Kentucky Domestic Relations Practice

Second Edition

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ABOUT ...

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PREFACE AND ACKNOWLEDGMENTS

Family law practice is one of the most interesting and dynamic fields in American jurisprudence, requiring attorneys to have not only a fundamental knowledge of subjects such as tax, trusts and estates, and bankruptcy, but also to have a grasp of the nature and sensitivity of the issues facing the American family. The need for a desktop resource to address the practical, complex, and delicate issues that arise in the family law context was the inspiration behind UK/CLE's first edition of KENTUCKY DOMESTIC RELATIONS PRACTICE IN 2006. With the aid of several returning original authors and the enthusiasm of new update authors, UK/CLE is pleased to announce the publication of the second edition of this essential Handbook.

The updated and expanded KENTUCKY DOMESTIC RELATIONS PRACTICE, 2D ED. is intended to serve as a single, comprehensive reference for Kentucky attorneys faced with family law issues. It presents substantive analysis of all crucial issues and provides a source of case law and statutory and regulatory research citations. Topics covered in this Handbook are addressed in a practice-focused manner, allowing the reader to take real-world advice from attorneys whose own practices are devoted to family law. Each chapter provides cross-references to other parts of the Handbook and running headers to facilitate use of the book. Finally, the book has been indexed carefully by an attorney to make it an invaluable practice tool.

Like every practice Handbook, KENTUCKY DOMESTIC RELATIONS PRACTICE, 2D ED. is a cooperative venture between the practicing bar and the University of Kentucky College of Law. Hundreds of hours of intensive research and writing were unselfishly devoted to this project by both the returning original authors and the update authors. If you benefit from their scholarship, I encourage you to express your appreciation to them. The authors' work on this publication is a testament to the Kentucky bar's commitment to high quality continuing legal education.

Over a period of many months, countless hours were dedicated to the production of this Handbook. This Handbook evolved into the work it is thanks to the many hours invested in composing and formatting by Editorial Assistants Katie E. Reilly and Jenna M. Sickman, without whose diligence, patience and perseverance this book would not have been possible. Their respective skills and continuing innovation have helped bring UK/CLE to the forefront of Kentucky legal publishers.

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THE KENTUCKY FAMILY COURT SYSTEM AND DOMESTIC RELATIONS COMMISSIONERS

JASON R. SOWARDS
Massey Law Library at Vanderbilt University
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I. [1.1] Introduction

"Family courts in most states conjure up overcrowded facilities lacking the veneer of civility, let alone majesty, whose chaotic site itself speaks volumes to the frequently downtrodden and almost always traumatized families that pass through them." Catharine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 FAM. L.Q. 3, 3 (1998). Despite this less-than-stellar public image, family courts are very powerful because they have a direct impact on the state, community, and individuals they serve. Family law matters are most often the frame of reference many people have with the justice system. This exposure therefore alters the average citizen's experience and understanding of how the court system works, which, in turn, evokes either a respect for, or a loathing of, the legal system as a whole. However, by channeling all family law matters into one forum with one judge, the legitimacy of the state's court system improves as does the level of service provided to families. These improvements have been the goal and outcome of the family court system in Kentucky.

II. [1.2] The Kentucky Family Court System

A. [1.3] Overview[1]

The mission of family court is to provide a centralized forum for prompt resolution of legal problems affecting families and children. The fundamental tenet of family court is the "One Family, One Judge, One Court" approach to case management. Domestic relations matters are presented in one court, allowing the same judge to hear all matters involving a particular family. Managing cases this way reduces the stress that can arise from being shuffled from court to court to resolve a particular issue.

Another benefit is that family court links families with a comprehensive social service system. The Kentucky Court of Justice employs its own social workers instead of relying on outside agencies as it had to do before the family court system was implemented. In addition to the judge, the family court staff includes a court administrator, a law clerk, a social worker and a judicial secretary. The entire staff receives training on the special needs of families and provides a wide range of services that include mediation, anger management, counseling, and education.

Currently, there are 51 family court judges serving 71 counties. A directory of family court judges with each judge's name, division, address, and phone

[1] Information from this portion of the chapter is taken in substantial part from the "Frequently asked Questions" of Family Court, provided by the Administrative Office of the Courts website at: <http://courts.ky.gov/circuitcourt/familycourt/default.htm/>.

number (as of the date this book was published) is available online at: <http://apps.courts.ky.gov/ContactList/Addresslist.aspx?Cat=FCJ>.

Several factors determine whether family courts will be established in judicial districts that do not currently have one. These factors include, but are not limited to: the present and projected caseloads in family law matters; the allocation of judicial and staff resources; whether facilities are available to accommodate a family court division; and the fiscal impact adding another judicial division would impose on the district. If the growth of the family court caseload in a judicial circuit would require adding a new judge, that need would have to be certified by the Kentucky Supreme Court, and money would have to be appropriated for a new judgeship by the General Assembly. Because the factors that affect whether a family court division would be implemented are neither foreseeable nor static, it is conceivable that not all judicial circuits in the Commonwealth will ever have a division of family court.

B. [1.4] History[2]

Because the Kentucky Family Court system is relatively new, its history is brief. To ascertain measures that would allow the Kentucky judiciary to serve Kentucky families more effectively, the Kentucky General Assembly adopted Concurrent House Resolution Number 30 in 1988. This Resolution established the Family Court Feasibility Task Force. The most notable findings of this task force included:

(a) The American family is the framework upon which a prosperous and healthy society is maintained;

(b) The various courts in Kentucky are routinely required to make judicial determinations on a wide variety of subjects which drastically affects the character and viability of particular Kentucky families;

(c) The jurisdictions of the state's various courts can and do overlap regarding particular family disputes, thereby exacerbating the fractionalization and disruption of judicial decision-making; and

(d) The establishment of a court devoted to and specializing in family law would promote the continuity of judicial decision-making and foster the development of expertise in managing and disposing of family law cases.

In response to the task force's findings, Kentucky launched an innovative project when the Jefferson County Family Court pilot program began in 1991. It was the first court of its kind in Kentucky which focused solely on the needs

[2] For a more thorough historical account of the Kentucky Family Court system, *see* Erin J. May, *Social Reform for Kentucky's Judicial System: The Creation of Unified Family Courts*, 92 Ky. L.J. 571 (2004).

of families and children. At its inception, six of Jefferson County's 39 county judges volunteered for the family court project – three from circuit court and three from district court. The project required that judges at different judicial levels be cross-sworn so that any potential jurisdictional limitations would not impede the project's goals.

Despite the Jefferson County Family Court Pilot Project's obvious appeal to many people, there were still challenges to its constitutionality. In *Kuprion v. Fitzgerald,* 888 S.W.2d 679 (Ky. 1994), the Kentucky Supreme Court upheld the constitutionality of the project by holding that, although a district judge lacks jurisdiction to hear marriage dissolution cases, the district judge in this particular case had been properly appointed as a special circuit judge by the Chief Justice in accord with powers vested in him by the Kentucky Constitution. *Id.* at 685. Therefore, this particular judge, although initially only a district-level judge, did have the power to hear the petitioner's case. The Supreme Court was careful to point out that although the project itself was constitutional, a new "official" court had not been born by its ruling. According to the Court, these types of temporary projects were authorized under the Kentucky Constitution whereas establishing new permanent courts was not. *Id.* at 683-684.

In 2001, exactly ten years after the Jefferson County Pilot Project began, the Kentucky Legislature passed Senate Bill 58, which proposed to amend § 112 of the Kentucky Constitution to establish family courts and allow the Supreme Court to designate one or more divisions of circuit court, within a judicial circuit, as a family court division. KY. CONST. § 112(6). The passage of the Family Court Amendment created a permanent place for family courts in Kentucky's judicial system.

Chief Justice Lambert was a guiding force behind the process of adopting a constitutional amendment to make family court a permanent part of the Kentucky Constitution. Kentucky voters overwhelmingly approved of the amendment in November 2002, when it passed in all 120 Kentucky counties with over 75% of the vote.

C. [1.5] Jurisdiction

Family court is a circuit court of general jurisdiction pursuant to § 112(6) of the Kentucky Constitution with primary jurisdiction over family law matters. Areas in which family court retains jurisdiction include dissolution of marriage; child custody; visitation; maintenance and support; equitable distribution of property in dissolution cases; adoption; and termination of parental rights. KRS 23A.100(1).

In addition to the general jurisdiction of a circuit court, a family court division of circuit court also has jurisdiction over the following areas:

- Domestic violence and abuse proceedings under KRS Chapter 403 subsequent to the issuance of an emergency

protective order in accord with local protocols under KRS 403.735;

- Proceedings under the Uniform Act on Paternity, KRS Chapter 406, and the Uniform Interstate Family Support Act, KRS 407.5101 to 407.5902;
- Dependency, neglect, and abuse proceedings under KRS Chapter 620; and
- Juvenile status offenses under KRS Chapter 630, except when proceedings under KRS Chapter 635 or 640 are pending.

KRS 23A.100(2). Family court divisions of circuit court are the primary forum for cases in this section, except that nothing in this section (KRS 23A.100) shall be construed to limit any concurrent jurisdiction by the district court.

This supplemental jurisdiction of a family court division of circuit court must be construed liberally and applied to promote its underlying purposes, which are:

- To strengthen and preserve the integrity of the family and safeguard marital and familial relationships;
- To protect children and adult family members from domestic violence and abuse;
- To promote the amicable settlement of disputes that have arisen between family members;
- To assure an adequate remedy for children adjudged to be dependent, abused, or neglected, and for those children adjudicated as status offenders;
- To mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage;
- To make adequate provision for the care, custody, and support of minor children of divorce and for those children who have been born out of wedlock; and
- To provide a level of proceedings , when necessary, that is more appropriate to a family court division of circuit court.

KRS 23A.110.

Local rules for each family court can be found online at: <http://apps.courts.ky.gov/localrules/localrules.aspx>.

D. [1.6] Qualifications & Elections of Family Court Judges

To be eligible to serve as a family court judge, a person must be a citizen of the United States, licensed to practice law in the courts of the Commonwealth,

and have been a resident of Kentucky and of the district from which he or she will be elected for two years preceding his or her taking office. KY. CONST. § 122. In addition, to be eligible to serve as a family court judge, the attorney must have been a licensed to practice law for at least eight years. *Id.*. Family court judges hold their offices for eight-year terms. KY CONST. § 119. Judges may not be deprived of their term of office through redistricting or by a reduction in the number of judges in their respective circuits.

Family court judges are elected from the judicial circuits established in KRS Chapter 23A and to a family court division as designated by the Kentucky Supreme Court pursuant to § 112(6) of the Constitution of Kentucky. KRS 118A.045(1).

III. [1.7] Domestic Relations Commissioners

It is the role of Domestic Relations Commissioners ("DRCs") to resolve certain family law issues in those jurisdictions without a family court, while leaving other matters to the circuit court to address. The use of DRCs has declined due to the implementation of family courts in many jurisdictions, both in its pilot stages from 1991 to 2002 and after its formal recognition constitutionally in 2002.

Prior to 2011, DRCs were governed by CR 53. However, with the increase in the number of family courts, the civil rules no longer met the needs of family courts. As a result, family court-specific rules were drafted and went into effect January 1, 2011. Known as the Kentucky Family Court Rules of Procedure and Practice ("FRCPP"), they cover all actions pertaining to dissolution of marriage, custody and support; visitation and timesharing; property division; maintenance; domestic violence; paternity; dependency; neglect or abuse; termination of parental rights; adoption; and status offenses, or any other matter exclusively within family law jurisdiction, except for any special statutory proceedings, which will prevail over any inconsistent procedures set forth in the FRCPP. FRCPP 1. The provisions of CR 53 relating specifically to DRCS now find a home at FRCPP 4. Domestic relations commissioners are appointed in each circuit by that circuit's chief judge. FRCPP 4(1). Circuit judges may refer domestic relations matters contained in KRS Chapter 403, except domestic violence, to DRCs. FRCPP 4(1).

Each domestic relations commissioner and deputy must have at least eight years of experience in the practice of law at the time of his or her appointment, unless different experience is authorized by the Chief Justice of the Kentucky Supreme Court. FRCPP 4(2). Each DRC must satisfy the state's annual continuing legal education requirements with domestic relations law education. *Id.* They must also attend training at least once every two years on the dynamics and effects of domestic violence including the availability of community resources, victims'

services and reporting requirements. *Id.* Attorneys who serve as DRC may not concurrently engage in the practice of domestic relations law. *Id.*

DRCs must hear all matters promptly. FRCPP 4(3). Testimony may be given and heard orally before the DRC or by deposition or interrogatory. *Id.* Any actions involving indigent individuals must be heard by the DRC without a fee. *Id.* Proceedings before the DRC must be reported or recorded on audiotape or videotape. *Id.* The recordings and the recording log must be filed with the clerk of court. *Id.*

DRCs have the authority to make recommendations to the circuit judge regarding motions for temporary orders of custody, support and maintenance. FRCPP 4(4). Trial courts can adopt, modify, or reject recommendations of domestic relations commissioners; they are not required to accept a DRC's findings of fact in dissolution of marriage cases. *Basham v. Wilkins*, 851 S.W.2d 491 (Ky. Ct. App. 1993); *Calloway v. Calloway*, 832 S.W.2d 890 (Ky. Ct. App. 1992). DRCs are also empowered to make valuation decisions which will be upheld so long as they are not clearly erroneous. *Hunter v. Hunter*, 127 S.W.3d 656, 662 (Ky. Ct. App. 2003).

With respect to the report the DRC must file, the court may also receive further evidence or may recommit it with instructions. *Eiland*, 937 S.W.2d 713, 716 (Ky. 1997); *see also,* FRCPP 4(4)(a). In essence, the trial court has extremely broad discretion with respect to how it chooses to use the reports made by DRCs. *Id.*; *Herndon v. Herndon*, 139 S.W.3d 822, 825 (Ky. 2004). Similarly, all temporary and final decrees and orders must be entered by the court upon review of the DRC's report. FRCPP 4(4)(b).

To determine who the DRC is for a county without a family court, contact the chief circuit judge's office for that county.

2

INITIAL INTERVIEW

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I. [2.1] Introduction

Unlike many other legal practice areas, the successful practice of family law is based upon communication between the client and counsel and a shared vision of what can be accomplished in the case. The initial interview should serve the purpose of permitting counsel and the prospective client to become acquainted with one another, discuss the issues to be dealt with, and decide whether the offered employment will be accepted or rejected. This chapter examines what counsel can (and should) hope to learn from the initial interview.

II. [2.2] Getting to Know You

"Tell me about yourself and help me understand how I might be able to be of help to you" is a simple statement designed to elicit the most basic, yet essential, information about a potential client. However, before asking that question, counsel must obtain some very basic information about the potential client and establish some ground rules before any face-to-face meeting can take place. Different practitioners will approach the screening process differently, but whether it is the attorney or someone from the attorney's staff who takes the initial call, someone will be charged with the responsibility of acquiring just enough information to ascertain whether this is an individual who will be desirable as a client. That inquiry may be limited to only that information necessary to avoid any obvious conflicts of interest. For example, it would be necessary to obtain the potential client's name and place of residence along with the name of the caller's spouse. Depending on the practitioner's circumstances, it may also be necessary to ascertain whether there are any business interests that may be involved and, if so, obtain the names of those entities and any related entities.

Assuming there are no obvious conflicts which would preclude an initial interview, the next is to define what will take place during that meeting. The first policy decision to be made is whether you will charge for an initial interview or consultation. Charging a potential client for an initial interview will tend to weed out people who cannot or will not pay. It will also tend to discourage potential clients whose goal is to create conflicts of interest for as many practitioners in a community as possible. Reasons not to charge for an initial interview would include avoiding any illusion that you are that individual's lawyer before the relationship has been formalized. People tend to believe, understandably so, that once they have paid an attorney for a consultation, that that attorney has agreed to represent them.

Perhaps the single most important piece of information to convey to potential clients in this very first conversation is that they will not be receiving legal advice during the initial interview. Until and unless an attorney-client relationship is solidified, you should not render legal advice to a person who is not your client.

You may safely tell a potential client what the law is, but you should not engage in giving that person any legal advice until the relationship with the individual is defined and established.

Once the potential client has arrived for the initial interview, the goal becomes one of eliciting as much information from that person as possible. Answers to the following questions are absolutely necessary during the initial interview:

- What are the issues?
- Am I competent to handle this matter?
- Are the issues presented ones that interest me?
- Is this a person with a cause that I can embrace?
- Are the prospective client's expectations reasonable?

The initial interview is the best opportunity to let the potential client talk. By listening to the person's narrative of his or her circumstances, the attorney has an opportunity to assess what family law issues are presented by the given facts. As an example, the matter may present issues of property and spousal maintenance, but because there are no children, custody and child support will not come into play. The initial interview is also an excellent opportunity to assess the attorney's own competence to handle the specific issues presented. For instance, a recently admitted solo practitioner may not be competent to handle valuation issues presented by a significant stockholder in a closely-held corporation.

Even if the potential client's circumstances do not fit the attorney's usual practice, there may nevertheless be issues presented that are of special interest to the attorney. Conversely, an attorney whose primary focus is on property issues may reject a case that focuses solely on custody issues.

There is no requirement in the Rules of Professional Conduct that attorneys must accept the political or social views of our clients, but neither are they required to accept or continue representation that is repugnant or imprudent. The initial interview is a great opportunity to determine generally what the potential client's attitude is toward the issues in his or her case and for the attorney to assess whether those views are so repugnant to the attorney's beliefs that a good working relationship cannot exist. Finally, the initial interview provides the opportunity to assess the client's expectations. A client with unreasonable expectations is truly dangerous, and unless counsel is able to disabuse a potential client of unrealistic expectations at the earliest opportunity, the client who desires a level of service that cannot be provided is a disaster waiting to happen.

III. [2.3] Conflicts of Interest

The initial interview provides the first face-to-face opportunity to ask all of the questions necessary to guard against conflicts of interest. There are six distinct rules within the Rules of Professional Conduct that address such conflicts, and are therefore a clear matter for concern from the outset. Rule 1.7, the general rule on conflicts of interest, provides that no lawyer shall represent a client if the representation of that client will be directly adverse to another client unless the lawyer reasonably believes that the representation will not adversely affect the second client and obtains the consent of each client after consultation. In a family law case, the identity of the other spouse is an obvious critical piece of information. However, keep in mind that if the party has been previously married and divorced, this information should be elicited. If business interests are involved, it is important to identify what those are as well as any entities related to those business interests. Comprehensive conflict checking systems should be in place in every law office, but the information necessary to make a thorough check is obviously required first.

Beyond the obvious direct conflicts, a lawyer shall not represent a client if the representation of that client may be materially affected by the lawyer's responsibilities to another client or third parties or by the lawyer's own interests. In other words, if a totally unrelated client to this engagement may pose an impediment to the representation because of what are sometimes referred to as "atmospherics," the attorney should probably reconsider accepting the new client. The attorney's own personal beliefs or interests may also adversely impact the attorney's ability to zealously represent the client.

A good deal of debate surrounds whether the attorney or the attorney's staff should conduct the initial conflict screening. This author tends to believe that no one knows his or her practice better than the attorney and certainly no one will know the attorney's personal predilections better than the attorney himself. For those reasons, it is important for the attorney to have a thorough discussion of possible conflict issues with the potential client focusing on those areas which staff cannot adequately handle. Attached to this chapter as Appendix A is a family law practice data packet which is intended to elicit a broad array of information from the client, such as information relating to income, expenses, property and debt. The packet provides an opportunity to acquire additional information necessary for a through conflicts of interest inquiry. Until this information is assembled, any analysis concerning potential conflicts should not be considered complete.

IV. [2.4] Defining the Engagement

Based on the facts and circumstances as counsel ascertains them to be during the course of the initial interview, it is appropriate at the conclusion of that

interview to begin defining the scope of the possible engagement in the event that the prospective client elects to engage your services. While this discussion can and should be done verbally during the course of the initial interview, it should likewise always be reduced to writing. A sample engagement letter has been included as Appendix B to this chapter. This form is by no means universal in scope and should not be taken as appropriate in all situations. Rather, it serves to suggest some content which may be useful in guiding the development of your own engagement letter. Basically, the engagement letter should set forth the scope of the engagement, *i.e.*, what it is you are willing to undertake for the client, along with what you are not willing to undertake. It should also restate your fee structure and your policy concerning retainers. Any other "road rules" that govern your acceptance of the representation should also be set forth specifically in the engagement letter. While a poorly crafted engagement letter can certainly be under-inclusive, it is hard to conceive of one that would overstate the professional relationship. Most professional liability carriers recommend strongly, if not outright demand, the use of engagement letters for all representations.

V. [2.5] Fees

There is no time like the initial interview to address one of the most difficult issues to be discussed with the client: fees and how they are structured. Because ethical rules prohibit contingent fees in domestic relations cases, the only remaining alternatives are to bill on an hourly rate or on a flat-fee basis. If you quote a flat fee to the client, then the work must be completed for the fee stated. The better practice, and certainly the more widespread one, is to do family law work on an hourly rate basis. Your hourly rate, as well as the rates of any partners or associates who may work on the matter with you, should be revealed to the client at the earliest opportunity. In the event that you routinely change your hourly rate at some juncture during the year or otherwise, this too should be made known to the client.

If a retainer is required, both the amount and how you handle it should be revealed to the client at the earliest opportunity. The letter should explain to the client whether the retainer is refundable or non-refundable, and if non-refundable, that a written agreement to that effect will be required. If the retainer is one against which billings will be made at an hourly rate until it is depleted, this too must be explained to the client and should form part of the engagement letter.

Finally, the prospective client should be told in detail what the firm's billing practices are. The billing cycle, the level of detail which will appear on billing statements, and any of the content matters should be discussed with the potential client at that time and should also be included in the engagement letter.

VI. [2.6] Conclusion

An attorney-client relationship which begins well has a much better chance of ending on the same note. Taking an hour to explore all possible circumstances which could arise and sharing in an upfront and forthright manner with the prospective client what the working relationship will be is a worthwhile investment of time.

VII. [2.7] Appendix A: Family Law Practice Data Packet

FAMILY LAW PRACTICE DATA PACKET

I. INFORMATION ABOUT SELF

Referred by: _____

A. Full (including maiden) name: _____

B. Do you want your maiden name restored? Yes___ No___ NA___

C. Date of birth: _____

D. State or foreign country of birth: _____

E. Social Security number: _____

F. Current address, telephone number(s) and e-mail (if applicable):

_____

_____

G. Job title and employer's name, address and telephone number:

_____

_____

H. Length of employment with present employer: _____

I. Salary (per pay period): Gross_____Net _____

How often paid? _____

Resident of Kentucky since? _____

J. Number of prior marriages?____How each terminated? _____

II. INFORMATION ABOUT SPOUSE

A. Full (including maiden) name: _____

B. Does your spouse want her maiden name restored?

Yes___ No___ NA___

C. Date of birth: _____

D. State or foreign country of birth: _____

E. Social Security number: _____

F. Current address:

_____

_____

G. Job title and employer's name and address: _____

_____

H. Salary (per pay period): Gross_____Net_____
How often paid? _____

I. Resident of Kentucky since? _____

J. Number of prior marriages?_____ How each terminated? _____

III. GENERAL INFORMATION

A. Date of Marriage: _____

B. County and state where license obtained: _____

C. Location of wedding (city, county and state): _____

D. Date of separation (or the date you last had marital relations with your spouse):_____

E. Do you and your spouse have a pre-nuptial or post-nuptial agreement?
If written, please attach a copy. If verbal, give details:

_____

_____

F. Minor children born of the marriage:

NAME	DATE OF BIRTH	SOCIAL SECURITY NUMBER

G. List addresses where the children have resided in the past 5 years if different from the addresses listed in I.F or II.F and the dates that you resided at those addresses._____

_____

H. Is wife currently pregnant? Yes___ No___

I. Are there any minor children living with you who were not born of this marriage? Yes___ No___. If yes, give details:

_____

_____

J. Is either spouse a member of the Armed Forces? Yes___ No___
If so, list the branch, years of service and retirement date.

_____

K. Is the marriage irretrievably broken? Yes___ No___
If you deny that the marriage is irretrievably broken, do you want to request a conciliation conference? Yes___ No___

L. Have any attempts at reconciliation been made? Yes___ No___
If yes, what attempts?_____

M. Does your spouse have an attorney? Yes___ No___ Unknown___
If yes, who?_____

N. Is there a Petition pending filed by either party for an Emergency Protective Order, a Domestic Violence Order or an Order presently in effect?
Yes___ No___ If so, attach a copy of the petition or order.

IV. PREMARITAL OR NON-MARITAL PROPERTY

A. List any property belonging solely to you with a value greater than $100:
Description, approximate value and reason considered non-marital:

_____

_____

_____

B. List any property belonging solely to your spouse with a value greater than $100:
Description, approximate value and reason considered nonmarital:

_____

_____

_____

V. MARITAL PROPERTY

A. REAL ESTATE

1. Location: _____

_____

In whose name? Husband___Wife___Both___Other___
How was property acquired? _____
Fair Market Value:_____When acquire _____
Purchase price:_____ Down-payment amount _____
What funds were used for down-payment? _____
Mortgage balance?_____

2. Location: _____

_____

In whose name? Husband___Wife___Both___Other___

How was property acquired? _____

Fair Market Value:_____When acquired _____

Purchase price: _____

Down-payment amount_____

What funds were used for down-payment?_____

Mortgage balance? _____

B. AUTOMOBILES, MOTORCYCLES, BOATS, TRAILERS, EQUIPMENT, ETC.

1. Year/Make/Model/Type:_____

In whose name? Husband___Wife___Both___Other _____

Fair Market Value:_____ Loan Balance _____

How acquired? _____

Down payment amount: _____

How was down payment made? _____

2. Year/Make/Model/Type:_____

In whose name? Husband___Wife___Both___Other _____

Fair Market Value:_____Loan Balance_____

How acquired? _____

Down payment amount: _____

How was down payment made? _____

3. Year/Make/Model/Type:_____

In whose name? Husband___Wife___Both___Other _____

Fair Market Value: _____ Loan Balance _____

How acquired? _____

Down payment amount: _____

How was down payment made? _____

C. SECURITIES, STOCKS, BONDS, MUTUAL FUNDS, ACCOUNTS AND/OR NOTES RECEIVABLE

1. Type and location of Investment: _____

Number of shares:_____Fair Market Value: _____

In whose name? Husband_____Wife_____Both _____

2. Type and location of Investment: _____
   Number of shares:_____Fair Market Value: _____
   In whose name? Husband_____Wife_____Both _____
3. Type and location of Investment: _____
   Number of shares:_____Fair Market Value: _____
   In whose name? Husband_____Wife_____Both _____

D. BANK ACCOUNTS

1. Bank name: _____
   Type of account: _____
   In whose name? Husband___Wife___Both___Other _____
   Account number:_____Balance _____
2. Bank name: _____
   Type of account: _____
   In whose name? Husband___Wife___Both___Other _____
   Account number:_____Balance _____
3. Bank name: _____
   Type of account: _____
   In whose name? Husband___Wife___Both___Other _____
   Account number:_____Balance _____
4. Bank name: _____
   Type of account: _____
   In whose name? Husband___Wife___Both___Other _____
   Account number:_____Balance _____

E. LIFE INSURANCE

1. Company and type of policy: _____
   Insured:_____Beneficiary: _____
   Cash surrender value:_____Loan balance: _____
2. Company and type of policy: _____
   Insured:_____Beneficiary: _____
   Cash surrender value:_____Loan balance: _____
3. Company and type of policy: _____
   Insured:_____Beneficiary: _____
   Cash surrender value:_____Loan balance: _____

F. RETIREMENT PLANS (PENSIONS, 401k, TAX DEFERRED SAVINGS, IRAS, ETC.)

1. Type and Name of Plan: _____
   Plan Administrator:_____
   Account number:_____Balance or value:_____
   In whose name? Husband_____Wife_____Both _____
2. Type and Name of Plan: _____
   Plan Administrator:_____
   Account number:_____Balance or value:_____
   In whose name? Husband_____Wife_____Both _____
3. Type and Name of Plan: _____
   Plan Administrator:_____
   Account number:_____ Balance or value:_____
   In whose name? Husband_____Wife_____Both _____
4. Type and Name of Plan: _____
   Plan Administrator:_____
   Account number:_____Balance or value:_____
   In whose name? Husband_____Wife _____Both _____

G. ASSETS HELD IN NAME OF/ON BEHALF OF CHILDREN

1. Type and Name of Asset: _____
   Balance or Value: _____
2. Type and Name of Asset: _____
   Balance or Value:_____

VI. PREMARITAL AND NONMARITAL DEBTS

A. YOUR DEBTS/OBLIGATIONS

1. List debts and obligations belonging solely to you:

Creditor	Amount Owed	Monthly Pmt. Amt.

Why are they considered nonmarital? _____

_____

2. Do you have a child support obligation to children not born of this marriage? Yes___ No___ If so, give details:

_____

3. Do you receive child support for children not born of this marriage?
   Yes___ No___ If yes, the amount you receive monthly?_____
4. Do you have a maintenance obligation to or receive maintenance from a previous spouse? Yes___ No___ If so, give details:

_____

B. YOUR SPOUSE'S DEBTS/OBLIGATIONS

1. List debts and obligations belonging solely to your spouse:

Creditor	Amount Owed	Monthly Pymt. Amt.

Why are they considered nonmarital? _____

2. Does your spouse have a child support obligation to children not born of this marriage? Yes___ No___ If so, give details:

_____

3. Does your spouse receive child support for children not born of this marriage? Yes___ No___
   If yes, the monthly amount received: _____
4. Does your spouse have a maintenance obligation to or receive maintenance from a previous spouse? Yes___ No___ If so, give details: _____

_____

VII. MARITAL LIABILITIES

Creditor	Purpose/Security	Amount Owed	Monthly Pymt. Amt.

VIII. CHILDREN'S HEALTH/DENTAL INSURANCE, CHILD CARE, ETC.

1. Health insurance for parties and their children:

   Company name:_____

   Insured: _____

   Monthly premium amount for children only?_____

   Who pays premium? Husband_____Wife _____

2. Dental insurance for parties and their children:

   Company name:_____

   Insured: _____

   Monthly premium amount for children only?_____

   Who pays premium? Husband_____Wife _____

3. Child care costs:

   Who provides?_____

   How often provider paid?_____ How much paid? _____

IX. MONTHLY EXPENSES (INCLUDE YOURSELF AND YOUR CHILDREN):

	Actual	Anticipated
Rent:	$_____	$_____
Mortgage:	$_____	$_____
Property Tax:	$_____	$_____
Homeowner's/Renter's Insurance:	$_____	$_____
House Maintenance:	$_____	$_____
Electric Utilities:	$_____	$_____
Fuel, Oil, Gas Utilities:	$_____	$_____
Telephone:	$_____	$_____
Cellular Phone:	$_____	$_____
Water and Sewer:	$_____	$_____
Garbage Pickup:	$_____	$_____
Yard Expense:	$_____	$_____
Cleaning Service:	$_____	$_____
Child Care/Babysitter:	$_____	$_____
Cable Television:	$_____	$_____
Car Payments/Lease Payments:	$_____	$_____
Auto Gas and Oil:	$_____	$_____
Car Maintenance and Repairs:	$_____	$_____
Car Licenses/Taxes:	$_____	$_____
Car Insurance:	$_____	$_____
Religious/Charitable Contributions:	$_____	$_____
Clothing: (including child)	$_____	$_____

Uniforms:	$_____	$_____
Dry Cleaners:	$_____	$_____
Entertainment:	$_____	$_____
Gifts:	$_____	$_____
Food:	$_____	$_____
Doctor:	$_____	$_____
Dentist:	$_____	$_____
Orthodontist:	$_____	$_____
Prescription Drugs/Medicines:	$_____	$_____
Optometrist/Eyeglasses/Contacts:	$_____	$_____
Medical/DentalInsurance (not deducted from pay):	$_____	$_____
Life Insurance (not deducted from pay):	$_____	$_____
Disability Insurance (not deducted from pay):	$_____	$_____
Newspaper:	$_____	$_____
Magazine Subscriptions:	$_____	$_____
Veterinarian/Pet Food:	$_____	$_____
Professional Dues/ Club Memberships:	$_____	$_____
Social Clubs:	$_____	$_____
Barber/Beauty Shop:	$_____	$_____
Tuition/School Expenses:	$_____	$_____
State/Federal/Local Taxes Not Withheld:	$_____	$_____
Athletic and Activity Fees (list):	$_____	$_____
Debt payments (list):	$_____	$_____
Other Monthly Expenses (list):	$_____	$_____
TOTAL MONTHLY EXPENSES:	$_____	$_____

VIII. [2.8] Appendix B: Sample Engagement Letter

Anita M. Britton
anita.britton@bojfirm.com

Date

Name
Address

RE: ***Dissolution of Marriage***

Dear **Name**:

This letter describes the basis on which our firm will provide legal services to you and bill for services.

1. Professional Undertaking: The most important point in this letter is that we will do our utmost to serve you effectively. We cannot guarantee the success of any given venture, but we will strive to represent your interests vigorously and efficiently. I will have primary responsibility for your representation, and will utilize other attorneys and legal assistants in the office in the best exercise of my professional judgment. If at any time you have questions, concerns or criticisms, please contact me at once.
2. Fees: We bill our clients on an hourly rate basis only. Statements for services are simply the product of the hours worked multiplied by the hourly rates for the attorneys and legal assistants who did the work along with any disbursements we have made on your behalf.

