records (school or psychological).   |
| Valuation of a Business                      | Business accountant/CPA/bookkeeper, retained expert witness, parties, tax preparer, other shareholders/partners, officers/directors, human resource personnel, individuals from whom or to whom an interest in the business was bought or sold, counsel for the business. |
| Income (cash flow) of either or both spouses | Parties, retained expert, accountant, CPA, tax preparer, keeper of bank records, friends and acquaintances, family members.   |

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| Issue  | Possible Witnesses  |
|--|---|
| Characterization of gifts/income as marital or non-marital | Donor, parties, preparer of tax returns (gift and income), other siblings or recipients.  |
| Ability of either spouse to work                           | Parties, vocational/occupational experts, health professionals, treating or retained, co-workers, past employers.                                     |
| Need of one spouse for alimony                             | Parties, economists/accountants as to future investment income/need projections.  |
| Retirement/pension plan value                              | Actuary as to present value and future income projections, plan administrator/representative as to mechanics of payments, plan rules and regulations. |

### §8:11 Choosing the Best Lay Witnesses

Your lawyer will rely on you to suggest lay witnesses. These are witnesses that are not being paid to conduct an investigation or evaluation and offer an opinion. Your lawyer will interview people you suggest and prepare them to provide testimony. Your lawyer may decide not to call all of them.

Your lawyer will decide what is important to establish the themes you have selected, and put on the best witnesses. Some people are better at testifying than others, and you want the best.

### §8:12 Your Children as Witnesses

Calling children as witnesses in a divorce is a bad idea. Children are inherently unreliable witnesses. Their testimony can change from night to day depending upon the way a question is asked. A child will tell you exactly what he or she thinks you want to hear. For example, if you ask a child in the presence of her mother who she wants to live with, she will respond, “Mom.” She will respond, “Dad,” in the presence of her father. Finally, and most significantly, forcing a child to provide testimony, even in the best of circumstances, will be a traumatic experience. The child will be pitted against one parent or the other. The enduring bonds between parent and child will be damaged and, consequently, the child will be damaged.

## **Preparing to Testify**

### **§8:13 Avoid Showing Hostility**

Nearly every lay witness in a divorce trial, yourself included, is rooting for a particular outcome. As a result, you and your witnesses may bring a zeal to your testimony that can be counterproductive to your case. For example, you, or one of your witnesses, may exhibit enmity for the other side, or opposing counsel. Notwithstanding your personal feelings, allowing anger or dislike of the other side or opposing counsel to bubble over in the courtroom is going to hurt your case and damage your credibility with the court.

Avoiding open hostility is a tall order for some witnesses, particularly those closest to you, such as parents and siblings. Sometimes your lawyer may decide to limit their testimony or keep them off the stand because, as much as they want to help, their testimony is more likely to hurt your case.

### **§8:14 Follow These Three Cross-Examination Rules**

Your spouse's lawyer is entitled to question (cross-examine) you and each of your witnesses. The three key rules to follow during cross-examination are:

- Don't debate opposing counsel.
- Remain calm. Do not lose your temper.
- Keep your answers short and focused on the question asked.

### **§8:15 Avoid Debate with Your Spouse's Lawyer**

Being combative with opposing counsel will get you eaten alive. No matter how smart or clever you might be, entering into a verbal battle with even the worst of lawyers is not going to end pleasantly. A combative lay witness will lose credibility with the court, and most likely will not be able to weather the storm unscarred.

You and your witnesses should keep it simple and maintain a calm demeanor. This will do the most good for your case and will have the added benefit of keeping cross-examination short, thereby minimizing the time spent in an uncomfortable situation.

### **§8:16 Keep Your Answers Short and Focused**

Keep your answers to cross-examination questions short and crisp and avoid long-winded narratives.

All too often, witnesses think too much. When asked a question, they start a mental process that usually leads to disaster. “Why is he asking me this? If I say this, then he might ask me that next. Then he’s going to ask about that, which I really don’t want to talk about. I’d better try to explain this, so that he will understand/like me/believe me/be convinced I am or my friend is a good guy, and his client is very bad. But what happens if he doesn’t ask me that later? I’d better say it now just to be sure he gets it. All right, what was the question again?”

Don’t let your mind run away with you like this. Focus on the question being asked, and answer the question asked, in as few words as possible.

### **§8:17 Anticipate These Trick Questions**

You and your witnesses can expect to be asked certain “trick” questions by your spouse’s attorney. For example, a party’s mother (or other relative or friend) will probably be asked, “Mom, you’re here today to help your son, correct?” The correct answer to that question is, “I’m here to tell the truth.”

Also, you and your witnesses will likely be asked if they talked to your lawyer about their testimony, and if your lawyer told them what to say. There is nothing wrong with talking to your lawyer about your testimony. Answer “yes,” to that question. Tell the judge what your lawyer told you to say, which should be: “The truth.”

### **§8:18 20 Tips for Good Testimony**

By following these suggestions when you testify, you can contribute to the success of your case. These tips will work, both for you, and your witnesses.

- Tell the truth. You can do no greater damage to your case than not telling the truth. No matter how damaging you might think the truth to be, it is never as damaging as a lie.
- Be yourself. Do not attempt to portray yourself as someone you are not. A lack of sincerity is almost as devastating to your case as not telling the truth.