Our schedule of hourly rates for attorneys and other members of the professional staff is based on years of experience, training and practice, and level of professional attainment. Currently, my rate is $245.00 per hour. The rates for other attorneys in the firm are $150.00 to $300.00 per hour. The schedule is reconsidered annually with changes effective on January 1st of each year.

3. Spouse's Obligation to Pay Fees. Kentucky law in some instances provides for the payment of attorney fees of one spouse by the other. Depending upon the relative income between you and your spouse, we may seek attorney's fees from your spouse. This in no way indicates that we have agreed that your spouse would be responsible for fees and you would not. Any attorney's fee which we

obtain and collect will be applied to your account and reduce it accordingly. Should a credit balance exist after the application of the attorney's fees received from your spouse, the money will be refunded to you.

4. Costs: Often it is necessary for us to incur expenses for items such as travel, lodging, meals, long-distance telephone calls and photocopying. Similarly, some matters require substantial amounts of ancillary services such as computer research services. In order to allocate these expenses fairly and keep billable rates as low as possible for those matters which do not involve such expenditures, these items are separately itemized on our statements as "disbursements." Also, we may need to retain experts such as real estate appraisers, CPA's, pension evaluators or mental health experts. No substantial cost will be incurred without prior consultation with you. It is a firm policy to bill such items directly to the client and you will be expected to pay the vendor of any such services.

5. Billings: Our statements are prepared and mailed during the month following the month in which services are rendered and costs advanced. We expect payment within 15 days after the statement date. **If for any thirty-day billing cycle you fail to make a payment, we reserve the right to immediately withdraw.** Payments are accepted by cash, check, Visa or MasterCard.

6. Retainer: We have received a retainer of $3,000.00 which will show as a credit on your monthly statement. Thereafter, you will receive a monthly bill and when the fees and costs exceed the amount of the retainer, you will be expected to pay any amount due upon billing.

7. Termination: Both parties reserve the right to terminate this agreement on written notice to the other party. In the event of termination, the client agrees to pay that attorney forthwith all sums due the attorney pursuant to this agreement. We will be happy to provide you a duplicate copy of your file upon request and prepayment.

Please review the foregoing and, if it meets with your approval, sign a copy of the letter and return it to me in the enclosed envelope. If you have any questions, please feel free to call me.

Sincerely yours,
BRITTON OSBORNE JOHNSON

By: _____

AMB/rv/enc. ANITA M. BRITTON

APPROVED AND AGREED:

By:_____ Date:_____

NAME

3

MARRIAGE AND ANTENUPTIAL AGREEMENTS

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I. [3.1] Introduction

The definition of "marriage" and restrictions on it have long been debated in Kentucky. *Jenkins v. Jenkins' Heirs*, 32 Ky. 102 (Ky. 1834); *Maguire v. Maguire*, 37 Ky. 181 (Ky. 1838). That debate continues today as Kentucky voters, legislatures and Courts address issues such as who may marry and at what age they may do so. KRS 402.005 currently defines "marriage" as follows: "As used and recognized in the law of the Commonwealth, "marriage" refers only to civil status, condition, or relation of one (1) man and one (1) woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex." Marriage is a civil status arising out of a civil contract, which, like any other contract, must be the result of an agreement of minds. *Baker v. McDonald*, 185 Ky. 470, 215 S.W. 292 (Ky. 1919).

II. [3.2] Prohibited and Void Marriages

Kentucky limits the ability for two people to marry in the following ways:

1. SAME SEX MARRIAGES. Two people of the same sex are prohibited from obtaining a marriage license. Kentucky Constitution § 233A and KRS 402.020(d). *See also*, KRS 402.005, *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 818 (Ky. Ct. App. 2008).
2. DEGREE OF RELATIONSHIP. Two persons "nearer of kin to each other by consanguinity, whether of the whole or half blood, than second cousins" may not marry in Kentucky. KRS 402.010.
3. MENTAL DISABILITY. Two persons may not marry if one or both persons have been adjudged mentally disabled by a court of competent jurisdiction. KRS 402.020(1)(a).
4. BIGAMY. A person may not marry if he or she has not been divorced from a living spouse. KRS 402.020(1)(b). Marriages between more than two persons are prohibited. KRS 402.020(1)(e).
5. PROPER CEREMONY. Only marriages that are solemnized or contracted in the presence of an authorized person or society are valid in Kentucky. KRS 402.020(1)(c).
6. AGE. Generally a minor may not marry in Kentucky unless he or she meets one of the following exceptions:
    a. UNDER AGE 16. Persons under 16 years of age may not marry unless the female is pregnant; they apply to

the district court judge for permission; and the judge, in his or her discretion, grants the application. KRS 402.020(1)(f)(3). While no court in Kentucky has addressed the issue, the most recent Attorney General opinion on the subject was that the applicant must be pregnant at the time of the application. Once the minor has delivered the child, she is obviously no longer pregnant, so the judge therefore may not consider her petition to marry. OAG 83-109.

b. AGE 16 OR 17. Persons under the age of 18 but over 16 years of age, may not marry unless they have the consent of the following:

   i. The minor's father or mother, if the minor's parents are married, are not legally separated, no legal guardian has been appointed for the minor, and no court order has been issued granting custody of the minor to a party other than the father or mother;

   ii. Both the father and the mother, if both are living and the minor's parents are divorced or legally separated, and a court order of joint custody of the minor has been issued and is in effect;

   iii. The surviving parent, if the minor's parents were divorced or legally separated, and a court order of joint custody of the minor was issued prior to the death of either the father or mother, and said order remains in effect;

   iv. The custodial parent of the minor, as established by a court order which has not been superseded, where the minor's parents are divorced or legally separated and joint custody of the minor has not been ordered; or

   v. Another person having lawful custodial charge of the minor, but in the case of pregnancy, either the male and/or female may apply to a District Judge for permission to marry. The application may or may not be granted in the discretion of the judge and by written order.

III. [3.3] Voidable Marriages

In addition to these prohibited marriages, Kentucky courts may declare certain marriages void such as:

1. Any marriage obtained by force or fraud. KRS 402.030(1). The right to set aside a marriage for fraud and duress is personal to the parties to the marriage; and can only be avoided by the parties themselves while they are yet alive. *Johnson v. Sands*, 245 Ky. 529 (Ky. 1932) and *Shepherd v. Shepherd*, 174 Ky. 615 (Ky. 1917).
2. At the request of a next friend, in which the person was a minor 16 or 17 years of age at the time of the marriage; the marriage was without the consent required by KRS 402.020(1)(f); and the marriage was not ratified by cohabitation after age 18. KRS 402.030(2).
3. At the request of a next friend, where the person was under 16 years of age at the time of the marriage; the marriage was not conducted with the permission of a District Judge, as required by KRS 402.020(1)(f)3; and the marriage was not ratified by cohabitation after the person reached 18 years of age. KRS 402.030(3).

IV. [3.4] Validity of Marriages Outside Kentucky

If any resident of Kentucky marries in another state, the marriage is valid in Kentucky if it was valid in the state where solemnized, unless the marriage is against Kentucky public policy. KRS 402.040. For example, marriage between members of the same sex is against Kentucky public policy and thus not valid in Kentucky even if such a marriage is recognized as valid in another state. KRS 402.040(2) and KRS 402.045.

V. [3.5] Solemnizing Marriages

In Kentucky, marriages may be solemnized only by: Ministers of the gospel or priests of any denomination in regular communion with any religious society; Justices and judges of the Court of Justice, retired justices and judges of the Court of Justice except those removed for cause or convicted of a felony; county judges-executive; such justices of the peace and fiscal court commissioners as the Governor or the county judge-executive authorizes; and religious societies that

have no officiating minister or priest and whose usage is to solemnize marriage at the usual place of worship and by consent given in the presence of the society, if either party belongs to the society. KRS 402.050(1)(c). Kentucky further requires that at least two persons, in addition to the parties and the person solemnizing the marriage, be present at the marriage ceremony. KRS 402.050(2).

As long as the parties believe that the person performing the marriage ceremony has the authority to do so and believe that they are lawfully married, the marriage is valid even if the person performing the ceremony actually does not have the authority to solemnize marriages. KRS 402.070 and *Arthurs v. Johnson*, 280 S.W.2d 504 (Ky. 1955).

Kentucky law prohibits a person, for compensation or reward, from soliciting, persuading, enticing, directing or inducing any persons to go before any person authorized to solemnize marriage to be married. KRS 402.090 and *Ladd v. Commonwealth*, 313 Ky. 754 (Ky. 1950). Persons authorized to solemnize marriages may not "pay, give to, or divide or share" with any other person their compensation for performing the marriage ceremony. KRS 402.090(2).

VI. [3.6] Marriage Licenses

Every marriage solemnized in Kentucky must be licensed. KRS 402.080 and *Pinkhasov v. Petocz*, 331 W.W.3d 285 (Ky. Ct. App. 2011). The license is to be issued by the clerk of the county in which the female resides at the time of the marriage if the female is a minor. If the female is eighteen (18) years of age or over or a widow and the license is issued on her application in person or by writing signed by her, it may be issued by any county clerk. KRS 402.080.

Kentucky law prohibits compensating, rewarding, soliciting, persuading, enticing, directing or inducing a person to go before any particular person to be married. KRS 402.090. Persons authorized to solemnize marriages may not "pay, give to, or divide or share" with any other person their compensation for performing the marriage ceremony. KRS 402.090.

Once a marriage license is obtained, the marriage must be solemnized within 30 days of the date it is issued. If not solemnized within that time period, the license is invalid. KRS 402.105. Every blank space on the license application form must be completed. KRS 402.110.

After the marriage ceremony, the person solemnizing the marriage or the clerk of the religious society before which it was solemnized must return the license to the county clerk of the county in which it was issued, with a certificate of the marriage over his signature, giving the date and place of celebration and the names of at least two of the persons present. KRS 402.220. The certificate is then filed in the county clerk's office. The county clerk keeps a record book reflecting the

parties' names, the person by whom or the religious society by which the marriage was solemnized, and the date when the marriage was solemnized. KRS 402.230.

In the absence of the county clerk or during a vacancy in the office, the county judge-executive may issue a marriage license and perform the duties and responsibilities of the clerk with respect to such licenses. The county judge-executive may return a memorandum regarding the marriage to the clerk, and the memorandum is then recorded as if the license had been issued by the clerk. KRS 402.240.

A circuit court may affirm or void a marriage if there is doubt as to the validity of a marriage. Either party to the marriage may petition in circuit court to avoid or affirm it. However, a party who was 18 years of age at the time of the marriage may not initiate such a proceeding against a minor. KRS 402.250.

VII. [3.7] Assets of Minor Who Marries Without Consent

The next friend of a minor who has married without the appropriate statutory consent may petition the court having general jurisdiction in the county of the minor's residence to commit his or her estate to a receiver. If the petition is granted a bonded receiver holds the estate of the minor and, after deducting a reasonable compensation for his services, pays out the rents and profits to the minor's separate use during infancy under the direction of the court. When the minor reaches the age of 18, the receiver surrenders the estate to him or her unless the court orders that it is in the minor's best interest that the assets continue to be held by the receiver. KRS 402.260.

VIII. [3.8] Criminal Liability

Criminal liability may be incurred with respect to marriages. It is a felony in Kentucky for:

1. an unauthorized person to solemnize a marriage under the pretense of having the authority to do so;
2. a person to falsely personate the father, mother, or guardian of an applicant in obtaining a marriage license; or
3. a person to falsely and fraudulently represent or personate another, and in such assumed character marry that person.

It is a misdemeanor in Kentucky to:

1. be a party to an incestuous marriage as defined by KRS 402.010 and also to continue to cohabit as man and wife after conviction for such an offense (KRS 402.990(1));

2. aid or abet the marriage of any person who has been adjudged mentally disabled, or attempt to marry, aid, or abet any attempted marriage with such a person (KRS 402.990(2));
3. knowingly solemnize a marriage that is prohibited by statute (KRS 402.990(3));
4. knowingly issue, as a clerk, a marriage license to any persons prohibited by statute from marrying (KRS 402.990(6)) (If convicted, the clerk shall also be removed from office);
5. knowingly issue, as a clerk, a marriage license in violation of the clerk's statutory duties (KRS 402.990(7)); or
6. knowingly issue a marriage license as a deputy clerk or any person other than a county clerk, in violation of the statutes.

It is a violation under Kentucky law:

1. to solicit persons to be married, share remunerations for solemnization services or for a minister or justice of the peace to solicit people to be married;
2. for a county clerk to violate any of the provisions KRS 402.110 regarding the issuance of the marriage license or 402.230 regarding the filing of the marriage certificate and the recording of marriages; or
3. for a person to fail to make the return of license and certificate required of him by KRS 402.220.

IX. [3.9] Prenuptial Agreements – An Introduction

The arsenal of tools utilized by estate planners has historically included prenuptial agreements, hereinafter referred to as antenuptial agreements. Most of these agreements have centered upon death.

After a warning in *Sousley v. Sousley*, 614 S.W.2d 942 (Ky. 1981), and a half-step in *Jackson v. Jackson*, 626 S.W.2d 630 (Ky. 1981), the Supreme Court of Kentucky announced a new public policy allowing such agreements to control property division in divorces in *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990). Estate planners may now carefully draft antenuptial agreements with an eye toward divorce.

When antenuptial agreements are drafted, the scrivener does not know whether the marriage will be ended by death or divorce. The thrust of this chapter is to review the status of such agreements at death, to emphasize changes in the law governing enforceability in the event of divorce, and to suggest potential areas in which future litigation over such agreements may center.

X. [3.10] Barring Spousal Rights At Death

Antenuptial agreements are used to control the inheritance and administration rights at the time of the death of one of the parties. Classic provisions in such agreements severely limit or abolish rights of inheritance from the spouse. What rights can be given up?

A. [3.11] What Are Spousal Rights at Death?

When there is no will, the surviving spouse receives the first $15,000 of the probate property[1] plus one-half of the balance of the probate property[2] (including both real estate[3] and personal property[4]) after expenses, debts, and taxes have been paid.[5] The surviving spouse also receives so much of the non-probate property of the decedent as was designated to be received by the surviving spouse before the death.

When there is a will, the surviving spouse receives the first $15,000 but only so much more of the probate property as is voluntarily left to the spouse by the terms of the will and only so much of the non-probate property as was designated by the deceased spouse to be received by the surviving spouse. If displeased by the will, the surviving spouse may renounce the will within a limited time period and take the amount of real and personal property which has been established by the legislature as being due the renouncing surviving spouse. This is sometimes called a "forced share."[6]

The surviving spouse may also have certain rights to avoid fraud upon his or her dower rights.[7]

The surviving spouse is normally preferred by statute for appointment as administrator or administratrix of the estate if no one is named by the will.[8] The administrator or administratrix of an estate is entitled to compensation for ordinary services to the estate of up to five percent of the personal property in the probate estate.[9]

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1 KRS 391.030(1)(c).

2 KRS 392.020.

3 KRS 391.010.

4 KRS 391.030(1).

5 Kentucky Inheritance Tax is imposed upon the recipient, but the duty to collect the tax is placed upon the personal representative. KRS Chapter 140. The indiscriminate use of a "tax clause" in practically every will has been criticized from widely different perspectives. One reason may be the potential for inadvertent imposition of the burden of the Inheritance Taxes upon a widow, for example, where non-probate assets pass to heirs who otherwise would pay their own tax.

6 KRS 392.080. A surviving spouse who renounces a Will receives one-third of the real estate and one-half of the personal property left by the decedent; the surviving spouse may also receive the $15,000 exemption. KRS 391.030(4).

7 *Benge v. Barnett*, 309 Ky. 354, 217 S.W.2d 782 (Ky. 1949). *See Harris v. Rock*, 799 S.W.2d 10 (Ky. 1990).

8 KRS 395.040.

9 KRS 395.150.

Surviving spouses also have dower or statutory share rights,[10] right of quarantine (use of a residence),[11] and a homestead exemption.[12]

In Kentucky, it appears to be clear that both parties can waive all of the above rights.[13]

B. [3.12] Standard Approaches

Traditionally, antenuptial agreements have been structured in such a manner as to:

1. waive the above right of inheritance, right to renounce the Will, right to serve as personal representative, right to dower and statutory share, right of quarantine and homestead exemption;
2. identify the separate assets and liabilities of each party; and
3. establish that the parties will maintain "separate property" in their separate names.[14]

C. [3.13] Alternatives to Rights at Death

Alternatives to statutory rights at death may include attractive provisions, such as:

1. A spouse can be guaranteed to be the beneficiary of certain life insurance.[15]

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[10] KRS 392.020. *Inter alia*, the surviving spouse receives a life estate in one-third of any realty seized by decedent during coverture but not at death unless barred, forfeited, or relinquished.

[11] KRS 392.050. The surviving spouse is entitled to the use and occupancy of his or her portion of the decedent's real estate free from rent and other charges from the date of death until "dower is assigned" or the property is sold. The surviving spouse gets his or her fraction of the gross rents and profits, with the ordinary expenses of maintenance, taxes, and water being born by the heirs. *Wyly v. Kallenbach*, 256 Ky. 391, 76 S.W.2d 34 (Ky. 1934); *Johnson v. Ducobu*, 251 S.W.2d 992 (Ky. 1952).

[12] KRS 427.060. The homestead exemption is the right to occupy a dwelling free from creditors to the extent of $5,000 for a reasonable time to allow for a newly acquired homestead. It cannot be claimed in addition to dower. *In re Gibson*, 33 F. Supp. 838 (E.D. Ky. 1940).

[13] *Lipski v. Lipski*, 510 S.W.2d 6 (Ky. Ct. App. 1974); *Stratton v. Wilson*, 185 S.W. 522 (Ky. 1916); *Gaines v. Gaines*, 163 Ky. 260, 173 S.W. 744 (Ky. 1915).

[14] It appears clear that antenuptial agreements are contracts in contemplation of marriage and therefore within one of Kentucky's statute of frauds, KRS 371.010(5), and therefore must be in writing. *Glazebrook v. Glazebrook's Ex'r*, 227 Ky. 628, 13 S.W.2d 776 (Ky. 1929). Kentucky has also held that the marriage itself is not sufficient "part performance" to take an Antenuptial Agreement out of the statute of frauds. *Wesley v. Wesley*, 181 Ky. 135, 204 S.W. 165 (Ky. 1918). *But see Smith's Administrator v. Price*, 252 Ky. 806, 68 S.W.2d 422 (Ky. 1934); *Lieber v. Mercantile Nat'l Bank*, 331 S.W.2d 463 (Tex. Civ. App.1960).

[15] *Simonds v. Simonds*, 45 N.Y.2d 233, 380 N.E.2d 189 (N.Y. 1978); *Wides v. Wides' Ex'r.*, 184 S.W.2d 579 (Ky. 1944); *Wewahitchka State Bank v. Mixon*, 504 So. 2d 1328 (Fla. Dist. Ct. App. 1987).

2. A spouse can be assured of inheriting a certain percentage of the probate estate.[16]
3. A spouse may be assured of the use of a residence for life or for a term of years.
4. A spouse can be assured of receiving a cash sum, assuming there are sufficient net probate assets to satisfy the obligation.[17]
5. Contracts may require that certain assets or payments be made prior to the marriage.[18]

D. [3.14] Drafting Suggestions

1. Consider severance clauses. Although *Stratton v. Wilson*, 185 S.W. 522 (Ky. 1916) held that certain clauses are severable, consideration should be given to using a severance clause when any clause is used which might be deemed to be in violation of public policy.[19]
2. Anticipate jointly acquired assets. Although most agreements provide the parties will keep their property separate, consideration should be given to using clauses to cover expected commingling, such as joint property.
3. Some practitioners use special language for household goods.
4. Do not fail to waive expressly all statutory rights. It appears clear that when any particular right is not expressly waived by the agreement, it remains for the surviving spouse.[20]

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16 *Roberts v. Conley*, 626 S.W.2d 634 (Ky. 1981); *Farmers Nat'l Bank of Danville v. Young*, 297 Ky. 95, 179 S.W.2d 229 (Ky. 1944).

17 Cash payments from one spouse to the other upon divorce continue to raise issues concerning public policy and are more completely addressed hereinafter. Such provisions should be used with caution.

18 It has been held that the transfer of property to a spouse under the requirements of an antenuptial agreement was not a fraudulent conveyance and could not be set aside to satisfy a federal tax lien. The promise of the spouse to marry and the waiver of other marital rights were held to be sufficient consideration. *Miele v. U.S.*, 637 F. Supp. 998 (So. D. Fla. 1986). Such gifts are not between "spouses," however, and are subject to the U.S. Gift tax.

19 Where a postnuptial agreement integrated settlement of both property rights and support rights, the material part of the agreement (limiting husband's obligation to support wife) was illegal, and therefore the entire agreement could not be enforced. *Cord v. Neuhoff,* 94 Nev. 21, 573 P.2d 1170 (Nev. 1978).

20 *Bauer v. Percy*, 912 S.W.2d 457 (Ky. Ct. App. 1995; *Pierce v. Tharp*, 58 Tenn. App. 362, 430 S.W.2d 787 (Tenn. Ct. App. 1967); later appeal 455 S.W.2d 145 (1970); *In the Matter of the Estate of DeRoo*, 1882, New York Surrogate's Court, December 6, 1990, as reported at the National Law Journal, January 21, 1991, at page 27, where the decedent and the surviving spouse entered into a prenuptial agreement waiving all statutory interests in consideration of concurrently executed wills. The surviving spouse argued that under New York statutes, certain property is exempted for the benefit of the family and never becomes a part of the decedent's estate. The court held

5. Incorporate the schedules of assets and liabilities in the text of the agreement. Often a spouse will later challenge the adequacy of financial disclosure and assert no recollection of the detailed financial disclosure made. This argument may be defeated in advance when the agreement itself makes reference to financial schedules which are attached. Consider signing the schedules, too.
6. Use the services of the client's CPA. Clients with assets that are significant enough to seek antenuptial agreements have accountants. The accountant can also assist in preparing the current financial statement and disclosure of income which are attached.
7. Remind the client to execute a consistent will.

XI. [3.15] Barring Spousal Rights at Divorce

Kentucky courts did not enforce antenuptial agreements in divorces prior to 1990. Public policy had always been to foster and encourage the family institution for the good of society. In the past, antenuptial agreements had been considered to be in violation of public policy because they anticipated or encouraged divorces. In *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990), the Supreme Court of Kentucky held that antenuptial agreements providing for disposition of property in the event of divorce are valid and do not conflict with the public policy of the State of Kentucky.

A. [3.16] What Are Spousal Rights in Property Upon Divorce?

Although the rights of the parties in a divorce are clearly outside the scope of this work, there are some general rules:

1. [3.17] Right to a Divorce

Either spouse is entitled to a divorce if the court is satisfied that the marriage is "irretrievably broken," which is defined as meaning that there is no reasonable chance that the parties will reconcile. Accordingly, the old expression "I won't give him a divorce" is certainly not the law of Kentucky.

2. [3.18] Title to Property

Property is divided in a divorce, without regard to whose name is on the asset.[21]

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that the language of the antenuptial agreement did not specifically waive that statutory right, and therefore the surviving spouse was entitled to exercise that exemption.

[21] KRS 403.190(3).

3. [3.19] Division of Marital Property

The marital property acquired during the marriage is to be divided in "just" proportions, considering all relevant factors, including the contribution of each spouse to the acquisition of the property, the duration of the marriage and the economic circumstances of each spouse.[22] "Just proportions" might or might not be equal.[23]

4. [3.20] Assignment Back of Non-Marital Property

Non-marital property is assigned to the party who inherited it, received it by gift, or owned it before the marriage.[24] Non-marital property may be "traced" from one form into another form and still be non-marital property.[25] However, appreciation in the value of non-marital property due to the efforts of one or both of the parties adds a marital component to an otherwise non-marital asset. The marital component of an otherwise non-marital asset is subject to evaluation and division with the spouse upon divorce.[26] More information on the tracing of assets may be found in **Chapter 7** of this Handbook.

5. [3.21] Surprises

There are surprises in many divorces. For example, a spouse who enters into a marriage with substantial property may expect to get his or her property back, with appreciation, if the parties are divorced. This spouse may discover, to his or her surprise, that if there is substantial appreciation in the value of a non-marital asset due to the efforts of one of the parties the appreciation becomes marital property.[27]

6. [3.22] Maintenance

The divorce court may award either spouse alimony (now called "maintenance") from the other, if the court finds that the spouse seeking maintenance lacks sufficient property to provide for reasonable needs, is otherwise unable to support himself or herself through appropriate employment, or is the custodian of a child whose condition makes it appropriate that the custodian not be required to seek employment outside the home. Once maintenance is ordered, the court sets a just amount for a reasonable period of time based upon many factors.[28] For more information on maintenance, *see* **Chapter 8**.

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22 KRS 403.190(1).
23 *Herron v. Herron*, 573 S.W.2d 342 (Ky. 1978).
24 KRS 403.190(2).
25 *Farmer v. Farmer*, 506 S.W.2d 109 (Ky. 1974).
26 *Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky. Ct. App. 1981).
27 *Goderwis v. Goderwis*, 780 S.W.2d 39 (Ky. 1989).
28 KRS 403.200.

7. [3.23] Costs and Attorney Fees

Although court costs are usually relatively minimal, attorney fees in divorces can be large. The court may require either spouse to pay all or a portion of the attorney fees for the other spouse after considering the financial resources of both parties.[29]

B. [3.24] Old Approach

Prior to *Gentry*, many Kentucky practitioners avoided use of the word "divorce" or the phrase "dissolution of the marriage" in antenuptial agreements to avoid the *Stratton v. Wilson* rule. Some practitioners thought that such agreements would or could be enforceable, in any event, so long as divorce was not mentioned.[30] For this reason, there is no standard Kentucky approach to divorce language in an antenuptial agreement.

C. [3.25] What Spousal Rights Can Be Barred?

Edwardson v. Edwardson, 798 S.W.2d 941 (Ky. 1990) held that an agreement could not resolve child custody, child support, or visitation issues.

Gentry clearly held that if an antenuptial agreement is otherwise enforceable, it can establish and restrict property rights upon divorce.

Language providing for payment of attorney fees has been discussed in *Ford v. Blue*, 106 S.W.3d 470 (Ky. Ct. App. 2003).

Abolition of alimony or maintenance rights, however, is a different issue in many respects. Kentucky has had significant alimony (hereinafter "maintenance") cases. Both of the following cases enforced a written obligation to pay maintenance.

1. [3.26] *Jackson v. Jackson*

In *Jackson v. Jackson*, 626 S.W.2d 630 (Ky. 1981), the antenuptial agreement did not mention divorce but provided "[T]he said Carl Jackson is to furnish the said Juanita Thurman Catlett a decent support during his natural life." The Supreme Court of Kentucky distinguished *Stratton* in the following manner:

> *Stratton v. Wilson*, *supra*, presented facts in marked contrast to those present here. The agreement there specifically made separate provisions to take effect upon separation or divorce. Here, the agreement was made at arm's length and merely obligates the husband to furnish the wife "a decent support during his natural life." The obligation commenced upon marriage of the parties, and does not depend upon a subsequent dissolution

[29] KRS 403.220.

[30] *See Jackson v. Jackson*, 626 S.W.2d 630 (Ky. 1981).

> or separation. Such an incidental relationship, with a possible future dissolution of marriage, cannot be considered to violate the public policy against the encouragement of marital breakdown articulated in *Stratton*.

2. [3.27] *Edwardson v. Edwardson*

Edwardson v. Edwardson, 798 S.W.2d 941 (Ky. 1990) was decided on the same day as *Gentry*. The wife sought to enforce an antenuptial agreement affirmatively against her husband, just as Juanita Catlett Jackson had done in *Jackson*. In *Edwardson*, the wife had been married before, and in her first divorce she had been awarded the sum of $75 per week as maintenance. This maintenance was to terminate upon her remarriage. The couple executed an agreement that provided, in part:

> In the event that the marriage of the parties shall be dissolved or the parties become legally separated, to the extent permitted under Kentucky law or the state of residence where said action is filed, the [wife] shall receive $75 per week as maintenance (alimony) from the [husband] for her life, or until her remarriage.

The Supreme Court of Kentucky enforced this contractual undertaking by Mr. Edwardson.

Neither *Jackson* nor *Edwardson* concerned a restrictive limitation upon maintenance. However, such restrictions have been the subject of many cases in other jurisdictions. It is fair to say that the number of jurisdictions approving bars to maintenance is increasing. Florida,[31] Illinois,[32] Massachusetts,[33] Pennsylvania,[34] Indiana,[35] West Virginia,[36] New Jersey,[37] District of Columbia,[38] Georgia,[39] Alabama,[40] Nevada,[41] Colorado,[42] Oregon,[43] Connecticut[44] and Louisiana[45] have enforced antenuptial agreements in which the wife has waived or limited claims for maintenance.

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31 *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970).
32 *Volid v. Volid*, 6 Ill. App .3d 386, 286 N.E.2d 42 (Ill. Ct. App. 1972).
33 *Osborne v. Osborne*, 428 N.E.2d 810 (Mass. 1981).
34 *Laub v. Laub*, 351 Pa. Super. 110, 505 A.2d 290 (Pa. Super. Ct. 1986).
35 *Flora v. Flora*, 337 N.E.2d 846 (Ind. 1975).
36 *Gant v. Gant*, 329 S.E.2d 106 (W. Va. 1985).
37 *D'Onofrio v. D'Onofrio*, 491 A.2d 752 (N.J. Super. Ct. App. Div. 1985).
38 *Burtoff v. Burtoff*, 418 A.2d 1085 (D.C. Ct. App. 1980).
39 *Scherer v. Scherer*, 292 S.E.2d 662 (Ga. 1982).
40 *Barnhill v. Barnhill*, 386 So. 2d 749 (Ala. Civ. App. 1980).
41 *Buettner v. Buettner*, 89 Nev. 39, 505 P.2d 600 (Nev. 1973).
42 *Newman v. Newman*, 653 P.2d 728 (Colo. 1982).
43 *Unander v. Unander*, 506 P.2d 719 (Or. 1973).
44 *Parniawski v. Parniawski*, 33 Conn. Supp. 44, 359 A.2d 719 (Conn. 1976).
45 *Holliday v. Holliday*, 346 So. 2d 1382 (La. Ct. App. 1977).

The inclusion of a clause limiting or prohibiting maintenance may result in a change that might not immediately meet the eye, namely the date of the determination of the fairness of the agreement.

XII. [3.28] Standard Of Fairness

In *Gentry*, the Supreme Court of Kentucky gave guidance as to the standard of fairness which should be applicable to antenuptial agreements:

> Although antenuptial agreements providing for the disposition of property on divorce are permitted, it is, of course, possible that a particular agreement may be invalid or even void when measured by appropriate standards:
>
> > ...the trial judge should employ basically three criteria in determining whether to enforce such an agreement in a particular case: (1) Was the agreement obtained through fraud, duress or mistake, or through misrepresentation or non-disclosure of material facts? (2) Is the agreement unconscionable? (3) Have the facts and circumstances changed since the agreement was executed so as to make its enforcement unfair and unreasonable? *Scherer v. Scherer*, [249 Ga. 635] 292 S.E.2d 662 (1982).

In *Edwardson*,[46] the Supreme Court of Kentucky commented upon "unconscionability":

> The second limitation to be observed is that the agreement must not be unconscionable at the time enforcement is sought. Regardless of the terms of the agreement and regardless of the subsequent acquisition or loss of assets, at the time enforcement is sought, the court should be satisfied that the agreement is not unconscionable. [footnote 2: Upon review of a post-nuptial separation agreement entered into pursuant to KRS 403.180, the trial court must determine whether the agreement is unconscionable. A number of Kentucky decisions have addressed the construction of this term and we need not attempt further refinement in this opinion. The concept of unconscionability is familiar to circuit courts by virtue of KRS 403.180 and KRS 403.250.] Upon a finding of unconscionability, the trial court entertaining such an action may modify the parties' agreement to satisfy the necessary standard, but should otherwise give effect

[46] *Edwardson v. Edwardson*, 798 S.W.2d 941, 945 (Ky. 1990).

> to the agreement as nearly as possible providing the agreement was not procured by fraud or duress.
>
> * * *
>
> Courts reviewing antenuptial agreements and faced with a claim of unconscionability should not overlook the wisdom, which is fully applicable to both spouses, expressed in this Court's decision rendered in *Clark v. Clark*, 301 Ky. 682, 192 S.W.2d 968, 970 (Ky. 1946):
>
> A separation agreement will be closely scrutinized by a court of equity.
>
> * * *
>
> It must appear that the husband exercised the utmost good faith; that there was a full disclosure of all material facts, including the husband's circumstances and any other fact which might affect the terms of the contract; and that the provisions made in the agreement...were fair, reasonable, just, equitable, and adequate in view of the conditions and circumstances of the parties....

In *Blue v. Blue*, 60 S.W.3d 558 (Ky. Ct. App. 2001), the court elaborated upon the standard of enforceability and extended the *Gentry* concept of "changed circumstances so as to make its enforcement unfair and unreasonable" to whether the circumstances in which the parties found themselves at the divorce were reasonably foreseeable. *Blue* enforced the prenuptial agreement although the husband's net worth had appreciated significantly, when the wife was also to receive a significant amount. Even though the parties still had extreme financial disparity in their respective net worths at the time of the divorce, the prenuptial agreement was upheld. This "foreseeability" approach is not unique to Kentucky. *Button v. Button*, 388 N.W.2d 546 (Wis. 1986).

The National Conference of Commissioners on Uniform State Laws has approved and recommended that all states enact the Uniform Premarital Agreements Act ("UPAA").[47] The House of Delegates of the American Bar Association approved the UPAA in 1984. Kentucky has not adopted the UPAA. It has been adopted in some form in the states of Arizona, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Kansas, Maine, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, South Dakota, Texas, Utah, Virginia, and Wisconsin. North Dakota adopted it but reserved unto the trial court authority to reject any agreement or provisions which would be unconscionable at the time of trial.[48] In 1986, Colorado approved an act similar to UPAA, but modifying the maintenance provisions. Alaska has embod-

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47 This body is again considering a new proposed Act which might supersede the UPAA.

48 North Dakota Cent. Code §§ 14-03-01 *et seq.* (1985).

ied the UPAA provisions in a published decision.[49] The UPAA provides that an antenuptial agreement is not enforceable, if the party against whom enforcement is sought proves that:

1. He or she did not execute the agreement voluntarily; or
2. (a) Before execution of the Agreement, that party was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; and (b) before execution of the Agreement, that party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond that actually provided; and (c) before execution of the Agreement, that party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party; and (d) the Agreement was unconscionable when it was executed.

The UPAA would enforce a provision barring maintenance in most cases. Specifically:

> If a provision of a Premarital Agreement modifies or eliminates spousal support and that modification or elimination causes one party to the Agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a Court, notwithstanding the terms of the Agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

It is clear that the Supreme Court of Kentucky intends for trial courts to carefully scrutinize any agreements which bar or limit maintenance. According to *Gentry*:

> The rule against antenuptial contracts which fix the parties' rights in the event of divorce also, of course, protects the public's interest in insuring that divorce does not leave one spouse destitute or dependent upon the state for support. In the Gentry antenuptial agreement, we are not confronted with a contract purporting to waive any claim to both marital property and maintenance, although we believe the trial court's broad discretion to review antenuptial agreements for unconscionability should adequately protect this interest.[50]

There is other non-binding guidance on the issue of unconscionability. It has been the subject of the following article:

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[49] *Brooks v. Brooks*, 733 P.2d 1044 (Alaska 1987).

[50] *Gentry*, at page 934.

> The most important limits to the enforceability of premarital contracts are unfairness and change of circumstances. The largest failing of the UMPA[51] and the UPAA is that they touch upon these concepts only tangentially. Judges are advised not to enforce unconscionable agreements, but receive no guidance in defining "unconscionable." "Unconscionable" in this context apparently refers to the fairness of the substantive terms of the agreement. The uniform acts do not reveal, though, whether the Uniform Commercial Code definition of unconscionability is appropriate. For many reasons it is simply inadequate to establish such a vague rule. In practice, the unconscionability rule probably will result in the principle that premarital contracts are enforceable unless the judge does not like the contract. Indeed, this seems to be the current rule in many states today. Such uncertainty is quite undesirable.
>
> ...Second, important public policy concerns relate to the circumstances of the spouses *at divorce*, not at the time the contract was signed. The circumstances of spouses can change dramatically during a marriage. For example, one spouse may develop health problems or may have a diminished earning capacity as a result of working solely as a homemaker. Few would dispute that the state has a strong interest in attempting to ensure that each spouse will be financially self-sufficient after divorce, and that any children will be adequately supported. Consequently, the state has a strong interest in policing the substantive fairness of the division of property at divorce. The circumstances of the parties at the time the marital contract was signed are irrelevant to these public policy concerns. So, the uniform acts' focus upon the fairness of a marital contract solely at the time of execution seems unwise. If substantive fairness is to be relevant to the question of enforceability of marital contracts, the focus should be upon the fairness of the contract at divorce. [*Premarital Contracts Are Now Enforceable Unless...*, Thomas J. Oldham, HOUSTON L. REV., Volume 21, page 757, at pages 774-775 (1984).]

A 1988 Supreme Court of Hawaii decision elaborated on the concept of unconscionability. That court set forth unconscionability as encompassing two basic principles: one-sidedness and unfair surprise. One-sidedness was defined as meaning that the agreement leaves the parties in an unjustly disproportionate economic situation at divorce. Unfair surprise was defined as meaning that one

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[51] Uniform Marital Property Act, also not adopted in Kentucky.

party did not have full and adequate knowledge of the financial condition of the spouse-to-be when the antenuptial agreement was executed.[52]

A. [3.29] Some Commentators Propose Different and Separate Evaluations of Fairness

The first would be an evaluation, based upon general contract principles, applicable at the time of the execution of the agreement, regarding issues of good faith, fair dealing, lack of undue influence, disclosure and lack of duress. Then at the time of enforcement of the agreement, these commentators would urge a new evaluation of fairness, based upon whether either spouse might become a ward of the state or whether there had been other changed circumstances.

B. [3.30] Effective Date of Application of Fairness Standard

Although *Gentry* and *Edwardson* appear to adopt a standard of "unconscionability" at the time of the divorce, there is substantial contrary authority, at least when the agreement seeks solely to divide the property. Arizona, Maryland, and Florida have held that the effective date for determining the fairness of an agreement is the date of its execution, not what develops later.[53]

There is foreign authority that the fairness of the antenuptial agreement should be evaluated as of the date of the divorce.[54] Colorado and Hawaii have proposed to evaluate the fairness of the property division provisions at the time of the execution of the agreement and the fairness of any maintenance provisions as of the date of the divorce.[55]

C. [3.31] Drafting Suggestions

Most importantly, the scrivener should now seek to avoid any issue as to whether divorce is impacted by the antenuptial agreement. Although there may have been justification for this position prior to *Gentry*, agreements should now be very clear.[56] Agreements which do not refer to divorce specifically may not apply to a divorce proceeding.[57] This is consistent with a Kentucky rule of law that a buy-sell agreement (or controlling bylaw) which did not mention inheritance at death did not control stock disposition at the death of a shareholder.[58]

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52 *Lewis v. Lewis*, 748 P.2d 1362 (Haw. 1988).

53 *Spector v. Spector*, 531 P.2d 176 (Ariz. Ct. App. 1975); *Del Vecchio v. Del Vecchio*, 143 So. 2d 17 (Fla. 1962); and *Martin v. Farber*, 68 Md. App. 137, 510 A.2d 608 (Md. Ct. App. 1986).

54 *In re The Marriage Of Meisner*, 715 P.2d 1273 (Colo. Ct. App. 1985) and *Hill v. Hill*, 356 N.W.2d 49 (Minn. Ct. App. 1984).

55 *Newman v. Newman*, 653 P.2d 728 (Colo. 1982) and *Lewis v. Lewis*, 748 P.2d 1362 (Haw. 1988).

56 *See Smetana v. Smetana*, 726 N.W.2d 885 (S.D. 2007); *Levy v. Levy*, 130 Wis. 2d 523, 388 N.W.2d 170 (Wis. 1986); *Busekist v. Busekist*, 224 Neb. 510, 398 N.W.2d 722 (Neb. 1987); and *Searcy v. Searcy*, 658 S.W.2d 931 (Mo. Ct. App. 1983) which held that those respective Antenuptial Agreements did not contemplate divorce and did not impact upon the parties' later divorce.

57 *Roth v. Roth*, 565 N.W.2d 782 (S.D. 1997).

58 *Taylor's Administrator v. Taylor*, 301 S.W.2d 579 (Ky. 1957).

In addition, in light of the questionable enforceability or conscionability of a clause barring maintenance, one might consider a separate severance clause for any such provision. Express provisions waiving claims for attorney fees, if the parties divorce, may be binding. *Ex Parte Walters*, 580 So. 2d 1352 (Ala. 1991); *Lashkajani v. Lashkajani*, 2005 Fla. LEXIS 1360.

XIII. [3.32] Defenses

A. [3.33] Lack of Disclosure

In *Edwardson*, the Supreme Court of Kentucky held:

> The first limitation upon parties to an antenuptial agreement is the requirement of full disclosure. Before parties should be bound by agreements which affect their substantial rights upon dissolution of marriage, it should appear that the agreement was free of any material omission or misrepresentation. *Jackson v. Jackson*, 626 S.W.2d 630 (Ky. 1981) and *Simpson v. Simpson's Ex'rs*, 94 Ky. 586, 23 S.W. 361 (Ky. 1893).[59]

Perhaps the most common basis upon which antenuptial agreements are set aside is the lack of adequate disclosure of financial resources.[60] A schedule of assets and liabilities should be attached for each spouse. A schedule of income, including tax free income, might also be considered.[61]

It has been held that a disparity in the amount which the spouse will receive and the amount which the spouse would otherwise have received gives rise to a presumption of nondisclosure or fraudulent misrepresentation.[62]

Lack of disclosure may not be a valid defense when the claim is made by a widow who has been represented by independent counsel and who entered into the antenuptial agreement in an effort to protect her own estate.[63]

B. [3.34] Fraud

Antenuptial agreements must be without fraud, deceit, misrepresentation, concealment, deception, undue influence or anything calculated to deceive.[64] Does

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59 *Edwardson*, at 945.

60 *Lawson v. Loid*, 896 S.W.2d 1 (Ky. 1995); *Potter's Ex'r. v. Potter*, 234 Ky. 769, 29 S.W.2d 15 (Ky. 1930); *Zimmie v. Zimmie*, 464 N.E.2d 142 (Ohio 1984).

61 *See* F.G. Madera, Annotation, *Setting Aside Antenuptial Contract Or Marital Settlement On Ground Of Failure Of Spouse To Make Proper Disclosure Of Property Owned*, 27 ALR2d 883.

62 *Gaines v. Gaines*, 173 S.W. 774 (Ky. 1915).

63 *In re Estate of Davis*, 281 N.Y.S.2d 767, 228 N.E.2d 768 (N.Y. 1967).

64 *Gentry, supra.*; *Stratton v. Wilson*, 185 S.W. 522 (Ky. 1916); and *Tilton v. Tilton*, 130 Ky. 281, 113 S.W. 134 (Ky. 1908).

fraud include a wealthy person seeking out an antenuptial agreement from a non-wealthy prospective spouse? The answer appears to be negative. *Blue v. Blue*, 60 S.W.3d 585 (Ky. Ct. App. 2001).

1. [3.35] Drafting Considerations

   a. The use of a CPA may avoid inadvertent financial discrepancies not obvious to the attorney and not recalled by the client. *Luck v. Luck*, 711 S.W.2d 860 (Ky. Ct. App. 1986).

   b. The use of separate counsel assists in defending against claims of fraud.[65]

C. [3.36] Duress

It is well settled that agreements procured by duress should be set aside.[66] The classic duress situation arises when the antenuptial agreement is first presented by the groom to the bride shortly before the wedding while she is awaiting the ceremony in her wedding gown and all of the guests are waiting.[67] Antenuptial agreements should be discussed, negotiated, and signed as early as possible to avoid any semblance of duress.[68] One dated Kentucky case held that duress would result if one party exercised dominance over the other.[69]

In foreign jurisdictions, a threat to call off the wedding if the agreement was not signed was held to be sufficient duress to set it aside,[70] but not when the spouse-to-be had advice from a competent attorney not to sign the agreement.[71]

Pregnancy may be a special form of duress.[72]

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65 *See McKee-Johnson v. Johnson*, 444 N.W.2d 259 (Minn. 1989).

66 *Gentry, supra.*; *In re Marriage of Dawley*, 131 Cal. Reptr. 3, 551 P.2d 323, 331 (Cal. 1976); *Norris v. Norris*, 419 A.2d 982 (D.C. 1980); *Volid v. Volid*, 6 Ill. App. 3d 386, 286 N.E.2d 42 (Ill. Ct. App. 1972); *Tomlinson v. Tomlinson*, 170 Ind. App. 331, 352 N.E.2d 785 (Ind. Ct. App. 1976); *In re Estate of Moss*, 200 Neb. 215, 263 N.W.2d 98 (Neb. 1978).

67 *Simzer v. Simzer*, 514 So. 2d 372 (Fla. App. Dist. Ct. 1987).

68 *But see In re Marriage of Ross*, 670 P.2d 26 (Colo. Ct. App. 1983), wherein the agreement was upheld, although signed the day of the wedding, when the wife had an ample opportunity to consult her attorney, who had recommended two changes, one of which was adopted.

69 *Tilton v. Tilton*, 130 Ky. 281, 113 S.W. 134 (Ky. 1908).

70 *Lutgert v. Lutgert*, 338 So. 2d 1111 (Fla. App. Dist. Ct. 1976).

71 *De Lorean v. De Lorean*, 511 A.2d 1257 (N.J. Super. Ct. Ch. Div. 1986).

72 In *Gant v. Gant*, 329 S.E.2d 106 (W. Va. 1985), the Supreme Court of West Virginia noted that the West Virginia Code declared void any prenuptial agreement entered into when the wife was pregnant. "If the woman is pregnant, this may also be evidence of duress". *Premarital Contracts Are Now Enforceable, Unless...*, Thomas J. Oldham, Houston L. Rev., Volume 21, p.758 (1984), at page 764 (footnote 25).

D. [3.37] Breach of Agreement

The general rule is that a party who breaches an agreement cannot then rely upon it.[73] A common provision in antenuptial agreements requires one spouse to maintain life insurance protection for the other. When this is a substantial provision of the agreement, failure to maintain such life insurance coverage may constitute a breach of the agreement precluding enforceability.[74] However, abandonment prior to death was held not to preclude the spouse from death benefits under the antenuptial agreement.[75]

XIV. [3.38] "Non-Probate" Assets

Certain assets have been considered "non-probate assets" because they traditionally do not pass through the hands of the personal representative. Issues remain at this time concerning the efficacy of an antenuptial agreement which does or does not make specific reference to non-probate assets. Caution would dictate that non-probate assets be disclosed, in any event. Special rules apply for some of these assets.

A. [3.39] Pension Plans

Pension plans are traditional "non-probate" assets because any benefits payable upon death are paid to the designated beneficiary, regardless of the provisions of the will of the decedent or the statute of descent and distribution.

Historically, a surviving spouse had no rights to retirement plan benefits, even if a will was renounced. A special protection was afforded spouses by the Retirement Equity Act of 1984, which required retirement plans to provide an automatic joint and survivor annuity form of benefit. The act also required plans to allow pre-retirement survivor annuity benefits. The plan participant may waive these benefits by executing a written election to waive them but only if the spouse gives a written consent. The period for the qualified joint and survivor annuity election is the 90-day period ending on the annuity starting date. These elections must be made within limited time periods. It would appear that spousal consent to a waiver is effective only with respect to that particular spouse. In addition, spousal consent is apparently not required if the marriage is less than one year old on the date of death or at the annuity starting date. It also appears that spousal consent is required for a participant's affirmative election of a non-spouse beneficiary.

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73 *Burtoff v. Burtoff*, 418 A.2d 1085 (D.C. Ct. App. 1980).

74 *Plant v. Plant*, 320 So. 2d 455 (Fla. Dist. Ct. App. 1975). In an analogous situation a former husband was held not entitled to enforce a separation agreement against his former wife, where he failed to maintain a life insurance policy and support the child according to the requirements of the Separation Agreement. *Stuart v. Stuart*, 77 U.S.App. D.C. 200, 133 F.2d 411 (1943).

75 *In re Estate of Crawford*, 115 Misc. 2d 395, 454 N.Y.S.2d 258 (1982).

Although the Act provides substantial protections for the spouse in defining benefit, money purchase, and, under certain circumstances, profit sharing and stock bonus plans subject to the automatic survivor coverage rules, there are limitations and remaining issues which have not been resolved:

1. It appears that an antenuptial agreement, by itself, cannot constitute the signed consent. Theoretically, the future spouse is not a "spouse" at the time the antenuptial agreement is executed. Assuming this is accurate, there must be a separate signed consent after the marriage, which must show that the spouse understands the nature of the consent. Remedies are unclear when the spouse, subsequent to the marriage, refuses to sign an appropriate consent.[76]
2. Drafters appear to agree that antenuptial agreements may have provisions in them requiring the spouse to consent.
3. A waiver by a non-participant spouse is believed to not constitute a gift to the designated beneficiary.
4. It is believed that a spousal consent, once signed and delivered, is irrevocable.
5. The actual participant in the plan may elect to waive and/or revoke the election. It therefore appears that the revocation right is the right only of the participant and the consent right is the right only of the spouse.
6. It appears that IRAs are not required to provide survivor annuity benefits.

Potential approaches include:

- A clause in the antenuptial agreement stating that the antenuptial agreement shall constitute a consent to waiver of the survivor annuity by the spouse-to-be. This may not be enforceable.
- Language whereby the spouse-to-be agrees to execute all necessary documents to accomplish such waivers and consents after the marriage.
- An agreement that the benefits to be received by the spouse-to-be will be reduced by the amount of any benefits which the spouse-to-be receives, due to no appropriate consent being accomplished.
- A provision that the spouse-to-be will pay to the beneficiary designated by the participant any sums received by the spouse-to-be due to any failure of the consent.

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[76] This might constitute a significant breach of the contract, as more fully discussed above.

This is an area that has been the subject of considerable litigation, and will remain so well into the future.

B. [3.40] Joint Property

Although joint property is a "non-probate" asset, which passes to the surviving joint tenant, the surviving spouse appears to have rights against joint property if there is fraud on the dower.[77] If dower is waived by the antenuptial agreement, then joint accounts with third parties would appear to be protected from the claims of the surviving spouse.

The peril involved in not following the language of the agreement was pointed out in *Gentry*. There, a parcel of real estate in California was purchased during the marriage in the joint names of the parties. The Supreme Court of Kentucky found that the wife had waived any claim to the husband's separate property, except for the California house, which was jointly titled:

> [Wife] argues that even if the circuit court was correct in upholding the agreement, it nevertheless applied the agreement incorrectly as to one asset – the California house. All real estate except the California house was held solely in [husband's] name and was awarded to [husband]. Notwithstanding the fact that title was taken and held by [husband] and [wife] jointly, the trial court found the California house was a business asset and awarded it to [husband]. This was error. It is true the record establishes that the house was purchased from the [husband's] account, but just as [wife] may not argue that her contribution to the marriage and the enterprise is not accurately reflected in the ownership of assets, [husband] is likewise precluded from arguing that the house is his sole and separate property. By virtue of the antenuptial agreement, property in [husband's] name at the time of the dissolution was [husband's]; property in [wife's] name at the time of dissolution was [wife's].... At the time of dissolution, [wife] had acquired, within the meaning of the agreement, and was seised of, a one-half undivided interest in the California real estate. We therefore remand to the trial court with instructions to award one-half the equity of the California real estate to [wife], in accordance with the antenuptial agreement and the deed. [*Gentry*, at page 935.]

Joint property with the spouse, however, is not contemplated by many antenuptial agreements. Instead, most agreements simply provide that the parties will keep their assets separate. Disputes arise concerning the intent of the parties over later-acquired joint banking accounts and jointly titled real estate. The

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[77] *Harris v. Rock*, 799 S.W.2d 10 (Ky. 1990).

attorney may wish to consider inserting a special clause for jointly held property in the antenuptial agreement.

C. [3.41] Life Insurance

Life insurance is a "non-probate" asset. It has been held in a dated Kentucky case to be outside "fraud on the dower" claims of the surviving spouse.[78]

D. [3.42] Living Revocable Trusts

Living trusts have traditionally been considered to be "non-probate" assets but may well be subject to claims by the surviving spouse.[79] When there is a waiver of such claims in an antenuptial agreement, such a waiver should be effective to protect the assets of a living trust.

E. [3.43] Election

Practitioners should be aware that conflicting provisions between a deed and a will or trust may require an election by the surviving spouse under the doctrine of testamentary election.[80] Thus, when a widow accepts benefits under a will, she may be precluded from attempting to enforce an antenuptial agreement with contrary limitations.[81]

XV. [3.44] Taxation

The certified public accountant who represents the client should review the antenuptial agreement before execution. Surprising tax implications can attend antenuptial agreements. The following sections are examples of areas in which surprises may occur.

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78 *Farley v. First Nat'l Bank*, 250 Ky. 150, 61 S.W.2d 1059 (Ky. 1933); *but see Murphy v. Metro. Life Ins. Co.*, 498 S.W.2d 278 (Tex. Civ. App. 1973).

79 *Sullivan v. Burkin*, 460 N.E.2d 572 (Mass. 1984).

80 *Kentucky Trust Co. v. Kessell*, 464 S.W.2d 275 (Ky. 1971). By like token, in the absence of a subsequent agreement, it is suggested that a party to an antenuptial agreement may be required to elect between the beneficiary provisions of an antenuptial agreement and (i) the beneficiary provisions of a will or trust; (ii) the beneficiary designations of non-probate assets, such as life insurance; and (iii) jointly titled assets such as real estate and banking accounts. *See In re Strickland's Estate*, 181 Neb. 478, 149 N.W.2d 344 (Neb. 1967). *But see* KRS 381.050(2).

81 *Lieber v. Mercantile Nat'l Bank*, 331 S.W.2d 463 (Tex. Civ. App. 1960); *see Pierce v. Tharp*, 430 S.W.2d 787 (Tenn. Ct. App. 1967).

A. [3.45] Property Transfers

Property transfers pursuant to antenuptial agreements may be subject to the Federal Gift Tax.[82] It may be best to delay such gifts until after the marriage.

B. [3.46] Estate Tax Issues

Will the payment of a spousal claim based upon an antenuptial agreement qualify for the marital deduction? Will the spousal claim be supported by full and adequate consideration and the estate entitled to a deduction from the claim as authorized by IRC § 2053(a)(3)?

C. [3.47] Gift Tax Issues

When the wife obtained a life estate pursuant to an antenuptial agreement in a community property state, the court found full and adequate consideration because the husband received a present economic benefit from the waiver in the antenuptial agreement.[83]

XVI. [3.48] Ethics

Kentucky Bar Association Formal Ethics Opinion E-290 concludes that it is usually not proper for the attorney representing a client in negotiation of an antenuptial agreement to "answer questions" of the spouse-to-be. The Opinion notes in part:

> Joint representation may threaten the exercise of counsel's independent professional judgment if one or the other of the parties is unwilling to be completely forthcoming....
>
> If counsel is possessed of confidences or secrets of a party that the other party needs to know and that party is not willing to disclose such information, it is obvious that counsel would, at the very least, violate DR 5-105 by purporting to represent both.

It is advisable that each party consult independent counsel.

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82 Reg. 25.2512-8 (1958); *Commissioner v. Wemyss*, 324 U.S. 303 (1945); *Merrill v. Fahs*, 324 U.S. 308 (1945).

83 *Carli v. Commissioner*, 84 T.C. 649 (1985).

XVII. [3.49] Business Agreements

Increased emphasis is given to antenuptial agreements to protect closely-held business interests. Families perceive a genuine need to exclude the spouse-to-be from gaining an interest in the business.

A. [3.50] Drafting Suggestions

1. The agreement should expressly reveal the value of the interest of the client in the closely-held business together with the debt associated therewith.
2. Consideration might be given to the execution of a family agreement with other participants in the closely-held business, which conceivably could make them have an interest in the enforceability of the antenuptial agreement.
3. Express language should appear in the divorce section of the antenuptial agreement excluding, as a portion of "separate property," all appreciation in the value of the closely-held business and other separate assets after the marriage. Such appreciation, in lieu of language excluding it, may constitute marital property.[84]
4. All earnings from the closely-held business and all reinvestments in the closely-held business from separate property should be deemed to be "separate property" in the antenuptial agreement.
5. Consideration should be given to having spouses execute buy-sell agreements renegotiated during the marriage, although the execution of the buy-sell agreement will not necessarily bind the spouse if the parties subsequently divorce.[85]

XVIII. [3.51] Debts

Antenuptial agreements may have express language concerning debts. As "the other side of the balance sheet," the debts may be as important as the assets. Beginning form language might be:

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[84] *Goderwis v. Goderwis*, 780 S.W.2d 39 (Ky. 1989).

[85] *See McGinnis v. McGinnis*, 920 S.W.2d 68 (Ky. Ct. App. 1995); *Suther v. Suther*, 28 Wash. App. 838, 627 P.2d 110 (Wash. Ct. App. 1981).

> Neither party shall assume or become responsible for the payment of any pre-existing debts or obligations of the other party because of the marriage. Neither party shall do anything which would cause the debt or obligation of one of them to be a claim, demand, lien or encumbrance against the property of the other, without the other's written consent. If a debt or obligation of one party is asserted as a claim or demand against the property of the other without such written consent, the party who is responsible for the debt or obligation shall indemnify and hold harmless the other from any such claim or demand, including the indemnified party's costs, expenses and attorney fees. In the event both parties sign for a debt, the obligation for the debt will follow the use of such funds; for example, if the funds are used for the benefit of husband, the debt shall be the separate debt of husband; for further example, if the funds are used for the financing of joint property or for the joint benefit of the parties, then the debt will be a joint debt, just as the asset will be a joint asset.

XIX. [3.52] Implementing the Agreement

If the antenuptial agreement is to benefit the parties, its terms must be carried out. The agreement should provide that the parties will keep their property separate. An antenuptial agreement will not be enforced if the parties abandon it.[86] Therefore, the husband should keep careful records of his real property, banking accounts, and securities in only his name. The wife should do the same. The failure to keep separate property and to otherwise follow the terms of the agreement may result in an abandonment of the agreement, which is a recognized defense to the enforcement of antenuptial agreements.[87]

The execution of a consistent will should take place forthwith upon the execution of the antenuptial agreement. The execution of an antenuptial agreement should not preclude either spouse from drawing a will which makes provision for the other spouse beyond the limitations of the antenuptial agreement.

The surviving spouse may consider filing a claim as a creditor of the estate for any benefits owing under the antenuptial agreement, but not provided for by will or non-probate designation.

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[86] *Prather v. Cox*, 689 S.W.2d 623 (Ky. Ct. App. 1985); 56 ALR4th 998.

[87] *Prather v. Cox*, 689 S.W.2d 623 (Ky. Ct. App. 1985); *Harlin v. Harlin*, 261 Ky. 414, 87 S.W.2d 937 (Ky. 1935).

A. [3.53] Drafting Suggestions

1. In order to assist the parties in implementing their agreement, the scrivener should consider the use of a "joint property" clause. The fact that jointly held assets are commonly acquired by couples often makes such a provision desirable.
2. To avoid any potential need for an election by the surviving spouse, due to inconsistent documents, counsel might insert, for clarity, a provision that the agreement does not preclude either from leaving assets to the other beyond the obligations of the antenuptial agreement.[88]
3. To avoid waiver of the attorney-client privilege, the attorney should avoid signing the agreement, and particularly signing a statement on the certification which relates in any way to the representation. *Jarvis v. Jarvis*, 533 N.Y.S.2d 207 (N.Y. Sup. Ct. 1988).

XX. [3.54] Independent Counsel

The absence of independent counsel, by itself, may be insufficient to set aside an antenuptial agreement.[89] The absence of independent counsel has been held not to raise a presumption of fraud. Rather, the courts appear to require that each have an *opportunity* to seek legal advice.[90]

Minnesota has adopted a statute allowing the enforcement of an antenuptial agreement when each party has an opportunity to consult with legal counsel of their own choice.[91]

In another Washington state decision, the Court of Appeals found that an antenuptial agreement was unfair and void when there should have been a more vigorous urging by the attorney that the spouse-to-be seek independent advice:

> [T]he disparity between the parties in business experience and assets mandated a more vigorous urging by the attorney that Mrs. Matson seek independent advice. She had some secretarial experience and separate property consisting only of household furnishings and child support payments. In contrast, Mr. Matson had successfully operated a fruit ranch, been elected to the State Senate, and had assets in excess of $200,000.[92]

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88 53 ALR2d 475; *see In re Strickland's Estate*, 181 Neb. 478, 149 N.W.2d 344 (Neb. 1967).

89 *Whitney v. Seattle-First Nat'l Bank*, 16 Wash. App. 905, 560 P.2d 360 (Wash. Ct. App. 1977).

90 *In re Estate of Crawford*, 107 Wash. 2d 493, 730 P.2d 675 (Wash. 1986); *In re Marriage of Cohn*, 18 Wash. App. 502, 569 P.2d 79 (Wash. Ct. App. 1977).

91 Minn. Stat. Ann. § 519.11 (West Supp. 1984).

92 *In re Marriage of Matson*, 705 P.2d 817, 821 (Wash. Ct. App. 1985).

In a New Hampshire decision, the attorney who drafted the antenuptial agreement had previously represented the husband but had never represented the wife. The attorney believed he was representing both parties in effecting a mutually desired agreement. The attorney did not advise the spouse-to-be to obtain independent counsel. The parties represented to the attorney that the purpose of the agreement "was to protect their respective children's interests in their estates." The attorney, during the preparation and examination of the agreement, "did not discuss divorce as a probable or possible cause for the termination of the marriage." The husband admitted that neither party discussed the financial consequences of ending the marriage by divorce or the possibility of divorce during the time the agreement was proposed, drafted, considered and signed. The Supreme Court of New Hampshire found that the agreement did not have an impact upon that divorce, although it had the following language:

> The parties mutually agree and do hereby release, convey and quitclaim unto the other all their respective interest that he or she may acquire by the said intermarriage in and to the property of the other, now in his or her possession, or what each may hereafter acquire renouncing forever all claims, either in law or in equity, of courtesy [sic], homestead, surviving or otherwise; to the end that neither party shall have or claim any interest in or to the property now owned or which may hereafter be acquired by the other.[93]

A. [3.55] Drafting Suggestions

1. The spouse-to-be should be told to obtain independent counsel.
2. If the spouse-to-be refuses to seek separate counsel, express language should be added to the effect that an opportunity was given for independent counsel.
3. If the spouse-to-be seeks separate counsel, written correspondence between counsel can display, years later, the involvement of separate counsel.

XXI. [3.56] Consideration

It is clear that consideration is required for antenuptial agreements.[94] The marriage itself is considered to be adequate and sufficient consideration. The mutual waivers, releases, and undertakings may also constitute consideration.

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93 *Parkhurst v. Gibson*, 573 A.2d 454, 456 (N.H. 1990).

94 *Luck v. Luck*, 711 S.W.2d 860 (Ky. Ct. App. 1986); *Hardesty v. Hardesty's Ex'r.*, 236 Ky. 809, 34 S.W.2d 442 (1930).

XXII. [3.57] Arbitration

At least one commentator recommends the insertion of an arbitration clause.[95] In light of the clear trend toward enforcement of arbitration clauses, even in employment discrimination claims, the enforceability of such a clause in a prenuptial agreement, thus avoiding costly litigation, should be considered. For more on arbitration, *see* **Chapter 15** of this Handbook.

XXIII. [3.58] Revocation

An antenuptial agreement may be revoked.[96] Generally, the provisions of an antenuptial agreement regarding death do not survive a divorce of the parties, unless there is express language or reasonable implication revealing such an intent.[97] A drafting suggestion would be to have all revocations be in writing.

XXIV. [3.59] What Is Left of Public Policy?

Historically public policy was to encourage the institution of marriage. Another stated public policy was to avoid individuals becoming wards of the state. Instead of a strict public policy rule prohibiting antenuptial agreements, courts have moved to protecting against abuse of such agreements by imposing standards of fairness, disclosure, and avoiding either spouse becoming a ward of the state. It appears that antenuptial agreements still must not promote or encourage dissolution of the marriage.[98] Questions remain concerning the viability of agreements which provide for lump sums to be paid upon divorce.

A. [3.60] Lump Sums in General

In the unpublished Kentucky Court of Appeals decision in *Gentry*, which was never published because the Supreme Court of Kentucky published its opinion, Judges Wilhoit, McDonald and Howard noted by dictum:

> The contractual provisions invalidated in *Stratton* and *Sousley v. Sousley*, 614 S.W.2d 942 (Ky. 1981), each provided for payments of money which would be made only in the event of divorce, and in one case, at least in lieu of alimony. Unlike the present case,

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95 Richard R. Block, Esq., Philadelphia; *Fairshare*, The Matrimonial Monthly, Vol. 9, No. 8, August 1989.

96 *Carter v. Carter*, 656 S.W.2d 257 (Ky. Ct. App. 1983).

97 *Busekist v. Busekist*, 224 Neb. 510, 398 N.W.2d 722 (Neb. 1987).

98 *In re Marriage of Dawley*, 131 Cal. Reptr. 3, 551 P.2d 323 (Cal. 1976).

those cases clearly fall within the rationale of the rule against contracts tending to induce separation or divorce.

[Unpublished opinion of Court of Appeals in *Gentry*, at page 7.]

B. [3.61] "Too Generous" Lump Sums

When the payments to the spouse upon divorce were considered too generous, the California courts found that the agreement violated public policy.[99]

C. [3.62] Decreasing Lump Sum

If the amount to be received by the ex-spouse reduces each year (instead of the more common tendency to increase the amount), then the agreement might violate public policy.[100]

D. [3.63] Inadequate Maintenance

As noted by an Illinois appellate court,[101] public policy may preclude the enforcement of an antenuptial agreement which provides for inadequate maintenance.