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- Look the judge in the eye when you are testifying.
- Watch your body language as sometimes people who are not telling the truth look away, look up, or take a protective stance. The judge will notice.
- Pauses are okay. If you are nervous, it is okay to say out loud that you are nervous, once.
- If you realize you have made a mistake, correct it. No one has immediate and perfect recall of every fact or conversation. If you are confronted with a document or some prior statement that conflicts with your testimony, do not be afraid to say “I made a mistake.”
- When answering a question from the opposing counsel, take a brief pause to give yourself a moment to think. This thinking time will also give your lawyer a chance to object to the question before you answer it.
- If your lawyer objects to a question, wait for the court to rule on the objection. Don’t answer the question unless the court overrules the objection and tells you to answer.
- Listen to the question. Let the questioner complete the question before answering. The court reporter can only take down what one person is saying at a time. If you are talking over the question, the reporter will have a more difficult time. Also, you might think you know the question being asked, but find out it is not what you thought.
- Be sure you understand the question. Never be afraid to say, “Could you repeat that? I don’t understand your question.” Never answer a question you don’t understand.
- Focus on answering the question that you are asked. Do not attempt to analyze why you are being asked this question, or what the next question will be, or what you will be asked in 10 minutes. Answer the question asked, as if it were the first, last, and only question you will be asked.
- Don’t guess or estimate unless you are asked to do so. If you know the answer in approximate terms, i.e., “How much is in your checking account today?” be sure to say “I’m guessing” or “approximately” in your answer.
- Answer the questions asked in as few words as possible to give a truthful answer. The more you talk, the more you will

be asked. Keep it short; less, in this case, is more. The best answers are: “Yes,” “No,” “I don’t know,” “I don’t remember.”

- Do not volunteer anything! The more you volunteer, the more trouble you will find yourself in, particularly if you offer answers that you aren’t really sure of in your desire to appear “helpful” to opposing counsel. Similarly, avoid offering excuses or explanations, which only lead to more questions.
- Take your time; talk loud enough for everyone to hear you.
- Be courteous. Do not argue with the other lawyer and **DO NOT LOSE YOUR TEMPER**. The opposing lawyer may try to upset you. If you feel yourself getting upset, ask your lawyer to ask for a break. You may feel a natural inclination to convince your spouse’s lawyer of why you are right and he or she is wrong. These attempts will always be unsuccessful and will only generate more questions.
- Do not be afraid, look at the person who asks you the questions, and be as positive as you can. Just tell your story in your own words and to the best of your ability.
- Be sincere, straight forward, and direct on all your answers to the point as much as is possible.
- Do not be ashamed to tell the whole relevant story. This is your one day in court. The outcome of the case may well depend upon the facts you and your witnesses reveal to the court.
- If the judge asks you a question directly, know that the answer is very important to the judge. If you have any concerns about how to answer, ask the judge if you can first consult with your lawyer.

## **Your Day in Court**

### **§8:19 What to Expect**

When your case is called for trial:

- You will take a seat beside your lawyer at the counsel table and this will be your place during the trial.
- Your lawyer will give a brief opening statement of the facts and basis of your claims to inform the court about your case.

The judge is most interested in what you want, what you need, and why.

- The Petitioner (person initiated the divorce and filed the first papers with the court) puts on his or her witnesses first and then the other party, the Respondent, does the same. Witnesses will be called, sworn, and testify. The attorney for each side will have the opportunity to question each witness as well as both parties, the Petitioner and the Respondent.
- If you are the Respondent, you may be called for cross-examination (this means you can be required by the opposing attorney to testify under oath) and you may be called as the first witness.
- After the witnesses testify, your lawyer and your spouse's lawyer will make an argument to the judge. Sometimes briefs or memoranda are submitted by each lawyer.
- The judge may decide the case immediately or may take it under advisement (study) or may wait to decide the case (enter a judgment) after the memoranda or briefs are submitted.

### **§8:20 How to Behave in the Courtroom**

Your demeanor and conduct, even in the waiting area and especially in court, is most important. How you act in court can have more impact on your case than what you say. Communication is 7% the words you say and 93% your tone, facial expressions, and body language. Be in control at all times. If you are having difficulty, let your lawyer know you need a break.

Turn off all electronic equipment and get rid of any gum you were chewing before you enter court.

Sit up tall in your seat. Do not fidget. Set up your space with a pad and pen to write notes. Do not cross your arms or legs as protective stances can make it look like you are trying to hide something. Keep your posture open.

Do not make faces or gestures while you are giving testimony or listening to testimony from others. Do not wink at the judge, mouth "no," "yes" or "he or she is lying" or say this out loud. Again remember your behavior is more important than what is said.

## DIVORCE: A PRACTICAL GUIDE

From time to time during the course of the trial your lawyer will consult with you and you should inform him or her by a whisper or a note of anything you feel he or she should know about. Ask your lawyer to ask the court for a break if you have a lot to talk about.

Court is formal. There are rules of decorum. You may speak only in response to questions. Do not speak out. Do not speak directly to the judge without permission, and then ask your lawyer, not the judge, for permission first.

As a party to a divorce trial, you will be under an emotional strain. Your lawyer will attempt to minimize it whenever possible. However, since your lawyer does not have control over all the factors that make up a case and since human nature is unpredictable, your emotional strain may increase before it begins to subside.