XXV. [3.64] Fiduciary Obligations

Some cases hold that persons about to be wed have fiduciary obligations to each other.[102]

XXVI. [3.65] Conclusion

The traditional simplicity desired in antenuptial agreements has been complicated by many relatively new developments. The estate planner and family law practitioner must now take into account a number of additional issues which were not present only a few years ago. As a result, starting forms for antenuptial agreements continue to be in a state of flux. Many clients will reject potentially beneficial language for antenuptial agreements, and negotiations may result in other provisions being modified or stricken. Antenuptial agreements seek to provide estate

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99 *In re Noghrey*, 169 Cal. App. 3d 326, 215 Cal. Reptr. 153 (Cal. 1985).

100 Oldham & Caudill, *A Reconnaissance of Public Policy Restrictions Upon Enforcement of Contracts Between Cohabitants* 18 Family Law Quarterly 93, at page 105 (footnote 50) (1984).

101 *Eule v. Eule*, 24 Ill. App. 83, 320 N.E.2d 506 (Ill. App. Ct. 1974).

102 *Friedlander v. Friedlander*, 80 Wash. 2d 293, 494 P.2d 208 (Wash. 1972); *Newman v. Newman*, 653 P.2d 728 (Colo. 1982); 41 Am. Jur. 2d *Husband and Wife* § 288 (1968).

planning, years in advance of the first death. Antenuptial agreements also seek to provide a divorce agreement, should the parties divorce, again years in advance. The practical difficulty of drafting such agreements is obvious. Great care must be taken and current developments in the law must be meticulously monitored.

4

UNCONTESTED DIVORCE

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I. [4.1] Introduction – When Is a Divorce Uncontested?

A divorce case becomes uncontested by the occurrence of one of two events. The case becomes uncontested if the respondent is in default or, in the alternative, if the parties execute a written separation agreement settling the issues within the divorce case. Otherwise, the case remains contested.

The Family Court Rules of Procedure and Practice ("FCRPP"), enacted by the Kentucky Supreme Court effective January 1, 2011,[1] set forth specific rules on obtaining a decree of dissolution in divorce cases in which the respondent is in default and in cases in which all issues have been resolved by agreement. *See* FCRPP 3(1) and (2). Additionally, local rules of each court may address obtaining a decree of dissolution in uncontested cases. Therefore, the local rules of the court in which the case is filed should be reviewed before proceeding to request entry of a decree of dissolution.

A. [4.2] Default

CR 55.01 defines a party in default as a party who "has failed to plead or otherwise defend as provided in these Rules" after service of process has been effectuated. If a party has been served and has not responded or appeared in any way in the action, he is clearly in default. If a party has been served and has responded by filing a verified response to the petition or an entry of appearance, he is clearly not in default. The question asked often in divorce cases is whether a party is in default if the party has been served and has not responded but has "appeared" in some way in the case, *i.e.*, a personal appearance at a hearing on a motion, signature on an agreed order or execution of a separation agreement. CR 55.01 provides that if a "default judgment" is sought against a party that has "appeared" in the action, that party is entitled to "be served with written notice" of the request for the judgment at least three days prior to any hearing on that request. Therefore, if a party has appeared in a divorce case in any form, the most appropriate route to obtain entry of a valid judgment is to give that party at least three days notice of the request to the court to enter the final decree. FCRPP requires the attorney submitting the divorce to affirm that "no answer or pleadings have been received by counsel, and that notice of hearing or submission has been served on the opposing party." FCRPP 3(2). *See supra* footnote 1.

B. [4.3] Separation Agreement

KRS 403.180 allows parties to settle the issues in their divorce case by execution of a separation agreement. The agreement must be written and signed by both parties. Oral agreements are not valid separation agreements. *Bratcher v.*

[1] Suggested revisions to FCRPP are currently pending and may become effective after publication of this book. It is possible that the rules regarding uncontested cases may change as a result of the revisions.

Bratcher, 26 S.W.3d 797 (Ky. Ct. App. 2000); *Carter v. Carter*, 656 S.W.2d 257 (Ky. Ct. App. 1983). However, the parties can reach an agreement and dictate it to a court reporter or into the court record, and the subsequent transcription of that agreement or execution of a written separation agreement constitutes a valid separation agreement pursuant to KRS 403.180. *Calloway v. Calloway*, 707 S.W.2d 789 (Ky. Ct. App. 1986).

II. [4.4] Finalization of Divorce – What Is Required?

In order for a court to finalize any divorce, whether contested or uncontested, the court must have jurisdiction to enter the decree. A court obtains jurisdiction to enter a decree upon the filing of a verified petition for dissolution of marriage. *Mathews v. Mathews*, 731 S.W.2d 832 (Ky. Ct. App. 1987). In the verified petition, or in subsequent pleadings, certain information must be provided to the court regarding child custody issues and domestic violence. A decree may not be entered until certain time periods have been satisfied. The court has to take evidence and make certain findings of fact and conclusions of law pursuant to CR 52.01 before a decree can be entered. Each court has local rules which may also set forth requirements prior to entry of a decree. This procedural minefield can convert what appears to be a simple, uncontested divorce into a difficult, time-consuming and sometimes embarrassing event for an attorney. In order to avoid this scenario, it is smart practice to go through the applicable statutes, case law and rules to make certain the uncontested divorce is not "lost" in its final stage.

A. [4.5] The Petition

1. [4.6] Is the Petition Valid?

Because the court's jurisdiction to enter a decree depends upon the filing of a valid petition for dissolution, it is imperative that the petition meet the requirements of KRS 403.150. That statute requires the following information be in the petition:

1. a statement that the marriage is irretrievably broken;
2. age of each party;
3. occupation of each party;
4. Social Security number of each party; *see infra* Section [4.7];
5. residence of each party or the party's attorney's address if that party is alleging domestic violence;
6. length of residence of each party in the state of Kentucky;

7. whether any domestic violence orders exist between the parties and the current status of these orders; *see also,* KRS 403.765
8. date of marriage;
9. where marriage is registered;
10. a statement that the parties are separated and the date of separation;
11. whether the wife is pregnant;
12. names, ages, Social Security numbers (*see infra* Section [4.7]), and addresses of any living minor children of the parties (if domestic violence is alleged, the addresses of the attorney for the party alleging abuse can be substituted for the address of the children);
13. any arrangements between the parties for custody, timesharing, and support of the children or maintenance of the spouse; and
14. the relief sought.

Most of these requirements are self-explanatory. However, a few warrant further discussion and are separately addressed below.

The petition must also be verified by the petitioner, which requires the petitioner sign the petition and swear, under oath, that at the time of execution the allegations therein are true and correct. This can be accomplished by having the petitioner swear to the contents of the petition in front of a notary public and having the notary public notarize the signature of the petitioner on the petition, indicating in the notarial certificate that the information was sworn to by the petitioner.

2. [4.7] Personal Identifiers

Kentucky Rule of Civil Procedure 7.03 requires the redaction of certain personal identifiers from most civil filings, including a dissolution petition. *See* Appendix A. Therefore, the Social Security numbers of the parties and, if applicable, the child(ren) must be blacked out or denoted by generic placeholders in the petition before filing with the court. The rule further requires the attorney filing the petition to retain an original, unredacted copy for production if requested by the court.

It is important to note that, in addition to Social Security numbers, the rule also requires the redaction of an individual's month and day of birth. The rule does not, however, prohibit year of birth or age from being included in a pleading. Thus, the ages of the parties and, if applicable, the child(ren) must be legible in a dissolution petition. The rule gives courts discretion with respect to certain elements of redaction, so be sure to check the local rules of the county in which you are filing your petition.

3. [4.8] Was the Petition Timely Filed?

A decree cannot be entered until the court finds that at least one of the parties has resided in Kentucky for at least 180 days before the filing of the petition. KRS 403.140(1)(a). Actual residence of only one of the parties in Kentucky for 180 days is all that is required to obtain personal jurisdiction to enter a decree dissolving the marriage. *Jeffrey v. Jeffrey*, 153 S.W.3d 849 (Ky. Ct. App. 2004). However, it should be noted that this jurisdictional requirement to enter a decree of dissolution may not also confer jurisdiction on a Kentucky court to resolve other issues in the case, such as property and debt distribution or child custody. Research should be undertaken to determine if the jurisdictional requirements to resolve other issues in the case have been met.

Actual residence in Kentucky while stationed in Kentucky for military service is specifically mentioned in the statute and allows a Kentucky court to divorce military personnel who meet the 180-day residence requirement.

Temporary absences from the state by the party claiming residency in Kentucky can present a factual dispute which may result in a hearing on the residency issue. In *McGowan v. McGowan*, 663 S.W.2d 219, (Ky. Ct. App. 1983), the Kentucky Court of Appeals allowed an "exception" to the 180-day residency rule if the divorcing party's absence from the state is "temporary" in nature.

4. [4.9] Is the Petition Filed in the Appropriate County?

KRS 452.470 requires that a dissolution action be filed in the county where the husband or wife usually resides. If the parties live in different counties of the state, the parties can file a dissolution petition in either of those counties. There is no time period requirement for residency in a county before a dissolution petition may be filed there. The only requirement is that the party "usually resides" in that county. Therefore, it is possible to live in a county for a very brief period of time, *i.e.*, one day or perhaps less, and file for divorce in that county. *See Calhoun v. Peek*, 419 S.W.2d 152 (Ky. Ct. App. 1967); *Lancaster v. Lancaster*, 738 S.W.2d 116 (Ky. Ct. App. 1987).

If a party timely asserts the defense of improper venue, there may be a factual dispute on venue requiring an evidentiary hearing. However, if a party does not timely raise the defense of improper venue, it will be deemed waived. *Shepherd v. Mann*, 490 S.W.2d 760 (Ky. 1973); *Jaggers v. Martin*, 490 S.W.2d 762 (Ky. 1973).

5. [4.10] Does the Petition Provide the Required Information about any Domestic Violence Protective Orders?

KRS 403.150(2)(a) requires the petition certify the existence and status of any domestic violence protective orders. "Any domestic violence orders" includes emergency protective orders entered pursuant to KRS 403.740, orders of protection

entered pursuant to KRS 403.750 and foreign protective orders. KRS 403.7521. Additionally, KRS 403.765 requires a party to a domestic violence order to certify the existence and status of any such order if that party initiates "an action" in circuit court after any domestic violence order is entered.

B. [4.11] Family Status Questions

1. [4.12] Have the Parties Been "Separated" for 60 Days?

The petition must state the date of separation of the parties. KRS 403.170(1) defines "separation" as the date of last sexual relations between the parties. The parties can live under the same roof and still be "separated," as defined by statute, during the divorce process.

Although the date of separation must be stated in the petition, no definite time period of separation must occur before the filing of the petition. However, the parties must be separated, in the statutory sense, for at least 60 days before the decree can be entered dissolving the marriage. KRS 403.170(1). This time period applies to all parties seeking entry of a divorce decree, regardless of whether they have minor children.

2. [4.13] If There Are Minor Children, Has the Required Information Been Provided in the Record?

If the parties to a divorce action have minor children, custody and timesharing will necessarily be issues to be resolved in the divorce action if the court has jurisdiction to do so. Therefore, a divorce case with minor children is a "child custody proceeding" as defined in KRS 403.800(4). KRS 403.838 requires *each* party, in that party's *first* pleading or in an affidavit attached to that pleading, to provide the following information under oath:

1. each child's present address or whereabouts;
2. the places where each child has lived during the last five years;
3. the names and present addresses of the persons with whom each child has lived during the last five years;
4. whether that party has participated as a party or witness or in any other capacity in any other proceeding concerning the custody or timesharing of each child and, if so, the identity of the court, the case number and the date of the child custody or timesharing determination;
5. whether that party knows of any proceeding that could affect this child custody proceeding, and, if so, the identity of the court, the case number and the nature of the proceeding; and,

6. whether the party knows of any person not a party to this proceeding who has physical custody of a child or claims rights of custody or timesharing to a child and, if so, the names and addresses of those persons.

This extensive and vital information satisfies most, but not all, of the requirements of KRS 403.150(2)(d). That statute also requires the ages and the Social Security numbers (*see* Section [4.7], *supra*) of each child in the petition for dissolution.

The requirements in KRS 403.838(1)(a)-(c) to provide information about other "proceedings" which affect the custody or timesharing of the child should result in the inclusion of information about any of the following types of legal proceedings which involve a child: divorce; custody or timesharing actions, including paternity cases; domestic violence actions and protective orders; guardianship actions; dependency, neglect or abuse cases; termination of parental rights cases; or adoption proceedings.

3. [4.14] Is the Wife Pregnant?

Although a petition for dissolution may be filed if the wife is pregnant, the court has the discretion to continue the case and not enter the final decree until the pregnancy is terminated. KRS 403.150(7). This allows the court to address and resolve the issues regarding that child in the final decree.

4. [4.15] Has the Wife Requested a Name Change?

KRS 403.230 allows the wife to request restoration of her maiden name or a former name in the dissolution action. She can make this request as part of her request for relief in her verified petition, in her verified response, or at any subsequent time in the case. The husband cannot request this relief or require the wife to change her name; this is relief only the wife can request on her behalf. If the wife decides at some point before entry of the decree to change her name in the decree, the best practice is to have her file a verified request or motion for restoration of a former or maiden name in the record. Alternatively, the wife can make this request personally when she is before the court at the final hearing.

C. [4.16] Post-Petition and Service of Process Questions

1. [4.17] Has Summons Been Issued and Has There Been Service of Process?

KRS 403.150(1) states that all proceedings commenced pursuant to Chapter 403 of the Kentucky Revised Statues shall be commenced as provided in the Kentucky Rules of Civil Procedure. Therefore, to properly commence an action, CR 4 must be followed.

First, summons must be issued by the clerk. CR 4.01(1). Even if the parties have agreed on all issues at the time of commencement, or if the parties believe actual service will not be necessary, summons must at least be issued by the clerk for proper commencement of the action. The summons must conform to the requirements of CR 4.02.

Next, service of process must be effectuated. Service can be accomplished by certified mail, restricted delivery. CR 4.01(1)(a). Once the respondent signs the postal card, hereinafter called the return receipt, indicating service, or if there is a failure to deliver the certified mail to the respondent, the return receipt will be returned to the clerk or the initiating party. If returned to the initiating party, that party should promptly deliver the return receipt to the clerk for filing in the record. The clerk is required to file the return receipt in the record and that filing is proof of the time, place and manner of service. It is the responsibility of the initiating party to pay the costs for the restricted delivery certified mail. This cost is deemed a court cost and may be recoverable, in whole or in part, in the action.

Service can also be effectuated by delivering the summons and the petition, with sufficient copies, to an authorized person for service of process, such as a police officer, sheriff or constable. The authorized person must personally serve the respondent with both the summons and the petition. CR 4.04(1). After service, the authorized person will verify at the bottom of the summons, or on some other form used by that authorized person to indicate service, that the summons and petition have been served. Proof of the time and manner of service is provided by this document which will be returned to the clerk or the initiating party. It should also be filed in the record. Any costs associated with this form of service may also be recoverable as a court cost.

The above discussion assumes the respondent is a Kentucky resident. If the respondent is not a Kentucky resident, service on the respondent does not equate to *jurisdiction* over the respondent. Jurisdiction to divide property may require an analysis of the Kentucky long-arm statute, KRS 454.210, as it applies to the facts of the case. Jurisdiction over a non-resident to decide child custody issues must meet the requirements of KRS 403.800 *et seq*. Therefore, service upon a non-resident does not assure the court has jurisdiction over the person and/or the issues to be resolved.

2. [4.18] Has the Respondent Filed an Entry of Appearance or Verified Answer?

Service of process on a respondent is not necessary if the respondent subjects himself to the jurisdiction of the court by filing an entry of appearance or by filing a verified response. If either of these pleadings are the basis to effect service, the respondent must sign the entry of appearance or response and his signature must be verified. Just as the petition must be verified, these pleadings must be verified by having the signature notarized by a notary public, and having the notary public

indicate in the notarial certificate that the respondent signed the entry of appearance or response while under oath. Careful attention should be paid to the contents of any entry of appearance to determine whether the respondent is simply entering an appearance or is also admitting further allegations in the petition. If the respondent submits to the court's jurisdiction by execution and filing of an entry of appearance or verified response, the filing date of the entry of appearance or verified response is the date to be used for service on the respondent. If jurisdiction over the person and/or the issues is contested by the respondent, the respondent may enter a special or limited appearance in his response.

3. [4.19] Is Personal Service on the Respondent Not Possible?

If a respondent does not submit to the jurisdiction of the court by entry of appearance or verified response, or if the respondent cannot be personally served by certified mail or actual service, constructive service on the person is allowed. CR 4.05 sets forth those parties who can be constructively served. In divorce cases, the most common reason for constructive service is the lack of current knowledge of where the respondent can be found for service. CR 4.05 requires that the respondent must have been unable to have been found for greater than a four-month period of time, or respondent has fled to avoid service. If this is the case, the petitioner must supply the affidavit required in CR 4.06. The affidavit is the basis for constructive service, so if the affidavit is insufficient, service may be insufficient. CR 4.07(1) requires the clerk to then appoint a warning order attorney. The clerk has a form to do this and the form is called the "warning order" in the Civil Rules. If the method of service is by warning order, the respondent is deemed constructively served on the 30th day after entry of the warning order.

CR 4.07(1)-(3) sets forth the duties of the warning order attorney. That attorney must comply with these requirements and submit a report to the court within 50 days of appointment, which is the date of entry of the warning order, indicating what that attorney has done in an effort to serve the respondent and the results of the search. The decree cannot be entered until the report of the warning order attorney is filed. CR 4.07(5). The appointment of a warning order attorney, the efforts of the warning order attorney, and the report of the warning order attorney are not to be considered an appearance by the respondent in the action. CR 4.07(4).

If constructive service is the basis for proceeding against the respondent, the court can only enter a decree dissolving the marriage; any issues relating to children or property may not be resolved in the decree because there is no personal jurisdiction over the respondent due to lack of personal service. If at some point before the decree of dissolution is entered, the respondent is found, personal service can be effectuated on the respondent and the action can proceed on the basis of personal service. CR 4.09. Because of the limited terms of a decree resulting from constructive service, it is beneficial to locate the respondent before entry of the decree and effectuate personal service.

4. [4.20] Have the Appropriate Time Periods Passed Since Service?

For divorce cases in which there are minor children, KRS 403.044 requires that 60 days elapse after date of service, entry of the warning order, filing an entry of an appearance, or filing of a verified response before testimony can be taken to enter the decree. In cases without minor children, CR 4.02 and CR 55.01 allow entry of the decree only 20 days after service, if the respondent has "failed to plead or otherwise defend."

Additionally, KRS 403.044 requires the parties to be separate, in the statutory sense, for 60 days before a decree can be entered. This waiting period applies regardless of whether the parties have minor children.

D. [4.21] Specific Court Requirements and Court Procedures

1. [4.22] Has the Appropriate Testimony Been Provided to the Court to Enter a Decree?

Certain information must be provided to the court under oath in order for the court to make the findings necessary to enter a decree. KRS 403.140 states a decree shall be entered if the following findings are made:

1. one of the parties resided in Kentucky for more than 180 days before the filing of the petition;
2. conciliation provisions of KRS 403.170 do not apply or have been met;
3. the marriage is irretrievably broken;
4. if the court has jurisdiction over these issues, the court has considered, approved or made provision for child custody, child support, maintenance of a spouse and disposition of property.

With regard to proof of residence in Kentucky, KRS 403.025 requires the court take actual proof, rather than rely solely on the sworn allegations in the petition, from one of the parties to establish residency before a decree is entered. It should be noted that this statute allows either party to testify as to the residency requirement and the party testifying can provide proof of the *other* party's residency. Therefore, if the petitioner does not meet the residency requirement but the respondent does, the petitioner can actually testify to that fact, which will allow entry of the decree.

With regard to the conciliation provisions and irretrievable breakdown of the marriage, KRS 403.170(3) states that a finding of irretrievable breakdown is the same as a finding that reconciliation is not possible. Therefore, the two middle requirements of KRS 403.140 which are set forth above could be met with a single finding of irretrievable breakdown of the marriage. Despite this language

in 403.170(3), and because KRS 403.140(1)(b) and (c) separately mention these requirements, cautious practice often includes two separate findings by the court, those findings being that the marriage is irretrievably broken and there is no hope of reconciliation. It should be noted that the parties do not have to agree that the marriage is irretrievably broken. If one party testifies the marriage is irretrievably broken, the court can make this finding and proceed to enter the decree. KRS 403.170(1) and (2).

In order for the last requirement of KRS 403.140(1) to be met, testimony must be provided to the court regarding child custody, child support, maintenance of the spouse, and disposition of property. Often, in uncontested proceedings, this is done by presentation to the court of a fully executed separation agreement which addresses these issues and a request that the court approve the agreement and find that it is "not unconscionable." KRS 403.180(4). An agreement has been held to be unconscionable if it is "manifestly unfair." *Peterson v. Peterson*, 583 S.W.2d 707 (Ky. Ct. App. 1979). Because of these statutory requirements, it is essential that the separation agreement address each of these issues, assuming the court has jurisdiction over each of these issues.

In uncontested divorce cases without an executed separation agreement, the court must receive testimony as to child custody, child support, maintenance of a spouse, and disposition of property prior to entry of the decree, assuming the court has jurisdiction over these issues. If this is done, findings must be made as to each of these issues before the decree can be entered. KRS 403.140(1)(d).

2. [4.23] Is the Required Testimony Presented to the Court Appropriately?

The required testimony to enter a decree may be presented to the court in several forms, depending on the local rules of the court. Most courts allow the required testimony to be presented to the court in open court by a party who has been sworn to tell the truth. Some courts also allow the required testimony to be presented to the court via deposition. If a deposition is allowed, a form deposition may be provided by the court in its local rules. *See* Appendix B. If a deposition is utilized to present the required testimony, the deposition testimony must be sworn to by the party and the notarial certificate must indicate the party has provided the information under oath. Further, the notary who swears the party in to provide the deposition testimony and who signs the deposition must not be the attorney for a party in the case. KRS 454.280(2)(a)(2). However, the notary can work for, or work in the office of, one of the attorneys for a party in the case.

3. [4.24] Are the Findings of Fact, Conclusions of Law, and Decree Complete and Appropriate?

The discussion above illustrates the many requirements that must be met before a valid decree can be entered. In order to make certain all requirements

have been met so that a decree can be entered, it is helpful to have a findings of fact form or checklist. Attached as Appendix C is an Administrative Office of the Court form Findings of Fact, Conclusions of Law and Decree. Many courts have their own Findings of Fact and Conclusion of Law forms. A checklist may also be helpful to the practitioner. *See* Appendix D.

The decree is the actual document that dissolves the marriage between the parties. As stated in KRS 403.130(5), a decree should not "award" a divorce to one of the parties. Rather, decrees should state that the marriage between the parties is dissolved and each is restored to the status of a single person.

If the uncontested divorce results from the execution of an approved separation agreement, the decree should also indicate as much, incorporate the separation agreement by reference in the decree and order the parties to comply with the terms of the agreement. KRS 403.180(4). Parties can agree to keep the separation agreement out of the record, but it must still be referenced in the decree as required by KRS 403.180(4).

If the uncontested divorce results from default, the decree should also reiterate the child custody, child support, maintenance and property disposition terms, to comply with KRS 403.140(1)(d).

If the wife has requested restoration of a former or maiden name, the decree should also order the name change. This will be the document needed by the wife to prove her name has been changed. It is this document which will allow her to change her name on other documents, such as a Social Security card, driver's license, bank accounts, retirement accounts, utilities, etc.

See Appendix E for some examples of a Decree of Dissolution.

4. [4.25] Have all Local Rules Been Complied With and Is the Record in Order to Allow Entry of the Decree?

Finally, before appearing for the final hearing or submitting the case for entry of a decree upon deposition, reference should be made to the local rules of the court to ascertain whether all required documents have been prepared appropriately and signed by all required attorneys and/or parties. Each court may have slightly different rules on these procedures. After having met all statutory requirements, it is frustrating and perhaps embarrassing to have the effort to finalize rejected or continued due to non-compliance with a local rule.

Smart practice also requires a review of the court record prior to the final hearing or submission to make certain the record is in order and contains all required documents to allow entry of the decree.

III. [4.26] Appendices

A. [4.27] Appendix A: Kentucky Rule of Civil Procedure 7.03

Kentucky Rule of Civil Procedure 7.03 – Privacy protection for filings made with the court

(1) Unless the court orders otherwise, in a civil filing with the court, excluding domestic violence matters, that
contains certain personal data, including an individual's social-security number or taxpayer-identification number, or birth date, or a financial-account number, an attorney or party making the filing must redact the document so the following information cannot be read:

(a) the digits of the social-security number or taxpayer-identification number;
(b) the month and day of the individual's birth; and
(c) the digits of the financial-account number.

Redaction may be made by any method, including but not limited to replacing the identifiers with neutral placeholders or covering the identifiers with an indelible mark, that so obscures the identifiers that they cannot be read.

(2) An attorney or party making a filing under part (1) above shall keep an unredacted, original copy of the filing.
The attorney and party shall be custodians of the original or unredacted copy of the filing and shall present it upon order of the court.

(3) The court may order that a filing be made under seal without redaction. If the court orders an unredacted copy of the filing under seal, a copy redacted in compliance with part (1) of this rule may also be filed.

(4) For good cause, the court may by order in a case:

(a) require redaction of additional information; or
(b) limit or prohibit a nonparty's access to a document filed with the court.

(5) The clerk is not required to review filings with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party making the filing.

(6) A person waives the protection of this rule as to the person's own information by including it in a filing without redaction.

(7) An attorney or party failing to comply with this rule will be subject to the sanction powers of the court, including having the relevant filing stricken from the record. A conforming copy of a filing previously stricken from the record for failure to comply with this rule may be refiled unless otherwise ordered by the court.

B. [4.28] Appendix B: Fayette Form FC-3 – Deposition Upon Written Questions

FC-3. Deposition Upon Written Questions

COMMONWEALTH OF KENTUCKY
FAYETTE FAMILY COURT
_____ DIVISION

IN RE THE MARRIAGE OF:

_____
PETITIONER

AND CASE NO. _____

_____
RESPONDENT

DEPOSITION UPON WRITTEN QUESTIONS

Comes the ❑ Petitioner ❑ Respondent ❑ by counsel ❑ pro se, after first being duly sworn and under penalty of perjury, submits the following responses to this deposition upon written questions:

1. Are you the Petitioner or Respondent in this case?

2. Please state your full name and age.

3. Please state your spouse's full name and age.

4. What was the date of your marriage?

5. In what county and state is your marriage registered?

6. Is either party in the active military service?

7. Is the wife pregnant?

8. When this dissolution action was filed, had either you or your spouse been a resident of Kentucky for more than 160 days? (*Please indicate which party has been a resident for more than 160 days in your answer.*)

9. Is there a Domestic Violence Protective Order in existence at this time or requested in this proceeding?

10. When did you and your spouse separate?

11. Have you and your spouse lived separate and apart without sexual cohabitation since that date?

12. Is your marriage irretrievably broken?

13. Is there a reasonable possibility of a reconciliation if the Court were to order you and your spouse to undergo counseling?

14. If there are any minor children of the marriage, what are their names, ages, current grades in school, and dates of birth?

15. Have both parents attended the Parents Education Clinic?

16. Have children in 1st through 5th grade attended Kids' Time?

17. Have children in 6th through 8th grade attended Tween Time?

18. Have you and your spouse signed a written separation agreement resolving all matters such as custody, timesharing, child support, health insurance, extraordinary medical expenses, maintenance, division of property and debts, and allocation of attorneys fees? (*Please attach the original separation agreement, or a copy if the original has been filed, to this deposition.*)

19. Do you recognize your signature and the signature of your spouse on the original written agreement?

20. Did you read the agreement in its entirety? Do you believe that this agreement is fair to both of you?

21. Has a child support guidelines worksheet been filed supporting the agreed upon or requested child support amount?

22. What is the amount of child support agreed upon or requested?

23. What is the custodial arrangement agreed upon or requested?

24. Is all property and debts allocated or distributed in the agreement?

25. Are either you or your spouse requesting maintenance?

26. What are the attorneys fees agreed upon or requested?

27. Does the wife wish to be restored to her former name? If so, what name?

C. [4.29] Appendix C: AOC Form – Findings of Fact, Conclusions of Law and Decree

AOC-245 Doc. Code: FC Rev. 4-09 Page 1 of 2 Commonwealth of Kentucky Court of Justice www.courts.ky.gov KRS Chapter 403	**DISSOLUTION OF MARRIAGE** **FINDINGS OF FACT AND** **CONCLUSIONS OF LAW**	Case No._____ Court_____ County_____ Judge_____

[ ] Child support ordered

IN RE THE MARRIAGE OF: Date of Hearing_____

_____
Petitioner/Joint Petitioner

_____
Respondent/Joint Petitioner

This cause, having been heard on oral testimony in open court, pursuant to notice, the Commissioner finds:

FINDINGS OF FACT

1. Date of Marriage _____ Place of Marriage _____
2. Ages of Parties: Petitioner _____ Respondent _____
3. Occupation(s) of Parties: Petitioner _____ Respondent _____
4. Addresses of Parties: Petitioner _____ Respondent _____
5. Petition states ground for Dissolution of Marriage _____

   Date summoned _____.

   Entry of Appearance _____ Responsive Pleading _____ Notice of Hearing given _____

   Previous marriages: Petitioner _____ Respondent _____

   How terminated: Petitioner _____ Respondent _____

7. At the time action commenced, one of parties resided in state for 180 days next preceding filing of petition.

   _____ proved by _____.

8. Military Status proved _____
9. Parties separated and lived apart 60 days _____ Date of Separation _____
10. Conciliation efforts: _____

    Marriage is irretrievably broken _____

11. Is there a written agreement _____ Is agreement unconscionable _____

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Page 2 of 2

12. Children: Name(s) Age(s) Address(es)

_____

_____

_____

_____

13. Best interest of children to be served by awarding custody to _____

Reasonable child support to be paid by _____ in the amount of _____

If Child support is ordered, the Petitioner's social security number is _____ & Respondent's social security number is _____. (**MANDATORY**)

JUDGE/COMMISSIONER: IF CHILD SUPPORT IS ORDERED PLEASE CHECK BOX AT TOP OF PAGE 1.

As no good cause has been shown, $_____ shall be withheld per [ ] week, [ ] month, [ ] pay period from petitioner's/respondent's wages and made payable to _____.

Visitation _____

14. Marital Property_____

_____

_____

_____

_____

15. Contribution of each party to acquisition:

Petitioner _____

Respondent _____

16. Reasonable Maintenance to _____ Amount _____

Duration _____

Party receiving maintenance:

Lacks sufficient property, including marital property apportioned to him to provide for his reasonable needs.

_____

Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

_____

CONCLUSIONS OF LAW

From the foregoing it is concluded as a matter of law that the parties are properly before the Court, that it has been established that the marriage is irretrievably broken, and that judgment should be entered accordingly, and it is so recommended (including): _____.

Dated: _____, 2_____ _____

Judge/Commissioner

D. [4.30] Appendix D: Compliance Checklist

Compliance Checklist for Uncontested Divorces

1. To Comply with KRS 403.150(2)

Petitioner's signature notarized (subscribed and sworn to)?

Petition allege irretrievable breakdown?

Petition states age of parties?

Petition states occupation of parties?

Petition states social security number of parties?

Petition states length of residence of each party in Kentucky?

Does Petition state existence and status of any domestic violence orders? (Also required in KRS 403.765)

Petition states date of marriage?

Petition states where marriage registered?

Petition states date of separation (defined in KRS 403.170(1)) and verifies parties are separated?

If minor children, does Petition state names, ages, social security numbers and addresses of children?

Petition states whether there are any arrangements for custody, timesharing, child support and maintenance?

Petition has prayer for relief?

Petition states whether wife is pregnant?

If wife is pregnant at time Petition filed, no decree until birth of child.

2. To Comply With KRS 452.470

Did either party usually reside in Fayette County when Petition filed?

3. To Comply With KRS 403.838 (if there is a child)

Petition or Response or Affidavit provides sworn testimony as to each child's:

Present address?

Where each child has resided over the last 5 years?

Names and present addresses of persons each child resided with over last 5 years?

Participation in any other litigation concerning custody of any child?

Information about any custody proceeding concerning each child in a court of this or any other state?

Knowledge of any person not a party to this action who has physical custody of any child or claims to have custody or visitation rights to any child?

4. **To Comply With CR 4, RFFC 14(E) AND KRS 403.044**

Was summons issued? _____

Return of summons? ____ When served? _____

Service by certified mail, restricted delivery? _____ Did party sign? _____When did the party sign? _____

If no children, has 20 days passed since service? _____

If children, has 60 days passed since service? _____

Entry of appearance or verified response filed? _____ When? _____

Warning Order appointed? _____When? _____ Report Filed? _____ When? _____

If there is a child and warning order attorney, has 60 days passed since entry of warning order? _____

If there is not a child and warning order attorney, has 50 days passed since appointment of warning order attorney? _____

5. **To Comply With KRS 403.140**

Has one party resided in Kentucky at least 180 days (6 months) before petition was filed?

If there is a child, has provision been made, in the decree, for custody and support of child?

6. **To Comply With KRS 403.170**

Parties have been separated for 60 days at time decree requested?

7. **To Comply With KRS 403.180 (If there is a written agreement)**

Is separation agreement filed or tendered?

Agreement unconscionable?

Decree incorporates separation agreement and orders it to be complied with?

If separation agreement not to be filed, does decree identify separation agreement?

8. **To Comply With KRS 403.044 and RFFC 14(E) (if there is a child)**

Has 60 days passed since service of summons, appointment of warning order attorney or filing of entry of appearance or responsive pleading?

9. **To Comply With KRS 403.230 (if former name is requested)**

Has wife requested restoration of former name?

10. **To Comply With RFFC 14(A) (if there is a child)**

Both parties attended Parent Education Clinic within 60 days of notice to attend and before decree was requested?

If there is a child(ren) in 1st – 8th grade at time decree is requested, has child(ren) attended "Kids Time" or "Tween Time"?

11. **To Comply With RFFC 14(G) (If respondent in default)**

Motion to submit tendered and served on other party?

Order tendered and signed by Petitioner or Petitioner's counsel submitting case upon deposition?

Deposition tendered and in compliance with Fayette Family Court Form 3 (KRS 403.140)?

Deposition notarized by someone other than attorney in case, relative or employee of party? (KRS 454.280(2)(a)(21)

Proposed decree tendered and signed by Petitioner or Petitioner's counsel?

Proposed decree in compliance with RFFC 14(F)? (see below)

Wage assignment with all required copies tendered?

12. **To Comply With RFFC 14(g) (If parties have signed agreement)**

Agreed Order submitting case for decision on written deposition signed by both parties, or counsel for both parties?

Deposition tendered and in compliance with Fayette Family Court Form 3 (KRS 403.140)?

Written agreement signed by both parties filed or tendered?

Approved and incorporated line for judge to sign at end of agreement?

Proposed decree tendered and signed by both parties or counsel for both parties?

Proposed decree in compliance with RFFC 14(F)? (see below)

Wage assignment with all required copies tendered?

13. **To Comply With RFFC 14(f) (if there is a child)**

Does child support order state amount and frequency of support payments?

Does child support order state support to be paid by wage assignment (if appropriate)?

Child support to be paid through Centralized Collections or Domestic Relations Office?

Does decree state each party's responsibility for health insurance and extraordinary medical expenses of child (KRS 403.211(8))?

E. [4.31] Appendix E: Form Decrees of Dissolution

COMMONWEALTH OF KENTUCKY
FAYETTE FAMILY COURT
____ DIVISION
CASE NO.: _____-CI-_____

IN RE THE MARRIAGE OF:

PETITIONER

DECREE OF DISSOLUTION OF MARRIAGE
(With Minor Children and no Separation Agreement)

RESPONDENT

* * * * * *

This matter having come before the Court on the record, the Court having examined the record, and made certain Findings of Fact and Conclusions of Law, which are filed herewith, made a part of the record and incorporated by reference into this Decree, and the Court being sufficiently advised;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The marriage between the parties, being irretrievably broken, is hereby dissolved and each of the parties is restored to the status of an unmarried person.
2. Each of the parties is restored _____ as his or her non-marital property.
3. Each party is awarded all marital property and debts in his or her name and or possession.
4. The (Petitioner/Respondent/Parties) is/are awarded (Joint/Sole) custody of the parties' minor child(ren): _____, with (Petitioner/Respondent/Neither) being designated as the primary residential caregiver.
5. The _____ is awarded reasonable timesharing.
6. The _____ is ordered to pay child support in the amount of $_____ per _____, said support is to be paid by wage assignment, if applicable, effective _____. _____'s child support payments shall be made payable to "DCS Non-IV__D" and mailed to P.O. Box 24828, Lexington, KY 40507-4828.

7. The (Petitioner/Respondent) shall maintain health insurance for the parties children. (Petitioner/Respondent) shall pay the first $100 of any uninsured and/or extraordinary medical expenses per child per year. Any of such expenses beyond that amount shall be shared by the parties in proportion to their combined monthly adjusted income.
8. The Wife is restored to her former name of FORMER NAME;
9. This is a final and appealable order, and there is no just reason for delay.

Entered this the _____ day of _____, 2_____.

_____
JUDGE, FAYETTE CIRCUIT COURT

TO BE ENTERED:

_____
HON.
ATTORNEY FOR PETITIONER

_____
HON.
ATTORNEY FOR PETITIONER

CLERK'S CERTIFICATE OF SERVICE

An attested copy of the foregoing Decree of Dissolution has been served upon the parties herein by mailing it on this the _____ day of _____, 20___, to the following:

Attorney for Petitioner or Petitioner
Address

Attorney for Respondent or Respondent
Address

_____
DEPUTY CLERK, FAYETTE CIRCUIT COURT

COMMONWEALTH OF KENTUCKY
FAYETTE FAMILY COURT
____ DIVISION
CASE NO.: _____-CI-_____

IN RE THE MARRIAGE OF:

PETITIONER

DECREE OF DISSOLUTION OF MARRIAGE
(With Minor Children and a Separation Agreement)

RESPONDENT

* * * * * *

This matter having come before the Court on the record, the Court having examined the record, and made certain Findings of Fact and Conclusions of Law, which are filed herewith, made a part of the record and incorporated by reference into this Decree, and the Court being sufficiently advised;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The marriage between the parties, being irretrievably broken, is hereby dissolved and each of the parties is restored to the status of an unmarried person.
2. The parties' Separation Agreement filed herein and bearing the date of _____, is not unconscionable and is hereby approved and incorporated by reference as if set forth verbatim, and the parties are ordered to obey the terms thereof.
3. *(Use paragraph from Separation Agreement)* The (Petitioner/Respondent/Parties) is/are awarded (Joint/Sole) custody of the parties' minor child(ren): _____, with (Petitioner/Respondent/Neither) being designated as the primary residential caregiver.
4. *(Use paragraph from Separation Agreement)* The _____ is awarded reasonable timesharing in accordance with the Fayette Family Court's Timesharing/Parenting Guidelines.
5. *(Use paragraph from Separation Agreement)* The _____ is ordered to pay child support in the amount of $_____ per _____, said support is to be paid by wage assignment, if applicable, effective _____.

_____'s child support payments shall be made payable to "DCS Non-IV-D" and mailed to P.O. Box 24828, Lexington, KY 40507-4828.

6. *(Use paragraph from Separation Agreement)* The (Petitioner/Respondent) shall maintain health insurance for the parties children. (Petitioner/Respondent) shall pay the first $100 of any uninsured and/or extraordinary medical expenses per child per year. Any of such expenses beyond that amount shall be shared by the parties in proportion to their combined monthly adjusted gross income.
7. The wife is restored to her former name of FORMER NAME.
8. This is a final and appealable order, and there is no just reason for delay.

Entered this the _____ day of _____, 2_____.

_____
JUDGE, FAYETTE CIRCUIT COURT

TO BE ENTERED:

_____
HON.
ATTORNEY FOR PETITIONER

_____
HON.
ATTORNEY FOR PETITIONER

CLERK'S CERTIFICATE OF SERVICE

An attested copy of the foregoing Decree of Dissolution has been served upon the parties herein by mailing it on this the _____ day of _____, 20___, to the following:

Petitioner/Attorney for Petitioner
Address

Respondent/Attorney for Respondent
Address

_____
DEPUTY CLERK, FAYETTE CIRCUIT COURT

COMMONWEALTH OF KENTUCKY
FAYETTE FAMILY COURT
____ DIVISION
CASE NO.: _____-CI-_____

IN RE THE MARRIAGE OF:

PETITIONER

DECREE OF DISSOLUTION OF MARRIAGE
(No Minor Children, without Separation Agreement)

RESPONDENT

* * * * * *

This matter having come before the Court on the record, the Court having examined the record, and made certain Findings of Fact and Conclusions of Law, which are filed herewith, made a part of the record and incorporated by reference into this Decree, and the Court being sufficiently advised;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The marriage between the parties, being irretrievably broken, is hereby dissolved and each of the parties is restored to the status of an unmarried person.
2. Each of the parties is restored _____ as his/her non-marital property.
3. Each of the parties is awarded the marital property and debt currently in his or her name and or possession;
4. The Petitioner is restored to her former name of FORMER NAME;
5. This is a final and appealable order, and there is no just reason for delay.

Entered this the _____ day of _____, 2_____.

_____
JUDGE, FAYETTE CIRCUIT COURT

TO BE ENTERED:

_____
HON. ATTORNEY NAME
ATTORNEY FOR PETITIONER

_____
HON. ATTORNEY NAME
ATTORNEY FOR PETITIONER

CLERK'S CERTIFICATE OF SERVICE

This is to certify that an attested copy of the foregoing was served by mailing same via US Mail, postage prepaid, to the following:

Hon. Attorney Name
Address or (By placing same in the pro bono box at the clerk's office)
Attorney for Petitioner

Hon. Attorney name or Respondent
Address
Attorney for Respondent

This the ____ day of _____, 20____.

_____
DEPUTY CLERK, FAYETTE CIRCUIT COURT

COMMONWEALTH OF KENTUCKY
FAYETTE FAMILY COURT
____ DIVISION
CASE NO.: _____-CI-_____

IN RE THE MARRIAGE OF:

PETITIONER

DECREE OF DISSOLUTION OF MARRIAGE
(No Minor Children, with a Separation Agreement)

RESPONDENT

* * * * * *

This matter having come before the Court on the record, the Court having examined the record, and made certain Findings of Fact and Conclusions of Law, which are filed herewith, made a part of the record and incorporated by reference into this Decree, and the Court being sufficiently advised;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The marriage of the parties, being irretrievably broken, is hereby dissolved and each of the parties is restored to the status of an unmarried person.
2. The parties' Separation Agreement filed herein and bearing the date of _____, is not unconscionable and is hereby approved and incorporated by reference as if set forth verbatim, and the parties are ordered to obey the terms thereof.
3. The Wife is restored to her former name of FORMER NAME;
4. This is a final and appealable order, and there is no just reason for delay.

Entered this the _____ day of _____, 2_____.

_____
JUDGE, FAYETTE CIRCUIT COURT

TO BE ENTERED:

_____
HON. ATTORNEY NAME
ATTORNEY FOR PETITIONER

_____
HON. ATTORNEY NAME
ATTORNEY FOR PETITIONER

CLERK'S CERTIFICATE OF SERVICE

This is to certify that an attested copy of the foregoing was served by mailing same via US Mail, postage prepaid, to the following:

Hon. Attorney Name or Petitioner
Address
City, State, Zip
Attorney for Petitioner

Hon. Attorney name or Respondent
Address
City, State, Zip
Attorney for Respondent

This the ____ day of _____, 20____.

_____
DEPUTY CLERK, FAYETTE CIRCUIT COURT

5

CONTESTED DIVORCE

SUZANNE BAUMGARDNER
Kershaw & Baumgardner, LLP
Lexington, Kentucky

VALERIE KERSHAW
Kershaw & Baumgardner, LLP
Lexington, Kentucky

I. [5.1] Introduction

If a divorce case does not meet the criteria to qualify as uncontested, it is contested. It is possible to resolve some of the issues attendant to the divorce in a signed partial settlement agreement or through stipulations to the court. Kentucky Family Court Rules of Procedure and Practice shall be abbreviated as "FCRPP" and Kentucky Rules of Civil Procedure shall be abbreviated as "CR" throughout this chapter.

II. [5.2] Pendente Lite Relief

A. [5.3] Temporary Orders

It is important to memorialize any oral temporary agreements between parties in writing. Parties' oral agreements can become clouded as the dissolution moves through the process and oral agreements are rarely enforceable. A temporary order is interlocutory and is not appealable. *Atkisson v. Atkisson,* 297 S.W.3d 858 (Ky. Ct. App. 2009). Temporary orders may be enforced through civil contempt. *Whitby v. Whitby*, 208 S.W.2d 68 (Ky. 1948).

B. [5.4] Relief Available

Courts are limited on the type of temporary relief pursuant to KRS 403.160 and KRS 403.280. Temporary relief is limited to custody, timesharing, child support, maintenance and injunctive relief. Statutory procedural requirements must be observed along with the rules of procedure.

1. [5.5] Hearing

Pursuant to FCRPP 2(8)(b), Pendente Lite (Temporary) Motions shall be set for a hearing pursuant to the local rules of filing. A hearing on temporary custody, timesharing and child support shall be held within thirty (30) days of filing the motion other than for good cause. FCRPP 6(2).

2. [5.6] Custody

The court will hold a hearing and review all of the factors set forth in KRS 403.270 in adjudicating temporary custody pursuant to KRS 403.280(1). All motions for temporary custody must be accompanied by an affidavit setting forth the grounds to award custody in the best interests of the children. There are no abbreviated requirements for determining temporary custody. Custody remains

modifiable at all times pendente lite based upon the best interests of the minor children.

3. [5.7] Child Support

A motion for temporary child support shall be accompanied by the movant's last three pay stubs or proof of current income if self-employed. Pursuant to KRS 403.211(2) the rebuttable presumption for the establishment of temporary child support are the guidelines under KRS 403.212. A court may deviate from the guidelines where unjust or inappropriate after making specific findings on the record based upon the criteria (one or more) set forth in KRS 403.211(3).

a. [5.8] Notice

All motions for temporary support **must** include the statement "You must file with the Court, at least 24 hours prior to the time of the hearing, a completed child support guidelines worksheet and copies of your last three pay stubs or, if self-employed, proof of your current income." FCRPP 9(4).

b. [5.9] Timing

KRS 403.160(2)(a) requires a court to set child support to be paid within fourteen (14) days from filing the motion for child support. It also states child support shall be retroactive to the date of the filing of the motion unless otherwise ordered by the court.

c. [5.10] Ex Parte Child Support

Pursuant to KRS 403.160(2)(b), child support may be set ex parte, without notice to the adverse party. However, there must be an affidavit to support this relief and it shall not become effective for seven (7) days after entry of the order. If the adverse party files a motion for a hearing within that seven day period, it must also be supported by an affidavit regarding income and a worksheet. A hearing will be set by the court and the adverse party must pay support in the interim based upon the guidelines and the information set forth in their affidavit. The eventual order of child support from the hearing will be retroactive to the date of the first filed motion for support unless otherwise ordered.

4. [5.11] Maintenance

A motion for temporary maintenance must be accompanied by an affidavit setting forth the grounds for an award of maintenance under KRS 403.200 on a temporary basis as well as the amount being requested. KRS 403.160(1). A motion for temporary maintenance must include the last three pay stubs, current income, and an affidavit of the movant's monthly expenses, income and income of the party form whom maintenance is sought. FCRPP 5(1).

a. [5.12] Amount and Duration

If the court finds the requirements of KRS 403.200(1) and (2) have been met, maintenance will be set during the temporary phase at a specific dollar amount or by payment of direct expenses. To be tax deductible to the payer, payment of expenses must be classified as maintenance during the temporary phase. The court has discretion to set temporary maintenance for the entire pendent lite phase of the litigation or for any period of time within, considering the factors of KRS 403.200(2). The court has wide discretion in setting the amount and duration of temporary maintenance and may consider age, health, duration of marriage, re-education and expenses that meet the standard of living enjoyed during the marriage for the movant as well as the expenses of the payer. *Brandenburg v. Brandenburg*, 55 S.W.2d 351 (Ky. 1932).

b. [5.13] Notice

All motions for temporary maintenance **must** include the statement "You must file with the Court, at least 24 hours prior to the time of the hearing, a responsive affidavit setting forth your net monthly income and expenses and attach copies of your last three pay stubs or, if self-employed, proof of your current income." FCRPP 5(1).

C. [5.14] KRS 403.160(6)

KRS 403.160(6) states that temporary orders, 1) shall not prejudice either party at the final hearing, 2) may be revoked or modified before a final decree is entered, and 3) shall terminate upon entry of a final decree or dismissal of the action.

D. [5.15] Status Quo Order

FCRPP 2(5) a and b allows the court at the initial appearance to enter a standing order which may protect and preserve the positions of the parties during the pendency of the action. The court may enter prohibitions on dissipation, transfer, sale and other conveyance of property out of the marital estate as well as limit the incurrence of unreasonable debt, except as necessary to pay reasonable living expenses. The court may also prohibit the termination of various insurances covering the parties, their property and from changing beneficiaries of such policies.

E. [5.16] Ex Parte Motions

Any ex parte motion for temporary relief must be filed with a supporting affidavit sufficient to meet the requirements for injunctive relief. A hearing will thereafter be set at the earliest possible date if the ex parte motion is granted. FCRPP 2(8)(a).

III. [5.17] Effective Discovery

A. [5.18] Informal Discovery

Discovery begins at the attorney's first meeting with the client. The client may have little, some, or nearly all the financial information concerning the marital estate and income. Every client has at least some knowledge about the household finances. In certain cases, discovery can be conducted informally between attorneys and parties as long as everyone is comfortable that there is full disclosure.

B. [5.19] Formal Discovery

1. [5.20] Preliminary Mandatory Disclosure

FCRPP 2(3) requires AOC-238 be completed and exchanged within forty-five days of filing the petition for dissolution. These statements are NOT filed of record. AOC-238 is a mandatory disclosure that a party must complete and sign under oath. Required attachments are the party's last three pay stubs and last two years of federal tax returns along with the first two pages of their state tax returns. Additionally, counsel must certify that the last twelve months of bank statements, canceled checks, registers, carbon copies of checks, deposit tickets, periodic statements from investments, statements on life insurance, periodic statements from retirement plans, periodic statements from assets held on behalf of children and documents reflecting debts and credit card statements for the past 12 months be in the possession of the answering party or their attorney when the mandatory disclosure statement is served upon the adverse party.

a. [5.21] Objections

If a disclosure statement is incomplete, the recipient must serve objections within twenty days. Objections are likewise not filed of record unless ordered by the court.

2. [5.22] Releases

Specific releases may be requested to be signed by the adverse party for relevant information. A party may object to a propounded release. If an objection is raised, a motion to compel must be filed to obtain the release. FCRPP 2(4).

a. [5.23] Simultaneous Transmission

FCRPP 2(4) requires all releases include a mandatory provision that all information provided to the requesting counsel be simultaneously provided to the

adverse counsel/pro se party at the requesting party's expense. Releases are to obtain full disclosure for all of the parties.

3. [5.24] Depositions

A deposition may be taken in Kentucky and used in Kentucky courts before any person set forth in CR 28.01. Outside of Kentucky, to be admissible in Kentucky, the deposition must be taken before a person set forth in CR 28.02.

a. [5.25] Parties

Depositions of parties can be used to check accuracy of information provided by your client and information provided in disclosure statements. They may be necessary to follow up on general information or to glean information relevant to custodial and timesharing issues. Discovery deposition scope is a matter which is relevant to the subject matter involved in the pending claim that is not privileged. CR 26.02(1). The main use of a deposition in the discovery phase will be for reference and impeachment during the trial.

i. [5.26] Cancellation

File a notice of cancellation if you cancel a deposition. CR 37.04 places a party at risk to pay fees for failing to attend a deposition they noticed.

b. [5.27] Non-Parties

Depositions of non-parties may be necessary to verify the accuracy of information, valuation issues, and custodial issues.

i. [5.28] Subpoenas Duces Tecum

Documents may not be subpoenaed from non-party witnesses (including institutions) without noticing a deposition. A deposition may be cancelled prior to the scheduled date upon receipt of the requested documents.

4. [5.29] Interrogatories

Civil Rule 33 governs interrogatories. Thirty written interrogatories may be propounded upon a party. Each sub-part counts as a separate request. All interrogatories must be answered in writing, in full, under oath or an objection stated. Interrogatories must be answered within thirty days unless the court orders a shorter or longer period of time.

a. [5.30] Expert Identification

Pursuant to CR 26.02(4)(a) and (b), information regarding expert testimony should be part of all standard interrogatories propounded.

b. [5.31] Objections

If an objection is made to providing an answer to an interrogatory, a motion to compel may be filed under CR 37.01(b). An incomplete or evasive answer may be compelled to be fully answered.

i. [5.32] Fees

If a motion to compel is granted, the party who sought same may be awarded fees under CR 37.01(d)(i); if the Motion is denied, the party who opposed same may be awarded fees under CR 37.01(d)(ii). The court may apportion fees if the decision is split. CR 37.01(d)(iii).

5. [5.33] Requests for Admissions

Requests for admission should be used to authenticate relevant documents and narrow the focus of disputed factual issues. Failure to answer in time prescribed by CR 36.01 can result the in requests being deemed admitted. Wording of the request for admission is crucial, only one small part must be incorrect for the entire admission to be properly denied. Answers are due within thirty days of service or an objection shall be made. A court may order a party to answer or, if the answer is incomplete, order that an answer be amended or deemed admitted. CR 36.01(3).

6. [5.34] Requests for Production of Documents

A request to produce documents requires only that documents and requested evidence be produced for inspection. The request must specify a reasonable, time, place and manner for inspection. It is important to note a request for production only requires the party to produce those things "which are in the possession, custody or control of the party upon whom the request is served". CR 34.01(a). Objections may be timely made and the procedure to compel is the same as delineated above under CR 37.01.

7. [5.35] Requests to Enter Land or Inspect

Under CR 34.01(b) a request may be made to enter land or property of a party to inspect and photograph. Such "walk throughs" are often helpful in dissolution matters with regard to personal property, condition of premises and business operations.

8. [5.36] Electronic Format

Civil Rule 26.01(2) encourages interrogatories, request for production and requests for admission be served in electronic format as well as in hard copy.

9. [5.37] Filing

Originals of depositions, interrogatories and requests for admissions are not filed of record unless offered as proof. The attorney who took or propounded same is the custodian of these records and shall present same upon direction from the court or request of the opposing party. FCRPP 3(4)(c).

IV. [5.38] Pretrial Procedure

A. [5.39] Issue Identification

Review of the case with the client should identify each issue that will need to be addressed in the dissolution action, such as custody, timesharing, child support, non-marital property restoration, valuation of marital property, equitable division of marital property, spousal maintenance and attorney's fees. Each individual case may have several small, fact-specific issues that need to be addressed. Each case is different but the attorney must be able to review the facts and accurately identify each issue contained in each individual action.

1. [5.40] Burden of Proof

Once an issue has been identified, it is imperative to determine the proof that may be needed for the court to accurately adjudicate the issue. This requires the attorney to know if there is a presumption, a rebuttable presumption or a specific burden of proof upon the party making the claim. Each issue under the law is handled individually in this Handbook, but it is essential in contested dissolution practice to identify your issue, understand your burden of proof and gather the evidence necessary to sustain your burden early on in the litigation process, specifically while discovery is still open.

B. [5.41] Case Management Conference

FCRPP 2(6) requires a case management conference be obtained within ten days after the failure of mediation or within sixty days following service of the petition if mediation has not been scheduled. Parties shall attend the case management conference unless otherwise ordered.

1. [5.42] Order for Final Hearing

After the final CMC, the court will schedule the final hearing. Necessary deadlines should be set by court order so the court may enforce same if one party fails to comply with the order. Deadlines should include: close of discovery, last day to depose a lay witness, last day to depose an expert, exchange of witness lists with contact information and a short synopsis of their anticipated testimony, exhibit lists with a copy of each exhibit to be provided to opposing counsel, motion in limine file date, motion in limine hearing date, a final pre-trial conference to be attended by attorneys only, final verified disclosure statement filing date and a trial memorandum filing date.

2. [5.43] Continuances

Trials will be continued only upon good cause shown. FCRPP 2(7).

3. [5.44] Final Verified Disclosure Statement

Pursuant to FCRPP 3(b), not later than ten days before the final hearing a FVDS must be filed in the record if property matters are in dispute. The FVDS along with supporting documentation should be provided to the opposing party within thirty days of filing the motion for the final hearing or at the deadline set by the court.

C. [5.45] Stipulations

If the parties agree upon any facts, they should enter into stipulations regarding same. Said stipulations should be reduced to writing and filed of record prior to the case management conference. The court will accept written stipulations, signed by both parties and/or both counsel, at any time prior to a final hearing as a method of narrowing the factual disputes and contested issues.

D. [5.46] Motions in Limine

At times the parties may agree on the facts, but not the law. A motion in limine can prove to be cost effective and may avert a trial. A motion in limine should succinctly state the relief being requested and the basis for the court to rule upon such request prior to the final hearing.

E. [5.47] Use of Expert Witnesses

Depending on the case, experts may be used for a multitude of reasons, the most common are to establish the value of property or to provide testimony and/or an opinion as to custodial and timesharing issues. Experts need to be chosen for both their expertise and their ability to communicate this expertise to the court.

Practitioners need to prepare experts to testify at trial just as they would a party. An expert must be prepared to respond to cross examination.

F. [5.48] Use of Alternative Dispute Dissolution

No matter how well a practitioner knows the facts, the judge, the client, and the law, predicting the outcome of a trial is dicey at best. Settlement is the only way to take the unpredictability out of the equation. A settlement can give the parties and practitioners the flexibility to be creative in fashioning an agreement that provides relief which the court may not have the jurisdiction to order. Parties are more likely to comply with an agreement they have made rather than an judgment pronounced by a judge with limited knowledge of the parties. Remember, however, that certain issues are always modifiable by the court.

1. [5.49] Four Way Meeting

A meeting should be scheduled with both counsel and both parties in one location. The issues should be identified and addressed. Even if the meeting is unsuccessful in reaching full resolution, the issues will likely be narrowed. It is often beneficial for the parties to sit down in one room and be able to air their grievances. At times those grievances are the stumbling blocks to settlement, not the larger issues.

2. [5.50] Mediation

A mediator is a trained professional who has completed the AOC mandatory training. They are skilled at seeking resolution to issues and have knowledge of the relevant law. A mediator should be a tool to be used effectively by the attorney to help them assist their client in settling their case. The mediator is not present to make a decision; he or she is present to facilitate the parties reaching an agreement. Mediation may be ordered by the court after the initial court appearance. FCRPP 2 (6)(a).

3. [5.51] Arbitration

Not all venues have arbitration available in family court cases. However, arbitration is allowed and, in some counties, a standard procedure. Arbitration is not suitable in all cases.

4. [5.52] Collaborative Law

Collaborative law practices are useful tools in negotiation. Collaborative law concepts require that negotiations take place prior to the filing of a petition for dissolution. Thus, in this chapter, collaborative law in the truest form is inapplicable.

G. [5.53] Preparation

Counsel should attend every case management conference, mediation and meeting fully prepared to discuss every issue. It counsel is not prepared or discovery is not completed, the time should be spent setting deadlines for the exchange of information and additional steps to be taken to gain complete information so the case may be fully discussed and negotiated.

V. [5.54] Preparation of Witnesses

A. [5.55] Client

Preparing your client to be a witness begins at the first meeting. Every meeting is an opportunity to prepare the client to testify. Evaluate your client to determine how much preparation they need to be an effective witness. Having your client participate in the process by timely completing forms and mandatory disclosures, explaining the necessity of court deadlines, and keeping client-attorney discussion on the issues pertaining to the divorce aid in preparing your client for trial.

1. [5.56] Procedure

Make sure your client knows where the courthouse is and where to park. They should be prepared for hearings to go past the allotted time. Parents should be advised to arrange for back-up daycare. They should know they cannot testify as to what someone "told" them and to wait until after an objection has been made and ruled upon before answering a question.

2. [5.57] Testimony

Review testimony with your client prior to the trial. Make sure they readily know the exhibits they are to identify. A client needs to understand they must testify, not simply answer "yes" to leading questions. A client should fully understand to answer a question by listening to the entire question, answering "yes" or "no" and then adding any relevant explanation. Work with your client on responding to direct and cross examination so they are prepared for trial. The attorney's job is to extract facts from the witness, not place facts into the client's head (or mouth). The practitioner must help the client highlight the strengths in the cases while successfully diffusing the weaknesses. The client needs to understand the theory of the case and how to best get that theory across to the judge. The client needs to have at least a basic understanding of the marital estate and finances. Even the most financially unsophisticated client must have an understanding of the scope and breadth of the marital estate, the monthly expenses, and the monthly income. The client must be able to explain his daily financial situation to the judge. The

attorney needs to make sure that her questions are clear and do not confuse the client who is already in a stressful situation. Avoid compound questions and double negatives, which only confuse the already nervous client

3. [5.58] Problems with the Truth

Sometimes a practitioner meets the client who has trouble with the truth. It is wise at the first meeting to have a discussion about attorney-client privilege and that an attorney cannot forward a fact that he knows to be a material misrepresentation. Advise your client that an attorney who knows a material misrepresentation has occurred must withdraw from the case, and that the withdraw may have to be a "noisy withdraw." Such withdraws can only lead to higher litigation costs for the client, both emotional and financial.

4. [5.59] Material Misrepresentation

A material misrepresentation could result in a settlement agreement being set aside, undisclosed property being awarded to the other, attorneys' fees required for extra discovery being awarded, a charge of fraud in the proceedings, and possibly perjury charges. Clients needs to understand that opposing counsel is likely to determine when something is amiss and lying or hiding assets usually costs more in the long run.

B. [5.60] Experts

During discovery the decision should be made as to retention of experts. Complicated matters such as business valuations will require an expert. Tracing may require an expert. Valuation of real property may require an expert. Custody and timesharing may also require expert testimony. Issues that will require expert witness assistance must be identified early on in the litigation. The expert should be employed before a trial date is obtained and long before the actual hearing date. Ensure you have the CV of your Expert as an exhibit to establish their credentials and are prepared to withstand a voir dire to be qualified as an expert.

1. [5.61] Custody and Timesharing Experts

The court has the ability to appoint an expert to investigate and make recommendations to the court regarding custody and timesharing under KRS 403.300(1). A party may make this request of the court or the court may appoint same sua sponte pursuant FCRPP 6(1). KRS 403.310 requires the filing of custodial reports prior to the hearing.

2. [5.62] Court Appointed Experts

Pursuant to RFCRPP 3(4)(a) a report of a court-appointed expert is "in lieu of live testimony" unless they are subpoenaed or the court orders otherwise.

If subpoenaed, the party who subpoenaed the court-appointed expert is responsible for the fees for the appearance unless otherwise ordered by the court.

3. [5.63] Other Experts

All other experts, especially financial experts, should be contacted prior to the final hearing to ensure their availability. The practitioner should review the report of the expert and review their testimony with them. If applicable, a practitioner should use her expert to assist in preparing for the cross examination of the opposing party's expert.

C. [5.64] Lay Witnesses

The use of lay witnesses needs to be done with precision. Redundant testimony is superfluous and tries the patience of the court. Each witness should be called only to expand and build upon the foundation of your case. To build your case effectively, you need to know how you are using your witness. Each witness should have an interview prior to the hearing, go over his/her testimony and be familiar with the theme of the case and the role of his/her testimony in the overall structure of the case.

Practitioners must be careful not to run afoul of ethical considerations while preparing witnesses. Attorneys cannot falsify evidence, cause or assist a witness to falsify evidence. While an attorney's overt actions to falsify evidence are easily identified as unethical (and perhaps illegal), more subtle methods of molding testimony may also violate the rules. Practitioners need to tread carefully so that witness preparation cannot be interpreted as implanting a memory or changing a client's memory of the truth.

VI. [5.65] Effective Presentation of Evidence

A. [5.66] Theme of the Case

A theme or a central idea upon which the entire case revolves keeps a case moving toward conclusion with all aspects of the case fitting into the central theme. A theme keeps an attorney and client focused on the important issues and not distracted by ancillary issues that at best do nothing to help the case. It is not uncommon for attorneys to get so caught up in a single issue or point that they lose sight of the overall theme. This can prove to be dangerous at trial and could be in conflict with the overriding legal theory needed to win at trial.

B. [5.67] Trial Notebook

A trial notebook is an effective method of organizing your materials for trial. A good trial notebook will outline the issues and objectives to be accomplished at trial.

1. [5.68] Witnesses

List their phone number/contact information so you may contact them if the trial is going slower or more quickly than anticipated. The notebook should contain notes on their testimony.

2. [5.69] Pleadings

For ease of use such pleadings as witness and exhibit lists, the pre-trial order should all be copied and readily at hand for reference.

3. [5.70] Case Law

If there is a specific issue being litigated with case law on point, it should be in your trial notebook, ready for reference.

C. [5.71] Exhibits

Exhibits should be pre-numbered and copied for the court and opposing counsel. Joint exhibits, such as the parties' tax returns, could be assembled and entered into the record at the beginning of trial.

1. [5.72] Exhibit Lists

FCRPP 3(4)(b) requires the court to order the parties to exchange the list of exhibits to be submitted at trial. Failure to provide an exhibit list could result in exclusion of the exhibit.

2. [5.73] Summary Exhibits

KRE 1006 allows summary exhibits to be provided in the form of a chart, summary or calculation. However, notice must be timely given of the summary with the originals to be provided for review and verification. Summary exhibits are very helpful to the court in summarizing voluminous financial records.

3. [5.74] Summary of the Estate

A spreadsheet summarizing the marital estate and all assets of the estate is a helpful tool to assist the court. This is considered a summary exhibit. Notice

should be provided to opposing counsel and a copy provided in advance of the hearing pursuant to the exhibit list requirements.

4. [5.75] Expense Summaries

For the purposes of maintenance and child support deviations, expenses summaries should be provided to the court. Again, these will fall under KRE 1006. Summaries and supporting documentation should be made available to opposing counsel.

D. [5.76] Visual Aids

No matter what you intend to prove, there is nothing easier for the judge (and your witness) to follow than a visual aid. This can be a simple as a flip chart with the relevant numbers shown in bold colors, an income graph, or a time line tracing non-marital assets through various stages. "A day in the life video" can be used to prove a child has extraordinary needs. Charts and graphs should be clear and concise.

E. [5.77] Direct Testimony

Use your time wisely and effectively.

1. [5.78] Organization

Place your witnesses on the stand in logical order to build your case. Even though it may be more convenient for the witnesses, do not jump from custody to finances and back to custody. Break down each issue, point by point, make the point and move forward to the next point or issue. Following the flow of the mandatory disclosure forms is useful, begin with background, go to custody, and support related issues, then onto non-marital property, marital property, spousal support, and then fees.

2. [5.79] Request Relief

Do not forget in your flow of your case what the goal is, be sure the testimony leads the court to what you want "this dollar amount of maintenance for this period of time" or "this account and this percentage of the retirement".

3. [5.80] Question Appropriately

All too often counsel fails to appropriately elicit information on direct and lapses into leading questions. It is a bad habit and leaves the court wanting to hear from the client. It may be quicker to state what you want them to say, but it is never better. Counsel must lay a foundation for their line of questioning if they wish to have a conclusion made.

4. [5.81] Jurisdictional Proof

Put the jurisdictional proof in first when the client testifies. It is mandatory for the decree of dissolution to be entered. No matter what, at the end of the day, the parties want to be divorced.

F. [5.82] Cross Examination

The most important part of an effective cross-examination is listening appropriately to the testimony on direct. Approach all witnesses, no matter how hostile, with courtesy. Ask very direct and very specific questions. Do not pepper the adverse witness with compound questions.

1. [5.83] Objections

Timely raise all objections when they occur. Do not "let" leading go by opposing counsel for an extended period of time. Renew your objections in a timely manner if they repeatedly occur.

2. [5.84] Impeachment

A witness may be impeached when their testimony differs from prior testimony or can be shown to be incorrect from documents and other evidence. Impeachment of a witness may be crucial; it may also simply be a case of an imperfect memory. The trier of fact gets to decide which witnesses are credible and which are not. Do not plan your entire case around impeachment, the court may believe the "false" statement to be more of an issue of confusion or recollection.

G. [5.85] Preserving the Record

The trial record is the basis for appeal. Attorneys must introduce evidence at trial to support a legal argument and must object to evidence he believes to be improperly introduced. In order to preserve the record, evidence barred by the trial court must be entered into the record by avowal. Failure to object to the entry of evidence or testimony will waive the error and will likely not be considered by the appellate court. Failure by a trial court to make specific findings of fact may be deemed a waived error if there was no request for a specific findings of fact by the trial court. In addition, the court of appeals is allowed to ignore what they deem as harmless error, or one that does not affect the substantial rights of the parties.

VII. [5.86] Post Decree Problems

A. [5.87] Follow Up on the Required Documents

Practitioners need to complete any post decree paperwork, such as quit claim deeds, QDROs, and wage assignments.

B. [5.88] Enforcement

The court has continuing jurisdiction to enforce judgments or separation agreements. KRS 403.240(2) states; "The failure of either party, without good cause, to comply with a provision of a decree or temporary order or injunction, including a provision with respect to visitation or child support shall constitute contempt of court, and the court shall remedy the failure to comply."

C. [5.89] Child Support

The court has the authority to use its contempt power as a method for collecting child support. In addition, ERISA authorizes that QDROs may be used for the collection of child support by either direct payment or to the IV-D Agencies. It is a misconception that child support collection under a QDRO can only being after the support obligor has retired. The earliest date an alternate payee may draw on the account normally begins on/at the time the obligor may withdraw funds from a plan. Depending on the plan, there may be a variety of reasons an obligor may begin drawing from a plan. If collection of child support becomes a problem, County Attorneys have certain methods of collection which are not available to private practitioners, such as tax intercepts for child support arrearage.

6

SETTLEMENT AGREEMENTS

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I. [6.1] Settlement Agreements Are Contracts

A. [6.2] Contract Principals Apply to Settlement Agreements

KRS 403.180(2) provides the terms of an agreement are binding on the court unless the court finds the agreement unconscionable. The agreement controls the parties' rights. The agreement must be in writing. *Bratcher v. Bratcher,* 26 S.W.3d 797 (Ky. Ct. App. 2000). However, an agreement dictated into the record may be found enforceable if a party refuses to sign. *Calloway v. Calloway*, 707 S.W.2d 789 (Ky. Ct. App. 1986). The agreement must be supported by consideration. Because separation agreements are contracts, they are not subject to "equitable considerations" and must be enforced as contracts. *Bailey v. Bailey,* 231 S.W.3d 793 (Ky. Ct. App. 2007). The agreement must be found not unconscionable by the reviewing court. *Shraberg v. Shraberg*, 939 S.W.2d 330 (Ky. 1997). Terms concerning property division are non-modifiable by the court once they are found to be not unconscionable. Terms concerning custody, timesharing and child support are always modifiable by a trial court and not binding on the court. KRS 403.180(2). Both lifetime and lump sum maintenance awards are now modifiable by a trial court. *Woodson v. Woodson*, 338 S.W.3d 261 (Ky. 2011), overruling *Dame v. Dame*, 628 S.W.2d 625 (Ky. 1982).

B. [6.3] Enforceable As Both a Contract and a Judgment (KRS 403.180(5))

Once the agreement is found to be not unconscionable and incorporated into a decree, it is enforceable as a judgment. A judgment is given full faith and credit in sister states. Contempt remedies are available for a judgment, but not a contract.

II. [6.4] How to Reach an Agreement

An agreement may be negotiated between the parties alone, with the assistance of counsel, or a mediator, and/or a therapist. If your client wishes to execute an agreement which you believe not to be equitable to your client, it is best practice to write your client a letter explaining your concerns and the likely outcome should the matter proceed to trial. Have your client initial the letter after you explain it to him. Give your client a copy and keep the original in your file.

III. [6.5] Terms to Include in the Agreement

A. [6.6] Waivers

The agreement must contain provisions waiving the other parties' inheritance rights, such as dower or the right to take intestate distribution, and relinquish all claims between the parties. *Overberg v. Lusby*, 727 F. Supp. 1091 (E.D. Ky. 1990), *aff'd*, 921 F. 2d 90 (6th Cir. 1990).

B. [6.7] Provisions for Children

1. [6.8] Custody

An agreement must provide for the custody (sole or joint) and timesharing of the parties' minor children. The custodial agreement may include provisions for schooling, medical decisions, and religious upbringing.

2. [6.9] Timesharing

A timesharing agreement may be as lengthy as several pages, or a short as a sentence stating, "the parties shall agree upon timesharing." The length of the timesharing provision is normally in direct correlation to the conflict between the parties. The higher the conflict, the more detailed the timesharing agreement should be. A more prudent path is somewhere in the middle with a clear understanding of regular school year timesharing, summer timesharing and holiday timesharing. There are guidelines for timesharing, AOC-P-106 contains model timesharing guidelines. The agreement should state if regular timesharing supersedes certain holidays and events (such as parent's birthdays, certain holidays) or if the holiday and event supersedes the regular timesharing. Some parents need a parenting plan included in the agreement with provisions for the parents' agreement on discipline, bedtimes, diet, homework completion and other parenting issues. Parties in high conflict may benefit from a parenting coordinator to assist in reaching an agreement on timesharing and parenting issues. It is often cost efficient to include a provision that parties will utilize a mediator or a parenting coordinator prior to bringing a disagreement on custody or timesharing before the court for resolution.

3. [6.10] Relocation

Currently there is not a statute on relocation, but there are case law and civil rules on relocation. *See Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). FCRPP 7(2) currently requires a parent intending to move more than 100 miles from the present residence with the children to give notice sixty (60) days in advance of the move. This rule requires "No relocation of the children shall occur unless the court enters an order modifying the status quo." If parties wish to contract

around this provision, the agreement must specifically reference this rule, the parties' knowledge and waiver of application of the rule and address the term they agree to supplement, such as the parties' own specific provisions for relocation and definition of what constitutes relocation. Do the parties believe relocation means out of the jurisdictional county, beyond the jurisdictional county and its surrounding counties, or out of the state? The agreement can also set forth how much advance notice the moving party is to give to the other party. Questions of burden of proof regarding relocation may be addressed in the agreement. Remind your clients that the court may or may not abide by the parameters of the parties' agreement on relocation depending on the statutes and case law applicable at the time the parties move.

C. [6.11] Provisions for Support of Children

1. [6.12] Child Support

Provisions regarding child support should include the parties' current gross income, the costs of work-related or education-related childcare, the cost of health insurance for the children, and a child support worksheet. Should the parties deviate from the guidelines under KRS 403.211, the agreement should specifically state the parties are aware of the guidelines and the reasons for the deviation from the guidelines. The agreement, incorporated into the decree, should meet the requirements of FCRPP 9. A Form AOC-152 should be entered.

2. [6.13] Cost of Extracurricular Activities

Should the parties agree to divide the costs of extracurricular activities, the allocation percentages should be set forth in the agreement. The parties may wish to include limiting factors concerning the number of activities per year for which they may be liable.

3. [6.14] College Education

Should the parties agree to pay expenses of post-secondary education, the allocation of theses costs between the parties should be specified in the agreement. Drafting considerations include limiting the parties' obligation by limiting tuition, room & board to that which would be paid to an in-state public university and limit the number of years post high school that the parties would be liable for providing for the children's education. Either parent or the recipient child has standing to enforce a post-secondary educational provision in a decree.

4. [6.15] Health Insurance

The payment and allocation of health insurance costs must be included in the agreement and the language should mimic the current statutory provisions. *See* KRS 403.211(7). The reasonable price of insurance should be set forth in the

agreement. KRS 403.211(8). The allocation of payment between the parties for unreimbursed health care costs should be set forth in the agreement. *See* KRS 403.211(9). It is most common that those costs be allocated pro rata to the parties' income. It is prudent to add a provision that the percentages shall not be changed unless the parties modify child support thereby modifying the percentages of the parties' incomes to avoid confusion over whether the percentages "float" and change as the parties' respective incomes change year to year.

5. [6.16] Additional Issues

The parties may wish to secure their child support payments with a life insurance policy, and if so, those provisions need to addressed in the agreement. The parties may agree to private educational costs and, if so, those provisions need to be specifically defined and included in the agreement. The parties may agree to a host of other child-related expenses and may contract to the provision of same in their separation agreement. These expenses may include purchase of a car, vehicle insurance, cellular phone service, tutoring, college preparatory classes, etc.

D. [6.17] Division of Assets

1. [6.18] Real Estate

The agreement should specifically define the real estate and the disposition thereof. Should one party be receiving real estate, the agreement should provide a provision stating whether the receiving party must remove the other from the debt associated with property, and how much time they have to do so. The agreement should include a provision that requires the execution of a quit claim deed upon the debt being removed from the other's name and a hold harmless and indemnification clause. A release of interest (per deed) should coincide with the release from the liability for any debt obligations secured by the property. If refinance or removal of liability is in question, the agreement may set forth the repercussions, including the forced sale or auction of the property to remove liability of the non-recipient spouse.

2. [6.19] Bank Accounts

The agreement should specifically define and value the parties' bank accounts, investment accounts, and retirement accounts and allocate them to the appropriate party. The agreement should state how and when the parties are to transfer the account if applicable.

3. [6.20] Retirement Assets

All retirement and deferred asset accounts should be listed, with values and the date of value. The agreement should specify which party will receive which account. If an account is to be divided, the agreement should specify the amount to be transferred to the other party or the percentage of the account. The

agreement should also state the effective date of the division of the account and whether or not the recipient party is entitled to gains and losses from the effective date to the date the account is actually divided. If the asset is a defined benefit account, the agreement should state whether or not Cost of Living Adjustments are to be awarded to the recipient spouse. If applicable and allowable by the plan, the agreement should address surviving spouse benefits and the allocation of any cost for such benefits. Prior to negotiation, the plan documents and a sample QDRO should be reviewed so the parties are both aware of the type of plan and the benefits that may be divided.

a. [6.21] QDRO

To divide most sponsored retirement accounts, including defined benefit and defined contribution plans, a Qualified Domestic Relations Order ("QDRO") must be entered along with the separation agreement. Most plans have "sample" QDRO's for review. It is important to realize that the retirement plan sponsor must accept and qualify the QDRO to divide the benefit. If the parties have contracted to provide a benefit or divide a benefit that is not allowed or accepted by the plan, the agreement will need to be amended. Each party should be aware that some plans charge to review QDRO's and the cost of this review should be allocated in the agreement. The agreement should state which party and/or their counsel is responsible for preparation of the QDRO.

b. [6.22] IRA Division Letter

Most IRA's are divided by a signed letter. The agreement should specify the party responsible for drafting the letter and the timeframe in which it should be prepared to ensure the timely division of the account.

c. [6.23] Unique Retirements

Military pensions, FERS and other retirement plans may not accept a QDRO but will require their own specific type or form of division order/letter/form. Military retirements often require an order along with the specific completed form be sent to DFAS to ensure the benefits are appropriately divided. The agreement should contain specific terms to require both parties to cooperate with the signing and submission of all required forms to effectuate the agreed-upon division.

4. [6.24] Businesses

The agreement should address the allocation of businesses and their associated assets and liabilities should it be applicable. Operating agreements may prohibit the in-kind division of certain business interests. This should be determined prior to the signing of the agreement, to ensure the parties are not creating an impossibility by attempting to divide a business interest in-kind if the other business

owners/members refuse to honor the division. Indemnification should be set forth for the party who does not receive the business interest.

5. [6.25] Vehicles

The agreement should allocate the vehicles, provide for title transfer, and require that the associated debt be removed from the name of the non-recipient party. It is often a preference to not remove a party's name from vehicle debt to avoid costs of refinancing or to lose a good interest rate. If the liability is in the joint names of the parties, there must be a provision to either require/force refinance or other removal of the non-recipient spouse's name from the obligation or the parties must know and accept the fact that this obligation will remain in their joint names post-decree.

6. [6.26] Furnishings and Personalty

The division of furnishings and personalty must be addressed in the agreement. Should one party need to remove furnishings from the marital residence, the agreement should set forth a timeline and the manner in which the furnishings shall be removed. Always include a fail-safe, if the property isn't removed by the date and time set forth, state whether or not it is forfeited.

7. [6.27] Unique Assets

There are innumerable possibilities of other unique assets the parties may own which should be listed and specifically divided in the agreement. These include but are not limited to the following:

a. [6.28] Rents

If property is transferred between parties by deed but rents are collected in the interim, the agreement should state the "effective" date of transfer, including receipt of rents. If property remains co-owned, division of rents and payment of expenses should be very specifically set forth in the agreement.

b. [6.29] Royalties

Certain items generated during the marriage may not have a current value but may continue to generate income in the form of royalties thereafter. This income stream may be divided between the parties in their agreement.

c. [6.30] Patents and Copyrights

Patents and copyrights are very specific to the asset. Again, the issue is that these intangible assets may have no current value or may have already been "sold" but have additional value paid after entry of the decree. The agreement

must address the division of this potential income stream and all rights to these intangible assets.

d. [6.31] Pending Law Suits

The parties may actually be, solely or jointly, a party to a law suit. If the claim arose during the marriage and meets no exclusions under KRS 403.190, it is marital property and/or liability to be divided. However, given it is an unknown quantity due to the "pending" nature of the claim, it should be specifically listed and addressed. There will be costs associated with "pending" litigation, thus the agreement should specifically state which party is responsible and require indemnification to the other party. The agreement should state specifically who should receive the proceeds and/or be responsible for the liability of the pending litigation, no matter what the outcome.

e. [6.32] Country Club Memberships

Memberships in country clubs may be held in one party's name or in joint names. There was likely a cost associated with obtaining the membership along with annual fees and even monthly fees and required assessments. The parties should know, prior to signing the agreement, whether the membership can be transferred between the parties by the terms of the membership itself. Further, all ongoing fees must be addressed specifically.

f. [6.33] Frequent Flier Miles/Reward Points

These "extras" for travel and use of credit cards and other products may be divided in kind or may require redemption to achieve an equitable division.

g. [6.34] Collections, Art, Antiques, Jewelry, Etc.

Most collections and personalty with higher values are difficult to value in dissolution as they may retain a higher value if they remain intact and may have a higher value to the parties than to outside investors. Appraisals should be performed prior to negotiations to value each item or a collection as a whole. In kind division may be easier but in reality difficult to achieve. If something like "alternate selection" is chosen to divide these items, the term must be very clear and concise about the items being divided with descriptions, values and the method of division.

8. [6.35] Equalizing Cash Payment

If one party is to receive a cash payment to equalize the division of assets, the agreement should include the provision of the cash payment, when and how it is to be paid. If it is to be paid over a period of time, the agreement needs to explicitly state the terms of the payments and interest to be paid, if any.

9. [6.36] Spousal Support Provisions

The agreement should not be silent as to maintenance. If neither party is paying maintenance to the other, the agreement should so state. Should there be an award of maintenance, the agreement must state the amount and duration of maintenance and the terms which may modify or terminate maintenance. For maintenance to be deductable for tax purposes by the payor spouse, the maintenance provision must be cash received by or on behalf of a spouse, under a decree or separation instrument (including an order), must not be designated as not includable in the payee gross income, the parties may not be living in the same household, and must cease upon the death of the payee. The payment may not be fixed as child support and may not be front loaded in excess of permissible amounts. Without these provisions, the IRS may consider the payment as something other than support, such as a property division or child support and the payor will lose his or her tax deduction.

10. [6.37] Division of Debt

The agreement should specifically define the debt and the allocation of same. If a party needs to remove the other parties' name from the debt, it should be specified in the agreement. The agreement should indemnify and hold harmless each party for the debt that is to be assumed by the other party.

11. [6.38] Taxes

The agreement must address taxes to protect both parties. The taxing authorities are not bound to recognize the terms of the agreement against them. However, the agreement will protect one party against the other as a contract for indemnification.

a. [6.39] Dependency Exemptions

The agreement should address which party may claim which child in which year(s) as an exemption and require the other party to promptly sign the appropriate form(s).

b. [6.40] Net Operating Losses/Carryforwards

These losses are actually an asset: an income offset that can be used in future years. Make sure the agreement addresses the division.

c. [6.41] Refunds/Liabilities

Parties may be in the process of filing. E-filing and direct deposit make the tracking of refunds more difficult than a jointly written check that will require the signature (and therefore notice) of both parties. The agreement should address

the method of filing, the division, and notice requirements if the returns are e-filed or direct deposit of the refund takes place and a time frame by which the other party should receive their allocable share. If the return requires payment to be sent, the agreement must specify the timely submission of the payment.

d. [6.42] Prior Years

A liability may be incurred by the parties due to an audit or mistake in the returns filed in past years. This liability may not be known at the time the agreement is negotiated. If the return was jointly filed, it will create a post-decree joint liability. This possibility should be acknowledged in the agreement and the specific division of this potential liability stated.

12. [6.43] Attorneys' Fees & Court Costs

The agreement should specify who is to pay the court cost, or who has paid them, and which party is to pay attorneys' fees.

13. [6.44] Bankruptcy

The agreement may include a provision on bankruptcy so that a spouse who received property or debt as part of a division of assets may be able to protect him or herself should the other party receive a discharge in bankruptcy by deeming those divisions as domestic support order ("DSO"). An attorney cannot completely protect his client, but he can try to mitigate the damage as much as possible. For example:

> The assumption of indebtedness by PARTY A shall be considered an obligation directly related to the support and maintenance of PARTY B, although payments of said debts shall not be considered deductible or taxable as alimony or maintenance for income tax purposes. The parties further stipulate that they intend these debts and liabilities listed shall be non-dischargeable under Section 523(a)(5) of the Bankruptcy Code. In the event that PARTY A should file a Petition under Section 7 or 13 of the U.S. Bankruptcy Code, and, despite the language of non-dischargability in this Agreement, receive a discharge, then PARTY B shall automatically be entitled, under this provision, to maintenance from PARTY A in an amount equal to that portion of any debt for which he/she is responsible hereunder and which the bankrupt party is relieved of paying due to the aforementioned filing and discharge.

14. [6.45] Incorporation of Agreement

The agreement should contain a provision incorporating the agreement into the decree of dissolution.

15. [6.46] Disclosure

The agreement should contain a statement that both parties have truthfully disclosed all assets. This provision should also contain an acknowledgement that the parties are aware of the discovery tools available to them, but waive their right to further utilizing tools. It is prudent to include a provision regarding any consequences should it be discovered after the signing of the agreement that a party failed to disclose an asset.

16. [6.47] Choice of Law

In today's mobile society, if the agreement is reached based upon Kentucky law and the parties wish for the agreement to be construed under Kentucky law, the agreement should clearly state this.

17. [6.48] Execution of Documents

There should be a standard provision regarding the execution of all necessary documents to effectuate the terms of the agreement. If either party refuses, the agreement should state the Master Commissioner may be ordered to execute a document to effectuate the terms of the decree which incorporates the agreement.

18. [6.49] Default

If one party defaults in their obligations under the terms of the agreement to the other, they should be required to pay all costs, damages, fees and attorneys' fees of the other party. This prevents one party from benefiting by making enforcement of the agreement cost-prohibitive to the other party. If this were allowed a party would be able to benefit from their bad behavior.

IV. [6.50] Appendix

A. [6.51] Sample Separation Agreement

COMMONWEALTH OF KENTUCKY
_____ COUNTY
FAMILY DIVISION
NO. XX-CI-XXXX

IN RE THE MARRIAGE OF:

WIFE PETITIONER

AND SEPARATION AGREEMENT

HUSBAND RESPONDENT

** ** ** ** ** **

This Separation Agreement, made and entered into on this the _____ day of _____, _____, by and between _____ (hereinafter "Husband"), of _____, _____ County, Kentucky and _____ (hereinafter "Wife"), of _____, _____ County, Kentucky:

WITNESSETH:

WHEREAS, the parties hereto are husband and wife, but unfortunate and irreconcilable marital differences have arisen between them, making it impossible for them to hereafter live together as husband and wife; and

WHEREAS, the parties live separate and apart and having filed a dissolution action in _____ Circuit Court, they are seeking a settlement of property rights, and other appropriate relief; and

WHEREAS, the parties are desirous of effecting a settlement of their property rights, irrespective of whether or not a decree dissolving their marriage be entered, and of determining, by agreement, questions of maintenance, division of the marital property, and all other matters at issue, and said parties having reached an understanding and agreement which they desire to reduce to writing,

NOW THEREFORE, for and in consideration of the premises and other good and valuable considerations as are hereinafter stated, including the mutual covenants contained herein, it is agreed by and between the parties hereto, as follows:

1. HUSBAND'S WAIVER. The Husband does hereby waive, release and relinquish unto Wife, her heirs and assigns forever, all of his right, title and interest in and to all property now owned or hereafter acquired by Wife,

including the right of curtesy, and does further waive, release and relinquish all claims for future support or maintenance that he may have against her except as hereinafter set forth in this Agreement.

2. WIFE'S WAIVER. The Wife does hereby waive, release and relinquish unto Husband, his heirs and assigns forever, all of her right, title and interest in and to all property now owned or hereafter acquired by Husband, including the right of dower, and does further waive, release and relinquish all claims for future support or maintenance that she may have against him except as hereinafter set forth in this Agreement.

3. CUSTODY. The parties shall share joint custody of the minor children of the marriage, namely _____ age ____, and _____, age ____. The parties agree that the children shall reside primarily with the Wife and shall share time with the Husband as set forth in paragraph (4) of this agreement.

4. TIMESHARING.

CHOICE – SPECIFIC OR NON-SPECIFIC:

EXAMPLE SPECIFIC:

It is agreed by and between the parties that Husband shall share time with the minor children every other weekend from Friday at 6:00 p.m. until Sunday at 6:00 p.m., every Tuesday evening from 4:30 p.m. until 7:30 p.m. and on the alternating Thursday following his weekend timesharing from 4:30 p.m. until 7:30 p.m.

The holidays will be divided as follows:

Winter Break: It is the intent of the parties to equally divide the children's winter break surrounding the Christmas holiday. The parties agree that the children shall be with Husband from 6:00 p.m. on the day they get out of school until the end of his Christmas timesharing. The children shall be with the Wife from the beginning of her Christmas timesharing until December 31st at 6:00 p.m. unless there are insufficient days at the beginning of winter break to create an equal division of the holiday. If there are insufficient days to create an equal division of winter break, the parties agree that Husband shall exercise his days at the beginning of break, then Wife will receive her Christmas timesharing and winter break days followed by Husband's remaining winter break days. Winter break timesharing may be accomplished after the New Year's holiday. However the division of winter break will not interfere with the New Year's holiday division and shall always be planned to coincide with that holiday division per this agreement. This year winter break is from December

20-January 3rd, and will be divided as follows: December 20th at 6:00 p.m. to the 24th at 9:00 p.m. with Husband; December 24th at 9:00 p.m. until December 31st at 6:00 p.m.; December 31st at 6:00 p.m. until January 3rd at 6:00 p.m.

Further the parties agree that during the winter break if the other parent and the children are in _____ area that they will be flexible and agreeable to timesharing during their time with the children with the intent that the children will not go for extended periods of time without seeing the other parent.

Christmas: The parties agree that in even-numbered years the children will be with the Husband until 9:00 p.m. on December 24th and with the Wife from 9:00 p.m. on December 24th through the end of her winter break timesharing. In odd-numbered years, the Husband shall enjoy Christmas timesharing from the beginning of winter break through 11:00 a.m. on December 25th and the children shall be with the Wife from 11:00 a.m. on December 25th through the end of Wife's winter break timesharing.

New Years: From December 31st at 6:00 p.m. until the 1st at 6:00 p.m. the children will be with the Husband in even-numbered years. On odd-numbered years the children will be with the Wife from December 31st at 6:00 p.m. until the 1st at 6:00 p.m. The odd/even year determination is set by the year that begins on the 1st.

Easter: The parties agree that every even-numbered year the children shall be with the Husband from 6:00 p.m. on Good Friday until 6:00 p.m. on Saturday and shall be with the Wife from 6:00 p.m. on the Saturday before Easter until 6:00 p.m. on Easter Sunday. In every odd-numbered year, the children shall be with the Husband from 6:00 p.m. on Good Friday until 9:30 a.m. on Easter Sunday morning and shall be with the Wife from 9:30 a.m. on Easter Sunday morning through 6:00 p.m. that evening.

Spring Break: The parties agree to equally divide the spring break holiday with the children each year. The parties agree that they shall divide the days of the break with the first part of the break going to the parent pursuant to the regular alternating weekend schedule but staying with that parent until 2:00 p.m. on Wednesday and spending time with the other parent from 2:00 p.m. on Wednesday until 6:00 p.m. on Sunday. The parties further acknowledge that there may be instances wherein spring break includes the Easter holiday weekend.

	If this occurs the Easter timesharing schedule above will be followed with the parties equally dividing the remaining days and scheduling their respective timesharing with the children to accommodate the division of Easter given above.
July 4th:	From July 3rd at 6:00 p.m. until the 4th at 9:00 p.m. the children will be with the Husband in odd-numbered years. In even-numbered years the children will be with the Wife from 6:00 p.m. on the 3rd of July until the 4th at 9:00 p.m.
Memorial Day:	From Friday at 6:00 p.m. until Monday at 6:00 p.m. the children will be with the Husband in odd-numbered years. In even-numbered years the children will be with the Wife from Friday at 6:00 p.m. until Monday at 6:00 p.m.
Labor Day:	From Friday at 6:00 p.m. until Monday at 6:00 p.m. the children will be with the Husband in even-numbered years. In odd-numbered years the children will be with the Wife from Friday at 6:00 p.m. until Monday at 6:00 p.m.
Thanksgiving:	From Wednesday before Thanksgiving at 5:00 p.m. through 2:30 p.m. on Thursday the children will be with the Husband. The children will spend from 2:30 p.m. on Thursday until Friday at 6:00 p.m. with Wife. Thanksgiving timesharing will not affect regular weekend timesharing.
Mother/Father's Day:	Each parent will have the children with them on Mother's Day (Wife) and Father's Day (Husband) from 9:00 a.m. until 6:00 p.m. unless the children are already with them pursuant to the regular timesharing schedule.
Parent's Birthday:	Each parent will have the children with them on their birthday (which is a summer day for each parent). They will have the children from the day before their birthday at 6:00 p.m. until 6:00 p.m. on their birthday unless the children are already with them pursuant to the regular timesharing schedule.
Summer:	Each parent shall have the right to choose two (2), one (1) week periods of uninterrupted vacation timesharing with the children each summer. The summer weeks will be scheduled by June 1st of each year and will not conflict with other holiday and birthday timesharing as set forth herein.
Halloween:	If trick or treating for each parent is on a separate night, each parent shall enjoy a four-hour block of timesharing with the children on the trick-or-treating night of their respective community, irrespective of the normal timesharing schedule. If this four-hour block of special trick or treating timesharing falls on the other parent's normal timesharing, there is no make-up timesharing period. If, for any reason, the trick-or-treating nights of each parent's community falls

> on the same evening, the parties agree to work out an arrangement wherein they will divide time equally with the children on that trick-or-treating night, irrespective of the normal timesharing schedule. There will be no make-up added to the normal timesharing schedule for missed timesharing due to the special Halloween timesharing. It is the intent of the parties that each parent shall enjoy taking the children trick-or-treating in their respective community.

[OR]

EXAMPLE NON-SPECIFIC:

The parties agree at this time the children shall reside with the Wife but shall enjoy liberal and frequent timesharing with the Husband given their activities and schedules. The parties shall discuss and agree to this timesharing in advance, when the activities of the children are known. The parties agree this shall be a fluid schedule, to maximize the time the children can share with each parent while still enjoying their normal lives. The parties agree Husband's timesharing shall be no less than the FCRPP Model Timesharing Guidelines, attached Exhibit "A".

All out of state trips including the children will include itineraries provided to the other parent, including contact and hotel numbers, flight information and other travel information.

Three day weekends described above for Husband shall take place of the next regular alternate weekend if they do not fall on Husband's regular timesharing weekend.

The parties agree that there shall be no corporal punishment of either child by either parent. Neither parent shall slap or spank either child at any time, for any reason.

The parties agree to contact the other parent if they know one week (7 days) in advance of an impending trip or plans which will require a babysitter for greater than four (4) hours. Each parent who becomes aware of such childcare needs will contact the other parent first to determine if they can provide care for the children during this timeframe. The other parent has the exclusive first right to personally provide the care for the children for a period of greater than four (4) hours known at least one week (7 days) in advance.

The Wife shall pick the minor children up from their alternating weekend timesharing on Sunday evenings at 6:00 p.m. at Husband's residence unless otherwise designated in writing. The Husband shall perform all other transportation to accomplish timesharing. Pick Ups and drop offs shall be at the marital residence unless otherwise designated in this agreement or in writing.

5. PARENTING COORDINATION. The parties agree that they shall participate in Parenting Coordination with _____. The purpose of this coordination is to assist the parties in working towards a goal of good communication and cooperation regarding issues relating to their children. It is the goal of these parents to co-parent their children and they realize that effective communication is essential to meet that goal. The parties shall participate in Parenting Coordination to work on issues relating to communication as well as issues upon which they are unable to agree, including custodial decisions and any timesharing related arrangements. The parties agree they shall be equally responsible for all fees of the Parenting Coordinator relating to joint Parenting Coordination sessions, 50% to be paid by Husband and 50% to be paid by Wife. Each parent shall be solely responsible for their respective share of these expenses and shall indemnify and hold the other party harmless from same. If either party has, for any reason, a separate session with the Parenting Coordinator, they shall be solely responsible for the costs of same.

Further, the parties specifically agree that neither party shall file a Motion with the Court regarding any parenting decision or timesharing disagreement without first addressing same in Parenting Coordination. Any Motion filed regarding parenting or timesharing disagreements shall include an attached certification from the Parenting Coordinator that the issue was addressed, unsuccessfully, by the parties in Parenting Coordination.

Further the parties both agree to participate, as directed by the therapist or counselor, in the counseling of the minor children. The parties shall participate, when requested by the therapist, in direct counseling for the children or in ancillary sessions to assist in providing information, education, to gain insight and all other forms of support for the emotional well-being of their children.

6. CHILD SUPPORT. The Husband shall pay to the Wife $_____ per month for support of their minor children pursuant to the Kentucky Child Support Guidelines, a worksheet is attached hereto, Exhibit "B," evidencing the calculation of Husband's obligation. A Wage Assignment Order shall be entered to effectuate the base monthly award of support agreed to herein.

The parties shall exchange their tax returns and their respective last pay stub for April of each year on or before May 5th of each year to determine if child support should be modified.

All work-related child care expenses incurred by the parties shall be divided by the parties pursuant to their respective income percentages. Child care has specifically not been included in the child support calculation. Each party shall be responsible for their percentage share, with their current percentages being _____% to be paid by Husband and _____% to be paid by Wife, directly to the childcare provider each and every week that work-related child care is incurred. Each party is solely responsible for their percentage share of work-related child care and they shall indemnify and hold the other party harmless from same.

The parties agree that they shall each explore the options for work-related child care for the children. The parties shall exchange information on childcare and shall jointly decide the childcare arrangements for the children each year no later than April 15th. Further, the parties agree that any additional days they are able to work around childcare in the summer, that being extra days in the summer that they may have off from work and plan to spend with the children, shall be the responsibility of that parent. Any last minute change of plans or arrangements that would require additional work-related child care costs to be incurred will be the sole responsibility of the parent who agreed to provide care for the children on that day.

The parties shall discuss and agree upon all additional extracurricular activities of the children that affect and infringe upon the timesharing schedule. The parties acknowledge and agree that the children are currently involved in _____ and the parties agree that the children enjoy these activities and shall continue them as long as each child desires to participate. The parties agree to equally divide and be responsible for all costs associated with these agreed upon extracurricular activities, including enrollment fees, class fees, uniforms, costumes and all other expenses directly related to the participation of each child in each activity, 50% to be paid by Husband and 50% to be paid by Wife. Each party shall be solely responsible for their 50% share of these expenses and shall indemnify and hold the other party harmless from same. Reimbursement shall be paid to the other parent within seven (7) days of being presented with a receipt for said expense.

7. HEALTH AND MEDICAL INSURANCE. The Husband shall maintain health insurance on the children of the marriage for so long as each is eligible for dependent care coverage pursuant to KRS 403.211(7)(c)(3) and it is available to him at a reasonable cost as defined by KRS 403.211(8)(a). The cost of extraordinary medical expenses shall be allocated between the parties in proportion to their adjusted gross incomes pursuant to KRS 403.211(9), ____% to be paid by Husband and ____% to be paid by Wife. Extraordinary medical expenses means uninsured expenses in excess of one hundred dollars ($100) per child per calendar year. "Extraordinary medical expenses" includes, but is not limited to, the costs that are reasonably necessary for medical, surgical, dental, orthodontic, optometric, nursing, and hospital services; for professional counseling or psychiatric therapy for diagnosed medical disorders; and for drugs and medical supplies, appliances, laboratory, diagnostic, and therapeutic services. Reimbursement from one parent to the other shall occur within fourteen days of being presented with a copy of a receipt or other documentation evidencing payment of an extraordinary medical expense as defined herein.

The Husband shall execute a Qualified Medical Child Support Order to permit the Wife to have access the health insurance carrier for purposes of filing health insurance claims for the children.

8. SPOUSAL MAINTENANCE.

The parties agree that the Husband shall pay the Wife spousal support and maintenance on the following schedule:

1. $2,850 per month, June 1, 20XX, through May, 20XX.
2. $2,500.00 per month beginning June 1, 20XX through May, 20XX; and
3. $2,000.00 per month beginning June 1, 20XX.

Maintenance shall be paid on the first day of each month, no later than the 5th day of each month in one installment payment unless otherwise agreed to by the parties.

Husband shall pay maintenance to Wife on the schedule set forth above until the first of the following occurs:

a. the death of the Wife;
b. the remarriage of the Wife;
c. the death of Husband;
d. the cohabitation of the Wife with an unrelated member of the opposite sex who provides financial support;
e. Receipt by Wife of Social Security retirement or disability benefits;
f. Loss of Husband of his employment by involuntary termination; or
g. October, 20XX.

With knowledge of the current case law the parties agree that maintenance is not modifiable based upon any other circumstance than those terminating events enumerated above, a-g. Pursuant to KRS 403.180(6), the parties are agreeing to expressly preclude modification of maintenance by any term other than these specifically bargained for terminating events, a-g. Both parties have given consideration in this negotiation to make maintenance non-modifiable and have relied upon that consideration in agreeing to fixed, non-modifiable maintenance. Both parties wish to have this maintenance be lump-sum, paid pursuant to the schedule set forth above and non-modifiable except for their bargained-for terminating events in a-g, above.

Spousal Maintenance shall be taxable income to Wife and tax deductible for Husband.

[OR]

The parties herein agree by execution of this Agreement that neither will seek maintenance or alimony from the other now or at any point in the future. Both parties acknowledge by execution of this Agreement they are waiving their right to receive maintenance from the other.

9. REAL ESTATE. The Wife currently resides at _____ _____. The parties agree the value of this marital residence is currently $_____. The mortgage indebtedness on this residence is to _____ with the approximate balance of $_____. Therefore, the parties agree the equity in the marital residence is approximately $_____.

The parties agree that Wife shall receive sole ownership of this residence, free and clear of any claims of Husband. Wife shall be solely responsible for all liabilities, mortgage, taxes, insurance and all debt associated with the residence and shall indemnify and hold Husband harmless from same. Wife shall refinance the mortgage on said residence to remove Husband's name from same on or before _____. Upon presentation of a Quit Claim deed prepared by Wife's counsel, within seven (7) business days prior to the scheduled closing on refinancing, Husband shall sign said deed upon proof of the closing date scheduled for the refinancing. Wife shall receive any escrow funds that may be reimbursed at closing, free and clear of any claims of Husband.

10. STOCK. The parties are the owners of approximately ___ shares of _____ stock. The parties agree that the stock shall be sold. The net proceeds from the sale of the stock shall be awarded to ____. Further, the parties agree they shall equally divide the loss associated with the sale of the stock. Therefore, Husband will receive 50% of the stock loss and be entitled to claim same on his tax returns and Wife will receive 50% of the stock loss and be entitled to claim same on her tax returns.

11. SAVINGS BONDS. The parties are the owners of _____ _____ in savings bonds. Wife shall receive sole ownership of the savings bonds, free and clear of any claim of the Husband. Husband shall sign any and all necessary documentation to transfer these bonds into the sole name of Wife.

12. PERSONAL RETIREMENT SAVINGS ACCOUNTS. The parties are the owners of three (3) personal retirement savings accounts. There is a 401-K savings account in the name of Husband managed by Fidelity through his employment with _____ with the approximate balance of $_____. There is a 403-B savings account of Wife through her employment with _____ managed by _____ with the approximate balance of $_____. There is a Roth IRA in the name of Wife managed by _____ with the approximate balance of $_____. The parties agree to equally divide these accounts, 50% to be received by Wife and 50% to be received by Husband. The equal division of these accounts shall be accomplished by valuing each account at the date of dissolution; subtracting from Husband's 401-K the total balance of Wife's 403-B and Roth IRA and dividing in half (50%) the remaining balance in Husband's 401-K. The amount determined by this formula to be due Wife on the date the Decree is entered shall be transferred to Wife by Qualified Domestic Relations Order with all allocable gains and losses from that date. Wife's counsel shall be responsible for preparing the QDRO. Neither party shall make any withdrawals or transfers from either of these accounts prior to the entry of the Decree, acceptance

of the QDRO and division of the account. Upon division of these accounts each party shall be awarded sole ownership of all accounts in their name, free and clear of any claims of the other.

13. PENSION. The parties acknowledge and agree that they have accumulated pension benefits in Husband's name with his employer, _____ that were accumulated 100% during the marriage. The parties agree to equally divide these pension benefits as of the date of entry of the Decree of Dissolution with Wife receiving 50% of the pension benefits and Husband receiving 50% of these pension benefits. A Qualified Domestic Relations Order shall be entered to effectuate the division of these pension benefits. Wife's counsel shall prepare the QDRO. Upon division of the pension account, each party shall be awarded sole ownership of the benefits in their name, free and clear of any claims of the other.

14. STOCK OPTIONS/APPRECIATION RIGHTS. SEE EXAMPLES BELOW:

OPTION 1:

The parties agree that during their marriage they have accumulated certain rights in a _____ Stock Options Plan and a _____ Stock Appreciation Rights Plan, which includes Short-term incentives ("STI") and Long-term incentives ("LTI"). The parties agree that all rights accumulated under both the _____ (LTI and STI) stock plans are marital property, up to an including the rights that will be received in _____. The parties agree to equally divide all stock options and appreciation rights that have been awarded as of the date of entry of the Decree of Dissolution. The parties agree to accomplish this division by each party receiving one-half (50%) of each specific award (one-half of the specific number of stock granted at each award at the grant price) of all options and appreciation rights.

The parties acknowledge that these stock options cannot be transferred to Wife to be held in her name. Therefore the parties agree that Wife's VARS shall remain in Husband's name but are Wife's property. When Wife elects to exercise her stock options, she shall notify Husband and he shall execute the purchase and sale of Wife's stock options within twenty-four hours of said notification. Notification by Wife to Husband shall be in writing. The check received for the Wife's exercised VARS shall be given to Wife by Husband, endorsed by Husband to Wife, within seven (7) days of receipt of the check. The parties further acknowledge that Husband will be required to pay taxes on the stock options profit from the sale. Taxes will be withheld by the entity executing the sale. The sale will appear on Husband's W-2. However, Wife shall be responsible for all additional tax to Husband that may be owed to the Internal Revenue Service or any other taxing authority due to the exercise of the stock options. The additional tax due shall be determined by April 15th of the following year in the following manner: Husband shall provide all of his tax information (W-2's, 1099's, K-1's, interest schedules

and deductions) to Wife. Wife shall pay for a licensed CPA to prepare Husband's taxes, both with the stock options included (as on his W-2) and by subtracting the stock options and appreciation rights from his W-2. Any additional tax due based on Husband's actual W-2 versus the calculation without the stock options shall be paid by Wife to Husband within seven (7) days of receipt of his tax information. Any additional amount of proceeds due to Wife due to too high of a withholding from the proceeds check based on Husband's actual W-2 versus the calculation without the stock options shall be paid by Husband to Wife within seven (7) days of receipt of his tax information.

Husband shall forward to Wife the quarterly statements he receives on both the Stock Options Plan and Stock Appreciation Rights Plan (STI and LTI) within seven (7) days of receipt of same. Both parties acknowledge these rights have specific expiration and vesting dates. The parties are aware of the vesting dates and the expiration dates of each grant. Each party is responsible for ensuring their own respective rights awarded to them herein under the plan are protected and do not expire. It is not the responsibility or obligation of the other party to notify the other party of the impending expiration of any grant.

[OR]

OPTION 2:

During his tenure as _____ at _____, Husband has, from time to time, been granted some or all of these equity instruments. Each grant has an associated "Grant Date", potentially a multiplicity of "Vesting Dates", a "Termination Date" upon which time the equity instrument is no longer available to Husband, and an "Option Price". Hereinafter, the term "Set" shall refer to a subset of the equity instruments of a particular Grant, all having the exact same Vesting Date.

Wife shall be entitled to 50% (fifty percent) of all equity grants (Sets) that were granted to Husband prior to the date of the entry of Decree of Dissolution. All of these Grants shall be viewed at a Set by Set level, with Wife being entitled to 50% of each Set.

SMSC, the Federal Government, agencies of the Federal Government, and the NASDAQ Stock Exchange have set forth rules, regulations, and restrictions that govern the timeframe and manner in which Directors can sell, buy, trade, exercise or speculate in any company equity instrument. Wife does hereby acknowledge the existence of such regulations and agrees to fully abide by the restrictions set forth for such a Director, both in the letter and the intent of the law.

At such a time as Wife decides to exercise any Set, part of a Set, or multiple Sets, the transaction must be executed by Husband, again within the context of the restrictions mentioned above. Upon written or verbal request from Wife, Husband agrees to make a "good faith and best effort" attempt to execute said requested transactions in a timely manner, and further agrees to execute such transactions as "Cashless Exercise" as defined by the SMSC plan under which said grant was

made. The gross proceeds of the transaction shall be paid to Wife within five (5) business days from the time when Husband receives the proceeds of said transactions. In simple terms, the "gross proceeds" is equal to the number of units exercised multiplied by a value that is equal to the price of SMSC common stock on the day of exercise minus the "Option Price" as defined by the associated SMSC plan.

These payments shall be treated as spousal maintenance for the purposes of federal, state, and local taxation and deductible to Husband and income to Wife for the sole purpose of ensuring Wife pays the taxes due on the exercise of this property, which will be treated by the taxing authorities as income to Husband. There is no other way to transfer this property into Wife's name and transfer the corresponding tax liability due to the exercise to Wife's name. Wife will net from the exercise of her respective share the same amount (after claiming same as maintenance) that she should have received had the options and SARS been able to have been divided and transferred into her name.

Should Wife precede Husband in death, this obligation ceases. Should Husband precede Wife in death, Wife shall be entitled to 50% (fifty percent) of the remaining value of all unexercised equity instruments and shall have a claim against his estate for same. The timing and manner of this payment shall be consistent with the SMSC Plans under which such equity instruments were granted and the time when Husband's estate gains access to these equity instruments.

15. LIFE INSURANCE. Each party is the owner of a term life insurance policy covering their respective life that was acquired during the marriage. Each party shall receive sole ownership of the life insurance policy covering their respective life, free and clear of any claims of the other party.

ADDITIONAL OPTION FOR CHILDREN:

The parties acknowledge Wife may be unable to own and/or continue her current term policy coverage since it is through Husband's employer but that Wife is eligible for term insurance through her employer for 3 times her salary. Husband agrees to continue term insurance coverage and death benefit equal to 4 times his salary and shall designate the children as the primary beneficiaries on his individual policy until such time as the youngest child attains the age of twenty-five (25). Wife shall provide term insurance coverage and death benefit of 3 times her salary and will designate the children as the primary beneficiaries on her individual policy until such time as the youngest child attains the age of twenty-five (25), whether it be the continuation of the current policy or a policy through her current employer.

16. BANKING ACCOUNTS. Each party shall receive sole ownership of all banking accounts in their sole name, free and clear of any claims of the other party. All joint banking accounts have been closed and proceeds divided to the mutual satisfaction of each party.

17. VEHICLES. The parties agree that they have accumulated one vehicle and 50% interest in a boat during the marriage. The parties agree Hus-

band shall be entitled to sole ownership of the _____ and the 50% ownership interest in the boat. The _____ is in the parties' joint names and is currently unencumbered. Husband shall be awarded sole ownership of the _____ and 50% ownership interest in the boat, free and clear of any claims by Wife. Wife shall sign any and all documentation to transfer the _____ into Husband's sole name. Husband shall be solely responsible for all taxes, insurance and other costs and expenses associated with this vehicle and ownership interest in the boat and shall indemnify and hold Wife harmless from same.

18. PERSONAL PROPERTY DIVISION. The parties agree that they have already divided their marital furnishings and personal property with the exception of the attached property on Exhibit "C" that shall be awarded to Husband. The parties agree that Husband shall have fourteen (14) days from signing this agreement to retrieve the property on Exhibit "C" from the marital residence. After retrieval of the property on Exhibit "C" from the marital residence by husband or the elapse of fourteen (14) days after entry of the Decree, whichever is first, each party is awarded all property in their possession, free and clear of any claims of the other party.

20. WRITINGS. Wife shall retain sole ownership, free and clear of any claims of Husband, of all writings she has authored during her lifetime. Husband hereby waives and relinquishes any claim he may otherwise have to these writings.

21. LUMP-SUM PROPERTY SETTLEMENT PAYMENT. In consideration for Wife being awarded a greater proportion of the equity in the marital residence, Wife shall pay to Husband a lump-sum cash property settlement payment of $_____ (_____ dollars) at the closing of the refinancing of the marital residence. After payment in full of $_____ to Husband by Wife the division of property shall be equalized and neither party shall have any further financial obligation to the other unless otherwise specified in this agreement.

22. DEBTS. The parties are not aware of any debts, other than as mentioned in this Agreement. The parties hereby agree that neither shall hereafter incur any debt or obligation upon the credit of the other, and each agrees to indemnify and save the other harmless from any debt or obligation so charged or otherwise incurred. Each party agrees to defend, indemnify and hold the other party harmless from any expense, debt or obligation for the marital debts which each has agreed to pay. Each party shall be responsible for any and all indebtedness he or she individually incurs subsequent to the date of separation. The parties represent that neither has incurred, nor shall either incur, any debt, or make or enter any transaction binding on the other, directly or indirectly, unless provided for in this Agreement. If either party incurs any such debt or obligation, he or she shall be solely responsible for the payment thereof. If the other party is called upon to make any payment of contribution toward the satisfaction of same, the responsible party shall promptly defend, indemnify and hold the other party harmless from any

obligation thereon. If there exists any debt or obligation acquired during the marriage and not specifically mentioned in this Agreement for which either party may be held liable, the parties each agree that the party who incurred the debt is solely liable for same and that they shall indemnify and hold the other harmless from same, including attorneys' fees, costs and any other liability incurred to defend or pay for such a liability.

23. DEPENDENCY TAX EXEMPTIONS. The Husband shall claim _____ as a dependent for income tax purposes. Wife shall claim _____ as a dependent for income tax purposes. Once _____ is no longer eligible to be claimed as a dependency exemption the parties agree to alternate the right to claim _____ with Wife having the right to claim _____ the first year that there is only one dependency exemption remaining and the parties alternating the right each and every year thereafter that _____ may be claimed as a dependency exemption.

Each party agrees to execute all documents upon submission to them for signature, needed to enable each parent to claim the tax dependencies pursuant to the terms of this Agreement as determined by the Internal Revenue Service, including but not limited to a Form 8332 on an annual basis. Neither party shall withhold their signature on this form. It shall be promptly signed and returned to the other parent within three (3) days of being presented with same.

24. INCOME TAX FILINGS. Wife shall be entitled to claim 100% of the mortgage interest deduction for the marital residence for _____ and all future years.

The parties acknowledge and agree that they will be divorced by December 31, ____. The parties will file separate tax returns for the tax year _____. There has been no maintenance paid during the temporary phase of this action.

If, for any of the previous years of filings in which the parties filed income tax returns "married filing jointly," the Internal Revenue Service or Kentucky Revenue Cabinet determines there is an additional amount due and owing in tax liability, interest or penalties, the parties agree to be equally responsible for said debt, 50% to be paid by Husband and 50% to be paid by Wife. The parties agree they shall each be responsible for their own respective share of any such debt and shall indemnify and hold the other party harmless from same.

25. NO CONTACT OR COMMUNICATION. The parties acknowledge and agree that there is currently a No Contact and No Communication Order entered by the Judge in this matter. The parties agree that by separate Order they shall continue this Civil No Contact and No Communication Order with the exceptions of communication regarding the children by e-mail, text message and by exchange of messages on their respective answering machines. It is the goal of the parties that this Order may eventually be dropped or further modified. The parties agree to work in Parenting Coordination towards this goal. The parties acknowledge

and agree that they wish to improve their communication and cooperation to co-parent their children and they will work towards that goal in Parenting Coordination but that at this time their communication is best left to e-mail, text messaging and the exchange of messages on answering machines.

26. ATTORNEYS' FEES AND COURT COSTS. Each party shall be solely responsible for their own respective attorneys' fees and court costs, and they shall indemnify and hold the other party harmless from same.

27. DISCLOSURE. The parties acknowledge that they have each been advised of each party's right to obtain and take advantage of the panoply of discovery tools available to litigants in a court proceeding including, but not limited to, interrogatories, depositions, requests to produce, an examination of the books and records of the other party, and the procurement of independent valuations of the assets possessed and/or controlled by the other, etc. prior to the execution of this Agreement. Each party knowingly waives his or her right to further utilize the foregoing discovery tools for the purpose of settling their differences concerning the issues arising out of the marriage. The parties represent that each has full, candid and truthful disclosure of his/her financial resources and property interest, both real and personal, and the estimated value thereof, and all assets and debts. However, if either party has failed to disclose assets of any nature, said asset shall be equitably divided by the court [OR] forfeited by the faulting party and deemed the property of the other.

28. RIGHT TO COUNSEL. The Wife has been represented by counsel during the negotiations of this Agreement and throughout these legal proceedings. The Husband has likewise been represented by counsel during the negotiations of this Agreement and throughout these legal proceedings. The parties understand their right to separate counsel to represent them in any future proceedings. Both parties acknowledge that they have read and understand the meaning of this Agreement and that they have signed it of their own volition under no compulsion or duress.

OR, IF ONLY ONE PARTY HAD COUNSEL:

Husband has been represented by counsel during the negotiations of this Agreement and throughout these legal proceedings. **Wife has decided to proceed "pro se" (without counsel) during these proceedings. Wife has been informed that Husband's attorney does not represent her in these proceedings.** The parties understand their right to separate counsel to represent them in any future proceedings. Both parties acknowledge that they have read and understand the meaning of this Agreement and that they have signed it of their own volition under no compulsion or duress.

X.X.X. _____

29. SIGNING OF DOCUMENTS. If any document, legal instrument, or other writing is necessary to effect the terms and provisions of this Agreement, each party will produce, execute and/or sign such document in order to effect the intent and purpose of this Agreement. If either of the parties shall fail or refuse to execute any documents reasonably necessary to put into effect their agreements as herein provided, the Master Commissioner of the Fayette Circuit Court, and if need be the Commissioner or other government entity in counties where the parties' real property is located, is hereby authorized to execute and deliver on behalf of either party any and all documents reasonably necessary to carry out the provisions of this Agreement.

30. FINAL AGREEMENT. This Agreement constitutes a complete, full and final settlement of all property, maintenance and support rights, both present and future, of the parties hereto and that, the same shall be fixed and irrevocable upon approval of the court; and that each party hereafter shall assume his or her own existing obligations and shall hold the other party free from any hereinafter incurred obligations, except as herein provided; and that it is further understood and agreed that no term of this Agreement shall be altered or varied except in a writing duly subscribed and acknowledged with the same formality as this Agreement.

31. GOVERNING LAW. This Agreement shall be governed by and interpreted to the internal laws of the Commonwealth of Kentucky.

32. BANKRUPTCY. The assumption of indebtedness by both parties shall be considered an obligation directly related to the support and maintenance of the other party, although payments of said debts shall not be considered deductible or taxable as alimony or maintenance for income tax purposes. The parties further stipulate that they intend that these debts and liabilities listed shall be non-dischargeable under Section 523(a)(5) of the Bankruptcy Code.

In the event that either Husband or Wife should file a Petition under Chapter 7 or 13 of the U.S. Bankruptcy Code, and, despite the language of non-dischargeability in this Agreement, receive a discharge, then the non-bankrupt party shall automatically be entitled, under this provision, to maintenance from the bankrupt party in an amount equal to that portion of any debt for which he or she is responsible to a third party hereunder and which the bankrupt party is relieved of paying due to the aforementioned filing and discharge.

33. INCORPORATION OF AGREEMENT. Both parties agree that this document, in the event a decree dissolving the marriage is granted by the Fayette Circuit Court or another court of competent jurisdiction shall be incorporated by reference into said decree, that there shall be no modification or alteration of the terms of this Agreement, except by written documents signed by both parties.

34. DEFAULT. In the event either party defaults in or breaches any of his or her respective obligations and duties as contained in this Agreement, then the defaulting and/or breaching party shall be responsible for and pay to the injured

party, in addition to such other damages as any court may award, all of his or her attorneys' fees, court costs, and any other related expenses incurred to enforce the promises contained herein against the defaulting party.

35. DRAFTING. This Agreement shall not be construed more strictly against one party than the other merely by virtue of the fact that it has been prepared initially by counsel for one of the parties, it being recognized that both the Wife and the Husband and their respective counsel have had a full and fair opportunity to negotiate and review the terms and provisions of this Agreement and to contribute to its substance and form.

36. CAPTIONS. All captions are inserted wholly for convenience of reference and shall not constitute a part of this Agreement or affect its meaning or construction.

IN TESTIMONY WHEREOF, the parties have hereunto set their hands to the original Separation Agreement, copies of which shall have the full force and effect of the original, this the day and year first written above.

_____ _____
HUSBAND WIFE

HAVE REVIEWED, APPROVED AND FOUND
NOT TO BE UNCONSCIONABLE

_____
JUDGE,_____ FAMILY COURT

STATE OF KENTUCKY)
COUNTY OF FAYETTE)

Subscribed and sworn to before me by, _____ on this the ___ day of _____, ____.

My Commission Expires: _____.

_____
NOTARY PUBLIC, STATE AT LARGE, KENTUCKY

STATE OF KENTUCKY)
COUNTY OF FAYETTE)

Subscribed and sworn to before me by, _____ on this the ___ day of _____, ____.

My Commission Expires: _____.

_____
NOTARY PUBLIC, STATE AT LARGE, KENTUCKY

7

CLASSIFICATION AND DIVISION OF PROPERTY

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I. [7.1] Introduction: The Scope and Significance of KRS 403.190

A family law practitioner must master multiple disciplines to effectuate a dissolution of marriage. This is never more apparent than when addressing KRS 403.190, Kentucky's statute concerning the division of marital property. The breadth of this statute is such that knowledge of real estate, wills and trusts, accounting, finance, taxation, bankruptcy, appraisals, and certain types of collectibles is required. The emergence of the current global society, marked by parties owning realty or holding investments outside the United States, exacerbates the complexities in this area.

The significance of the property division statute cannot be overstated as it encompasses all financial issues in a divorce except child support, maintenance, and attorney fees. The importance of the statute to the parties, likewise, cannot be overstated since it represents the only opportunity for each spouse to obtain his or her fair share of the assets accumulated during the marriage. Whether a spouse is properly awarded an item of realty or personalty depends upon the accuracy with which the property division statute is applied.

The frequency with which a court must consider KRS 403.190 is exceeded only by the frequency with which it must consult the family law jurisdictional statutes. Simply put, every divorce action requires consideration of KRS 403.190. Dividing even the smallest estate requires that the property division statute be examined before the trier of fact fashions a ruling or deems a settlement not unconscionable.

Kentucky's adoption of the Uniform Marriage and Divorce Act ("UMDA") led to sweeping changes in property division, by making Kentucky an equitable distribution state. The enactment of KRS 403.190 in 1972, entitled Disposition of Property in Kentucky, was momentous.

A. [7.2] History of Property Division in Kentucky

Prior to 1972, Kentucky courts had only sought to restore the parties' assets to the status quo ante, thus making the economic spouse whole. In its simplest form, the spouse who brought the assets to the marriage left it with those same assets.

The law on this point was set out in KRS 403.060 and KRS 403.065, and required that each party be restored all property he or she had obtained from the other or through the other before or during the marriage and in consideration of the marriage. Property was deemed to have been acquired "in consideration of the marriage" if it had been obtained without valuable consideration. *Ball v. Ball*, 317 S.W.2d 870, 872-73 (Ky. 1958). "Valuable consideration" meant a monetary

ontribution to a specific asset. *DiSimone v. DiSimone,* 388 S.W.2d 591, 592 (Ky. 1965).[1]

Significantly, the domestic services of a wife and mother in aid and support of her husband did not constitute "valuable consideration." *Heustis v. Heustis*, 346 S.W.2d 778, 780 (Ky. 1961); Petrilli, *supra* note 1, § 24.6, at nn.74-75. Under the restoration statute, consideration of the economic circumstances of the spouses after the divorce was not within the court's purview. To the thinking of some, the more regular allowance of alimony made up for the deficiency.[2]

Judicial fiat, in *Colley v. Colley* heralded the demise of the restoration statute, two years before the enactment of KRS 403.190. 460 S.W.2d 821 (Ky. 1970). The *Colley* court broke with tradition by holding that "where property is acquired during marriage by the joint efforts of the parties, it should be divided between the spouses according to what is just and reasonable." *Colley*, 460 S.W.2d at 826. Thus, property acquired during the marriage through team effort of the parties was to be divided, based upon what was just and reasonable. The *Colley* court also indicated that the homemaker's contribution should be regarded as "valuable consideration." *Id*. This Kentucky Court of Appeals decision heralded a new era of property law, creating its own system of property division.

Goaded by this judicial prodding, the Kentucky General Assembly in 1972 adopted the first version of Kentucky's Uniform Marriage and Divorce Act.[3] For a complete discussion of the pre-1974 law on this point, see Petrilli, *supra* note 1, § 24.6; *see also*, Comment, *Kentucky Divorce Reform*, 12 J. Fam. L. 109, 121-22 (1972-73). KRS 403.190 is identical to the Uniform Act, except for KRS 403.190(2)(e), which adds the words: "to the extent that such increase did not result from the efforts of the parties during marriage," with regard to non-marital property that has increased in value due to joint efforts.

The General Assembly introduced several novel concepts when enacting KRS 403.l90. It decreed, first, that property shall henceforth be divided equitably and, second, that marital misconduct would no longer affect the division of marital property between parties. With the adoption of KRS 403.190, the homemaker spouse was viewed as a family partner who had a rightful claim to a significant portion of the assets accumulated during the marriage.

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1 For a more extensive treatment of this point, see Ralph S. Petrilli, Kentucky Family Law, § 24.6 (1st ed. 1969), hereafter Petrilli.

2 Entitlement to alimony under the prior statute, the complexities of which are beyond the scope of this work, is discussed at length in Petrilli, *supra* note 1, § 21.1 *et seq*.

3 *See* Thomas W. Miller, *Kentucky's New Dissolution of Marriage Law*, 61 Ky. L. J. 980, 990 (1973) ("The new act in KRS 403.190, supposed to codify *Colley v. Colley*.").

B. [7.3] Community Property

It is important to note that Kentucky did not choose to become a community property state. Both community property and equitable distribution states view marriage as a partnership and are akin in many regards.

Equitable distribution and community property law differ with regard to the time at which a spouse's partnership interest vests. In states following the common law system, including Kentucky, neither spouse has a present, vested interest in the separate property of the other spouse. Harold Marsh, Jr., Marital Property in Conflict of Laws, 27-58 (1952); W.S. Mcclanahan, Community Property Law in the United States, 35-36 (1982).

In community property states, by contrast, both spouses enjoy present, vested and equal rights in all property acquired during the marriage. Robert L. Mennell and Thomas M. Boykoff, Community Property in a Nutshell, 8-9 (2d ed. 1988); Alvin E. Evans, *The Ownership of Community Property*, 35 Harv. L. Rev. 47, 55 (1921).

The rule that all property acquired during coverture belongs to the community, is applicable during the course of the marriage. William Q. Defuniak and Michael J. Vaughn, Principles of Community Property, 140-45 (1971). In common law states, these rules become applicable only upon dissolution of marriage. *In re Marriage of Martin*, 681 N.W.2d 612, 619 (Iowa 2004); *Nicholas v. Nicholas*, 83 P.3d 214, 221 (Kan. 2004).

Kentucky appellate courts have even relied on community property precedent at times.[4] The wealth of case law available in community property states such as Texas and California is tempting to the family law practitioner from Kentucky, as more factually analogous rulings are likely to be found in foreign jurisdictions. However, practitioners should be extremely cautious when relying on decisions from community property states.

Similar caution should be utilized when relying on rulings decided under the restoration statute and immediately following the enactment of Kentucky's Uniform Act. At least three early opinions seem to have regarded KRS 403.190 as simply a recodification of the restoration act, but in different language. *Munday v. Munday*, 584 S.W.2d 596 (Ky. Ct. App. 1979); *Angel v. Angel*, 562 S.W.2d 661 (Ky. Ct. App. 1978); *Farmer v. Farmer*, 506 S.W.2d 109 (Ky. 1974). Professor Petrilli, however, maintains that cases decided after *Colley* and before enactment of the present statute, remain good law.[5]

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[4] *See, e.g.*, *Duncan v. Duncan*, 724 S.W.2d 231 (Ky. Ct. App. 1987); *Foster v. Foster*, 559 S.W.2d 223 (Ky. Ct. App. 1979).

[5] Petrilli, Kentucky Family Law, § 24.7, at nn.58-65 (2d ed. 1988). A discussion of the cases decided between *Colley* in 1970, and the promulgation of KRS 403.190 in 1972, and their continuing validity as precedent, is found in the same section of Petrilli.

II. [7.4] Applying KRS 403.190(1)

The text of this chapter corresponds to the subsections of the property division statute, KRS 403.190. The first subsection sets forth the proceedings to which the statute applies:

> [A] proceeding for dissolution of the marriage or for legal separation or a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property...

In the same subsection, the legislature then set policy for the courts to apply.

A. [7.5] Legislative Policy: Marital Misconduct; Division in Just Proportions

KRS 403.190(1) eliminated marital misconduct as a factor to be considered in dividing marital property, and established that marriage should be treated as a partnership; the statute directs the court to "divide the marital property without regard to marital misconduct in just proportions." The legislature gave no further guidance as to what constitutes "marital misconduct," nor did it define "just proportions."

B. [7.6] Is Equitable Equal?

An intriguing question raised by this statute is, whether "equitable distribution" means equal division between the parties. No equitable distribution state, including Kentucky, actually requires equal division.[6] However, an ultimate imbalance in the value of the assets received by the parties in a trial court's order may pique appellate curiosity. It is generally assumed, though there is no case law supporting the proposition, that such an imbalance in the property division is warranted only in the case of very large estates or in unique situations.

A more recent Kentucky Court of Appeals' case, involving a sizeable estate, illustrates the rule. *Smith v. Smith*, 235 S.W.3d 1 (Ky. Ct. App. 2006). In that case, the trial court allocated the wife 60% of the equity in the parties' farm. The appellate court upheld this ruling, noting that the wife had spent more time on the farm, and had taken a more active role in making improvements to it. *Id.* at 13-15; *see also, Shively v. Shively*, 233 S.W.3d 738 (Ky. Ct. App. 2007).

Clients invariably inquire about the meaning of "equitable" in dividing their marital estate. Frequently voiced concerns include: "Will the attorney assure

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[6] J. Thomas Oldham, Divorce, Separation and the Distribution of Property § 3.03[1] at 3-7 n. 1 (2012), hereafter Oldham.

the litigant that he or she will receive half of the family's funds even when the money is in the other spouse's possession?" or "Is the business owner who intends to keep the couple's business required to pay the estranged spouse one half its worth?"

III. [7.7] The Anatomy of KRS 403.190

KRS 403.190 is divided into four subsections: (1) division of marital property; (2) the definition of marital property; (3) the effect of record title; and (4) exempt retirement benefits.

A. [7.8] Four Factors Which the Trial Court Must Consider in Dividing Property – KRS 403.190(1)(a)-(d)

The legislature directed trial courts to divide marital property considering all relevant factors, which must include: (a) contributions of a spouse, including contribution of a spouse as homemaker; (b) value of the property set aside to each spouse; (c) duration of the marriage; and (d) the economic circumstances of each spouse when the division of property is to become effective.

"Nonmonetary contributions" require special attention. KRS 403.190(1)(a) states that the "[c]ontribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker" is a factor to be considered in making the disposition of property. With this provision, the effect of the parties' joint efforts and financial protections for homemaker spouses became an integral part of Kentucky's property law.

B. [7.9] Marital and Non-Marital Property Defined – KRS 403.190(2)

Marital property is defined as all property acquired by either spouse subsequent to the marriage and prior to dissolution, with five exceptions, namely: (a) property acquired by gift or inheritance and the income therefrom, unless there are contributions to the increase in value or income from the significant activities of either party; (b) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift or inheritance during the marriage; (c) property acquired after a decree of separation; (d) property excluded by a valid agreement of the parties; and (e) the increase in value of property acquired before the marriage, to the extent it did not result from the efforts of the parties during marriage. Each of these definitions is sufficiently important to merit a more detailed explanation.

C. [7.10] Presumption of Classification as Marital Property When Acquired After Marriage – KRS 403.190(3)

Another innovation wrought in Kentucky's property law by the enactment of KRS 403.190 is the marital property presumption. The enactment of KRS 403.190(3) in 1972 turned Kentucky marital property law virtually "on its head" by decreeing that "[a]ll property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property."

D. [7.11] Record Title and Form of Ownership Not Determinative – KRS 403.190(3)

A further concept initiated by KRS 403.190(3) was the rejection of record title as a factor in property division. A client will often be quick to assert that a particular asset is titled in his or her name. Kentucky, however, is not a record title state; in fact, no pure title state remains. Neither record title nor the form in which property is held affects the nature of the asset or its ultimate disposition.

Clients, particularly those in second or higher order marriages who have maintained separate accounts since their wedding, often find it difficult to understand that title is not determinative. However, the mandate is clear. KRS 403.190(3) states: "All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property."[7]

E. [7.12] Equalization of Regulated Retirement Benefits – KRS 403.190(4)

The fourth subsection of KRS 403.190 makes equal the treatment of a married couple's retirement, which is exempted either totally or partially from classification as marital property. The section applies to retirement benefits regulated by the Employees Retirement Income Security Act of 1974 or a public retirement system administered by an agency of the state or local government.[8]

The statute provides that, should one spouse's retirement benefits be exempted from classification as marital property, the other spouse may exempt an equal amount of his or her retirement benefits from classification. Thus, if one spouse has exemptible retirement benefits equaling $50,000.00, the other spouse

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[7] Of course, there must be some record of an ownership interest by one of the spouses before the court may contemplate dividing the asset. An asset cannot be classified as "marital property" unless at least one of the spouses is seized of an ownership interest therein. *Mullins v. Mullins*, 797 S.W.2d 491 (Ky. Ct. App. 1990). Moreover, the value of that marital interest will be reduced if that ownership interest is less than an unencumbered fee simple title. *McFarland v. McFarland*, 804 S.W.2d 17 (Ky. Ct. App. 1991).

[8] An extensive treatment of this subject may be found at Graham & Keller, Ky. Prac. Domestic Relations § 15.20-15:25 (2012-2013 ed.), hereafter Graham & Keller.

may exempt $50,000.00 from his or her retirement benefits, leaving the balance to be divided by the court.

IV. [7.13] The Order of Proof

The first provision of the equitable distribution statute itself provides a road map setting out the order in which the trial court, and thus the practitioner, must consider property issues. This section clearly mandates that non-marital property must first be assigned before marital property is valued and apportioned. Indeed, KRS 403.190(1) could hardly be more explicit: "the courts shall assign each spouse's property to him. It also shall divide the marital property..." *See also, Snodgrass v. Snodgrass*, 297 S.W.3d 878, 887 (Ky. Ct. App. 2009).

The order set out by the General Assembly in the Uniform Marriage and Divorce Act makes clear that the task of classifying, valuing, and dividing property under KRS 403.190 must be concluded before maintenance under KRS 403.200 can be considered. *Petersen v. Petersen*, 479 S.W.2d 892 (Ky. 1972) .

Failure to follow the statute's intended order, the segregating of non-marital property before proceeding to divide marital property, will result in reversal and remand. Erroneously classifying non-marital property as marital, as well as a failure to accurately divide marital property, may also result in reversal. Moreover, the maintenance award may be vacated on appeal if the property has been improperly classified. *Newman v. Newman*, 597 S.W.2d 137 (Ky. 1980).

V. [7.14] The Trial Court's Discretion

The latitude afforded trial courts by the legislature pursuant to KRS 403.190(1) differs considerably depending on whether the property in issue is marital or non-marital. Simply put, the assignment of non-marital property is mandatory, while the division of marital property is discretionary, albeit within certain limits.[9]

The practitioner should be careful to distinguish between the court's discretion in the division of marital property and the absence of such discretion in the classification of marital property.[10] KRS 403.190(1) is explicit when stating that: "[T]he court shall assign each spouse's property to him." There is no qualifying

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[9] *See Jones v. Jones*, 245 S.W.3d 815, 817-18 (Ky. Ct. App. 2008) ("While the court possesses discretion in the division of marital property, the classification of property as nonmarital and assignment of such nonmarital property to its owner is not open to the court's discretion."). *See also*, Graham & Keller, *supra* note 8, at § 15.4.

[10] *See, e.g., Cox v. Cox*, 2007 WL 2743443 *8 (Ky. Ct. App. 2007) (While the court may consider the economic status in dividing the parties' property, it cannot consider economic status in determining the status of property as either marital or nonmarital).

language instructing courts to consider fairness or any other factors. However, in *Rice v. Rice*, the Kentucky Supreme Court stated that "[q]uestions of whether property or debt is marital or nonmarital are left to the sound discretion of the trial court" and that on appeal, such determinations are reviewed for the abuse of the court's discretion, and will be overturned only where the decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal practitioners." 336 S.W.3d 66, 68 (Ky. 2011) (citation omitted). The *Rice* case involved only questions regarding the division of debts, and the court did not discuss its departure from the established law. While this restatement of the law is controlling precedent, it is unlikely that the court intended a radical departure from the prior precedent disallowing a court's discretion in characterizing property as marital or non-marital.

Under the rule of *Jones*, *supra* note 9, cases where most of the parties' property is non-marital may conclude with harsh results to one spouse. In such a case, if it were unclear whether an asset should be classified as marital or non-marital, a practitioner might urge the court to choose between competing rules, or to adopt a rule of discretion as proposed by *Rice*. Alternatively, he or she might urge the court to follow precedent from other jurisdictions that produced a desirable result. However, if Kentucky law on a point is clear, Kentucky courts have no discretion to alter the rule to avoid awarding one spouse most of the property. The factors set out in KRS 403.190(1)(a)-(d) apply only to the allocation of property after it has been classified; they may not be applied to the classification itself.

VI. [7.15] Only Property May Be Divided

The next signpost in the statute's intended road map requires the court to divide the marital property "in just proportions considering all relevant factors." This apparently simple directive masks a number of complex problems. Before classifying an asset as either marital or non-marital, the practitioner must consider the more basic question of whether that particular asset is, in fact, "property." If the asset is not "property," it is not within the court's jurisdiction and may not be assigned by the court.

An asset obviously cannot be "marital property" unless it is "property." While courts in other states have considered such questions as whether the family dog were "property," *Kennedy v. Byas*, 867 So. 2d 1195 (Fla. Dist. Ct. App. 2004) (dog is property); *Juelfs v. Gough*, 41 P.3d 593, 597 (Alaska 2002) (motion to change custody of dog), Kentucky courts have contemplated whether the term applied to various other types of property; *see* Section [7.42] *infra*.[11]

[11] For a more extensive discussion of cases on this point which have arisen outside Kentucky, see Graham & Keller, *supra* note 8, at § 15.2, 855 n.1.

Since KRS 403.190 does not define "property," the term has been left to judicial construction. Courts have generally defined the term as broadly as possible. "The term 'property' is a general term that is used to designate a right of ownership and it includes every subject of whatever nature upon which the right of ownership can legally attach." *Ball v. Ball*, 430 S.E.2d 533, 534 (S.C. Ct. App. 1993).

Courts have focused on whether an asset was transferable, Brett R. Turner, *infra*, § 5.8 at nn.4-9; whether its value had already vested, *Wilbanks v. Wilbanks*, 624 So. 2d 605, 609 (Ala. Civ. App. 1993); and whether the asset was capable of valuation. *Faulkner v. Faulkner*, 824 A.2d 283, 286-87 (N.J. Super. Ct. App. Div. 2003). However, they have not always provided clear guidance. *Cf. Inman v. Inman*, 578 S.W.2d 266 (Ky. Ct. App. 1979) (suggesting that an academic degree is "property"), *with Inman v. Inman*, 648 S.W.2d 847 (Ky. 1982) (suggesting that an academic degree is not "property").[12]

The speculative nature of an asset may affect the manner of its distribution or its value but does not necessarily determine its classification as property. Assets whose ultimate receipt is at risk may be handled with deferred rather than immediate distribution.[13] Property with functional worth to only one spouse is still classified as property but perhaps at a reduced value.[14] The scope of items held to be property is broad; therefore, being imaginative or "thinking outside the box" to expand the definition of property to include a particular item in one's case may be of great financial benefit to the client.

VII. [7.16] Factors Affecting Equitable Distribution – A More Detailed Analysis

KRS 403.190(1) sets forth four factors which the trial court must consider in dividing the marital property "in just proportions": (a) the contribution of each spouse to the acquisition of marital property, including the contribution of a spouse as homemaker; (b) the duration of the marriage; (c) the amount of non-marital property which has been assigned to each spouse; and (d) the economic circumstances of each spouse at the time of the division, including the need for a spouse with the custody of minor children to retain the marital residence. The operative term is "just," not "equal." *See Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001); *Brosick v. Brosick*, 974 S.W.2d 498 (Ky. Ct. App. 1998); *In re Marriage of Donovan*, 838 N.E.2d 310, 315 (Ill. App. Ct. 2005) ("the distribution need not be equal so long as it is equitable").

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12 An extensive discussion of the *Inman* cases may be found in Section [7.57].

13 *See, e.g. McMullin v. McMullin*, 338 S.W.3d 315, 321 (Ky. 2011) (while law mandated that pension be valued as of date of decree, division on that date was not mandated).

14 Examples would be an advanced degree or professional license, *see* Section [7.57], or pension benefits which have not yet vested, see Section [7.71]. *See also,* 1 Ann Oldfather, *et al.*, Valuation and Distribution of Marital Property, § 18.003 [2][b]-[f] (2012), hereafter Oldfather.

The seminal case on this point is *Herron v. Herron*, 573 S.W.2d 342 (Ky. 1978). The trial court followed the pre-*Colley* rule awarding a wife one-third and the husband two-thirds of the marital estate. The Court of Appeals overturned the lower court indicating that "there should be a presumption of equal distribution... in the absence of evidence to the contrary." *Id*. at 343.

> [T]he courts have a legislative mandate to divide the marital property in accordance with the standards set out in the statute. It is significant to us that the statutes do not mention "presumptions"; and in the absence of this, we are of the opinion the legislative mandate is binding upon us and that presumptions in the division of marital property should not be indulged in at all.
>
> It is the duty of the trial court to apply statutory standards to the facts of the case and to make a just division of the marital property.

Id. at 344.

The distribution process, therefore, lies within the trial court's sound discretion, *Rush v. Rush ex rel. Mayne*, 914 So. 2d 322, 325 (Miss. Ct. App. 2005), and an equitable distribution need not necessarily be an equal one. *In re Marriage of McFarland*, 176 S.W.3d 650, 659-60 (Tex. App. 2005); *Croft v. Croft*, 240 S.W.3d 651, 655 (Ky. Ct. App. 2007).

A. [7.17] The Role of Marital Misconduct

The statute also directed that, "[The trial court] shall divide the marital property without regard to marital misconduct." This is similar, but not necessarily identical, to the prior rule; *see* Petrilli, *supra* note 1, § 24.6, at n.53 (citing *Taylor v. Taylor,* 331 S.W.2d 895 (Ky. 1960)) ("fault of either spouse is irrelevant in determining restoration"); *but see Braden v. Braden*, 280 Ky. 563, 133 S.W.2d 902 (Ky. 1939); *Woford v. Woford*, 267 Ky. 787, 103 S.W.2d 296 (Ky. 1937).[15]

Sexual misconduct, alone, without adverse economic consequences, cannot be considered. *See Dowell v. Dowell,* 490 S.W.2d 478 (Ky. 1973); *Brosick v. Brosick*, 974 S.W.2d 498, 500 (Ky. Ct. App. 1998). Therefore, a practitioner wishing to present evidence of the other spouse's misconduct as a factor in the division of property, should show that the misconduct had economic consequences. *Boucher v. Boucher*, 553 A.2d 313, 315-16 (N.H. 1988). In other words, the misconduct may be characterized as a "negative contribution" that detracted from the value of the marital estate. Monroe L. Inker, Joseph L. Walsh, and Paul P. Perocchi, *Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts*, 10 Suffolk U.L. Rev. 1, 9-10 (1975). An earlier Court of Appeals case held that the husband's spending on "[a]ny good looking broad that comes by" gave the

[15] Fault could, in unusual circumstances, be considered in awarding alimony. *Heustis v. Heustis*, 346 S.W.2d 778, 779 (Ky. 1961).

trial court grounds to include a portion in the parties' net worth as marital property. *Barringer v. Barringer*, 514 S.W.2d 114 (Ky. 1974).[16]

Kentucky courts recognize that one spouse may be compensated for the other spouse's economic misconduct, or dissipation of marital assets. In *Heskett v. Heskett*, 245 S.W.3d 222, 227 (Ky. Ct. App. 2008), the Court of Appeals determined that "[d]issipation occurs when 'marital property is expended (1) during a period when there is a separation or dissolution impending; and (2) where there is a clear showing of intent to deprive one's spouse of her proportionate share of the martial property." (quoting *Brosick v. Brosick*, *supra*). In that case, the court held that the husband's "complete failure to account or validly justify the disappearance of substantially all of his division proceeds constitutes a dissipation of marital assets." *Id.* at 828. Other recent Kentucky cases involving dissipation include *Gripshover v. Gripshover*, 246 S.W.3d 460, 466 (Ky. 2008) (non-fraudulent transfer of land to family trust did not constitute dissipation where transfer was not "made in contemplation of divorce with the intent to impair the other spouse's interest") and *Kleet v. Kleet*, 264 S.W.3d 610, 617 (Ky. Ct. App. 2008) (gifts made to family members with knowledge that "a divorce was possible or...likely" may constitute dissipation).

B. [7.18] The Role of a Spouse's Monetary Contribution

In defining "just proportions," the legislature directed the trial court to consider: (a) contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker; (b) value of the property set aside to each spouse; (c) duration of the marriage; and (d) economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

The contribution included both parties' income from marital property and from non-marital property until 1996. It also included the contribution of a homemaker spouse.[17]

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[16] In *Barringer*, the Court of Appeals found that, after the wife filed for divorce, the husband converted $25,000.00 in stocks to cash, "and like the 'prodigal son,' dissipated the funds with reckless extravagance." Among other expenditures, he took a Caribbean cruise and lost $8,200.00 gambling in Las Vegas. At the hearing, he testified that he had spent the money on, "Any good looking broad that comes by." 514 S.W.2d at 115.

The trial court attempted to compensate the wife for this dissipation of marital assets by awarding her all of the household furnishings and including the parties' net worth $10,500.00 of cash previously spent. The appellate court upheld this property award. *Id.*

[17] Apparently, a homemaker spouse is given no credit for a homemaker contribution where the parties lived off the wife's non-marital business and neither worked outside the home. *Dotson v. Dotson*, 864 S.W.2d 900 (Ky. 1993).

C. [7.19] Contributions of Homemaker Spouse

Kentucky's law prior to adoption of the 1972 Act was reflected in the 1947 case, *Fifer v. Fifer*, 305 Ky. 701, 205 S.W.2d 479 (Ky. 1947):

> This Court has held repeatedly that the duties performed by a housewife in support of her home and in raising a family do not constitute such valuable consideration as will permit her to resist the mandatory provisions of the statute requiring the restoration to her husband of any property she may have acquired during the existence of, or by consideration of, the marital relationship.

305 Ky. at 703.

Later cases are even more egregious. In a 1953 case, *Johnson v. Johnson*, 255 S.W.2d 610 (Ky. 1953), the wife performed the household duties and "had worked in the fields, thus assisting her husband to save up enough money to pay for the land." *Id.* at 611. In *Heustis v. Heustis*, 346 S.W.2d 778 (Ky. 1961), in addition to household duties, the wife had assisted in her husband's "around-the-clock tire business" and had operated her own business, a beauty salon. *Id.* at 779.

Nevertheless, in each case, the court found that the respective wives had acquired no interest in the marital property. *Johnson* at 612; *Heustis* at 780. In the latter case, the court opined that this was "a travesty made tolerable only by the judicial power to correct it in the form of alimony." *Heustis* at 780; *see* Petrilli, *supra* note 1, § 24.6, at nn.74-75.

The Uniform Act, by contrast, views marriage as a partnership, which accumulates property. When that partnership dissolves, each partner is entitled to a share of the property. Nanette K. Laughrey, *Uniform Marital Property Act: A Renewed Commitment to the American Family*, 65 Neb. L. Rev. 120, 131 (1986); Joan M. Krauskopf, *Classifying Marital and Separate Property – Combinations and Increase in Value of Separate Property*, 89 W. Va. L. Rev. 997, 997-98 (1987).

As the Oregon Supreme Court has observed: "A homemaker spouse contributes to the acquisition of marital assets, because the performance of domestic tasks by one spouse frees the other spouse to devote energy and concentration to other tasks that may generate marital assets." *In re Marriage of Massee*, 970 P.2d 1203, 1210 (Or. 1999); *see also, Harrington v. Harrington*, 752 N.Y.S.2d 430, 432 (NY. App. Div. 2002) (during 32-year marriage, wife "made significant non-economic contributions as a primary caretaker and solo homemaker").

Though the homemaker spouse's contribution must be recognized, the Kentucky Appellate Courts have offered the practitioner little guidance, *Lovett v. Lovett*, 688 S.W.2d 329 (Ky. 1985);[18] *Stallings v. Stallings*, 606 S.W.2d 163

[18] A number of unpublished cases are cited herein. They may not "be cited or used as binding precedent in any other case in any court of [Kentucky]". CR 76.28(4)(c). "However, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by

(Ky. 1980);[19] *Farmer v. Farmer,* 506 S.W.2d 109 (Ky. 1974); and *Fox v. Fox*, No. 2002-CA-000421-MR, 2003 WL 2004207 (Ky. Ct. App. 2003).[20] The *Stallings* Court commented that such a contribution "does not necessarily cease when the other spouse leaves, especially when minor children remain with the homemaker-spouse." *Stallings*, 606 S.W.2d at 164 (by providing care for the parties' children, the homemaker-spouse "enhance[s]" the other spouse's ability to earn a living); *see also, Wilder v. Wilder*, 294 S.W.3d 449 (Ky. 2009) (Upholding the trial court's decision to equally divide a "stimulus check", issued after dissolution but "earned" during the marriage, between the income-earning spouse and the homemaker-spouse.).

Courts of other states have also found it difficult to enunciate a clear rule for valuing the contribution of the homemaker spouse. *Wilson v. Wilson*, 241 S.E.2d 566, 568-69 (S.C. 1978); *Shapiro v. Shapiro*, 176 P.2d 363 (Colo. 1947); *Arrington v. Arrington*, 150 So. 2d 473 (Fla. Dist. Ct. App. 1963); *Musgrave v. Musgrave*, 347 N.E.2d 831 (Ill. App. Ct. 1976). For a more extensive discussion of this point, see Lawrence J. Golden, Equitable Distribution of Property, § 8.17 (1st ed. 1983).

Among the criteria which have been utilized to determine the value of the homemaker spouse's contribution are the replacement costs,[21] equality of contributions,[22] the quantity and quality of homemaker services,[23] extraordinary contributions by the homemaker spouse,[24] and lost opportunities.[25]

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the court if there is no published opinion that would adequately address the issue before the court." *Id*. Practitioners in other jurisdictions should consult their local rules. These cases are included for clarification of points which are not squarely addressed by any reported Kentucky case, or to illustrate a different factual situation.

19 Decisions from other states which have discussed the matter provide only limited guidance. *Williams v. Williams*, 686 So. 2d 805 (Fla. Dist. Ct. App. 1997); *Luedke v. Luedke*, 476 N.E.2d 853 (Ind. Ct. App. 1985), *overruled* 487 N.E.2d 113 (Ind. 1985); *Rosenburg v. Rosenburg*, 497 A.2d 485 (Md. 1985); *Fonzi v. Fonzi*, 633 A.2d 634 (Pa. Super. Ct. 1993); *Hutnick v. Hutnick,* 535 A.2d 151 (Pa. Super. Ct. 1987). *Smith v. Smith*, 486 S.E.2d 516 (S.C. Ct. App. 1997); *Billion v. Billion*, 553 N.W.2d 226 (S.D. 1996); *see* 1 Oldfather, *supra* note 14, § 19.07[6].

20 Moreover, in *Robinson v. Robinson*, 569 S.W.2d 178 (Ky. Ct. App. 1978), the court stated: "The increase in equity after the marriage attributable to the joint efforts of the parties, including those efforts of the wife as housewife and mother, shall be treated as marital property." *Id.* at 181. This language appears to be a directive that courts compensate the homemaker spouse under the property division statute, KRS 403.190, rather than under the maintenance statute, KRS 403.206.

21 Roy M. Warner, *Expert Testimony and the Value of a Wife and Mother*, 16 Trial Law Q. 2:19, 24-26 (1984); Nancy R. Hauserman and Carol Fethke, *Valuation of a Homemaker's Services*, 1978 Trial Law. Guide 249, 251-54. The former Kentucky Court of Appeals appears to have sanctioned this method of calculating the value of a housewife's services in *K. & I.T.R. Co. v. Becker's Adm'r*, 185 Ky. 169, 171, 214 S.W. 900 (Ky. 1919), a personal injury case. This method may, however, lead to unreasonably large awards; *see Raley v. Raley*, 437 S.E.2d 770, 772 (W. Va. 1993) (appellate court rejected testimony that replacement cost of wife's services during 30-year marriage was $216,572.00); *cf. Brooks v. Baton Rouge/Parish of East Baton Rouge*, 558 So. 2d 1177 (La. Ct. App. 1990) (homemaker's services valued at $2,039,243.00 in personal injury case).

22 *Rolla v. Rolla*, 712 A.2d 440, 444-45 (Conn. App. Ct. 1998).

23 *See generally* Barth H. Goldberg, Valuation of Divorce Assets § 15.529 (rev. ed. 2005).

24 *Lester v. Lester*, 547 So. 2d 1241 (Fla. Dist. Ct. App. 1989); *Marcello v. Marcello*, 560 N.Y.S.2d 841, 842-43 (N.Y. App. Div. 1990) (wife had cared for husband's children by a prior marriage).

25 *In re Marriage of Williams*, 714 P.2d 548, 552 (Mont. 1986) (housewife compensated for "career value losses").

A more unusual situation is presented by those cases where one spouse is both the homemaker and the primary breadwinner, *Williams v. Massa*, 728 N.E.2d 932, 934 n.12 (Mass. 2000) ("a party who works outside the home, as well as performs the bulk of 'traditional' homemaking and child care responsibilities, may be entitled to a greater portion of the marital assets"), and in cases where the husband is the homemaker spouse. *Smith v. Smith*, 778 N.Y.S.2d 188 (N.Y. App. Div. 2004) (husband was primary caretaker for three young children while wife worked as attorney).

D. [7.20] Length of Marriage

The third factor set forth in KRS 403.190(1) is "duration of the marriage." The statute gives no further guidance as to how to quantify "duration." Duration of marriage also factors into an award of maintenance. KRS 403.200(2)(d).

Generally, many practitioners regard marriages lasting more than fifteen years as lengthy; *see* GRAHAM & KELLER, *supra* note 8, at § 15.95, 1126 n.1 for an extended listing; *see also, Russell v. Russell*, 878 S.W.2d 24 (Ky. Ct. App. 1994) (29-year marriage); *Clark v. Clark*, 782 S.W.2d 56 (Ky. Ct. App. 1990) (nearly 20-year marriage); *Leveridge v. Leveridge*, 997 S.W.2d 1 (Ky. 1999) (18-year marriage). These latter two cases deal with maintenance, where the duration of marriage is more frequently litigated. Conversely, a 19-month marriage was held insufficient to give the wife an interest in her injured husband's Jones Act award. *Reeves v. Reeves*, 753 S.W.2d 301 (Ky. Ct. App. 1988).[26]

Length of marriage also affects property division indirectly in that usually a lengthy marriage will increase the size of the marital estate (or marital debt), as well as making tracing of non-marital assets more difficult. Additionally, increases in value of non-marital assets through joint efforts and expenditures will likely increase during a longer marriage.

E. [7.21] Economic Circumstances and Other Factors

The fourth factor listed in KRS 403.190(1) is the "economic circumstances of each spouse." The court, when dividing property, must first clarify whether the assets are marital or non-marital." It then must return to each party his or her non-marital assets. Once this is done, the court must divide the marital estate in equitable proportions. *Hunter v. Hunter*, 127 S.W.3d 656 (Ky. Ct. App. 2004). It appears that, should one party be restored substantially greater non-marital assets, the court may consider this under "economic circumstances," and award a larger portion of the marital estate to the other spouse. *Angel v. Angel*, 562 S.W.2d 661 (Ky. Ct. App.

[26] The Connecticut Court of Appeals regarded a six-year marriage as "relatively short." *Levy v. Levy*, 497 A.2d 430 (Conn. Ct. App. 1985). However, the Oregon Court of Appeals regarded an eight-year marriage as "not a short marriage," even though the parties had separated two and a half years before entry of the decree, *i.e.*, after five and one-half years of marriage. *In re Marriage of Olinger*, 707 P.2d 64 (Or. Ct. App. 1985).

1978). Courts have held that non-marital assets, such as gifts from family members and inheritance, may be considered in determining a party's economic condition for purposes of maintenance. *Qualls v. Qualls*, 384 S.W.2d 326 (Ky. 1964), *Hall v. Hall*, 380 S.W.2d 231 (Ky. 1964), *Roberts v. Roberts*, 744 S.W.2d 433 (Ky. Ct. App. 1988), *Russell v. Russell,* 878 S.W.2d 24 (Ky. Ct. App. 1994). However, a party's refusal to work cannot be considered in dividing the marital estate, although it may factor into any maintenance award. *Owens v. Owens*, 672 S.W.2d 67 (Ky. Ct. App. 1984).

Although more commonly litigated in a maintenance context, it would appear that a court should also consider the earning capacity of either party. *Wood v. Wood*, 720 S.W.2d 934 (Ky. Ct. App. 1986) (court should not only consider non-marital estate and its ability to produce income, but spouse's ability to support self). Courts may also divide property based upon the needs of the parties' children. *See Brooks v. Brooks*, 350 S.W.3d 823, 827 (Ky. Ct. App. 2011) (awarding a vehicle to the husband based on his need to transport the parties' children to school).

Trial courts also show a preference for allowing the spouse, with custody of the parties' children, to retain the marital residence. KRS 403.190(1)(d); *see, e.g., Spratling v. Spratling*, 720 S.W.2d 936 (Ky. Ct. App. 1986). However, the trial court is not required to do so. *See, e.g, Newton v. Newton*, 2004 WL 2260612 (Ky. Ct. App. 2004) (upholding the trial court's order that the marital residence be sold and reiterating that the trial court is given wide discretion in dividing marital assets.).

Graham & Keller note that the trial court is authorized to consider any other relevant factor, specifying illness of one of the parties, and allocation of indebtedness, and cites Kentucky and out-of-state cases on the subject. Graham & Keller, *supra* note 8, at § 15.98, 1130 nn.1-2.

VIII. [7.22] Marital Property Defined – KRS 403.190(2)

All property owned by either spouse must be classified as either "marital" or "non-marital." KRS 403.190(2). Generally, the placement of any particular asset into one of these categories depends upon the time and manner of its acquisition. The presumptive rule governing marital property is that all property acquired by either spouse after the date of the marriage and before the decree automatically becomes "marital property." KRS 403.190(2). However, this rule is subject to five statutory exceptions.

IX. [7.23] Statutory Exceptions to the General Rule That All Property Acquired During Marriage Is Marital – Loss of Non-Marital Status Through Activity – KRS 403.190(2)

The five statutory exceptions to the definition of "marital property" alter the treatment of property between spouses to such a degree that understanding these exceptions is just as important as comprehending the general rule.

The five statutory exceptions are set out in KRS 403.190(2)(a)-(e). Only the third statutory exception, subsection (c), relates to timing. The remaining statutory exceptions relate to the manner of an asset's acquisition. Therefore, eliciting information from the client and ultimately collecting proof regarding each particular asset in a divorce as to when and how it was obtained are among the practitioner's foremost obligations.

A. [7.24] Property Acquired After a Legal Separation

KRS 403.140(2) permits a court to grant a decree of legal separation rather than dissolving the marriage. KRS 403.190(2)(c) provides that any property acquired by either spouse after entry of a decree of legal separation, is not marital property.[27]

A related timing issue often arises when property is acquired after the parties have physically, but not legally, separated. Parties who are no longer cohabiting, especially couples who have lived separately for extended periods of time during the pendency of a divorce, tend to view themselves as no longer married. Consequently, they may not realize that a couple continues to acquire marital property under these circumstances.

Some states terminate the acquisition of marital property upon the filing of a divorce petition or upon physical separation. Kentucky law, however, follows a "bright line rule" that assets acquired "during the marriage" means property obtained after the marriage ceremony and before the decree of dissolution is entered.

Six years after enactment of KRS 403.190, the Kentucky Court of Appeals was confronted with a case in which the husband had purchased a residence after the parties' actual separation, but prior to entry of the final decree of dissolution. The court held that it was marital property. *Culver v. Culver*, 572 S.W.2d 617, 620 (Ky. Ct. App. 1978).

Two years later, in *Stallings v. Stallings*, 606 S.W.2d 163 (Ky. 1980), the Kentucky Supreme Court reaffirmed that such is the law. The court wrote: "The language of the legislature is so definitive it not only does not require, but rather prohibits, us from engrafting any exception based on mere 'actual separation.'" *Id.*

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[27] Kentucky law permits "bifurcation" by allowing a court to separate marriage dissolution and property disputes. Graham & Keller, *supra* note 8, at § 20.4, 96.

at 164. In *Neidlinger v. Neidlinger*, the court once again stated that such was the correct rule. 52 S.W.3d 513, 522 n.5 (Ky. 2001).[28]

While property, accumulated during a period of separation, but prior the entry a divorce decree, is marital property, the court is not required to distribute that property in the same manner that it distributed property acquired prior to the parties' separation. *Shively v. Shively*, 233 S.W.3d 738, 740 (Ky. Ct. App. 2007).[29] Nor is the court required to make an equal distribution of post-separation property. *Id*. The distribution must only be divided in "just proportions". *Id.*[30]

B. [7.25] Property Excluded by a Valid Agreement of the Parties

KRS 403.190(2)(d) is the most straightforward of the remaining four statutory exceptions to the general rule that all property obtained after the marriage and before the decree is marital.

KRS 403.190(2)(d) alters the definition of marital property by excepting "[p]roperty excluded by valid agreement of the parties." Property included in a properly executed antenuptial agreement must be allocated to the appropriate party. However, because it must still be valued, KRS 403.190(1)(b) mandates that, in dividing the marital property the court must consider the "value of the property set apart to each spouse." Antenuptial agreements entered in contemplation of divorce were contrary to public policy, and per se invalid, until the Kentucky Supreme Court decided *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990), and its companion case, *Edwardson v. Edwardson*, 798 S.W.2d 941 (Ky. 1990). Consequently, the practitioner should not rely on any cases decided prior to 1990.[31] For more information on antenuptial agreements, see **Chapter 3**.

C. [7.26] Property Exchanged for Non-Marital Property

Subsection (b), sometimes designated the "derivative" statute, excepts property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent. KRS 403.190(2)(b). This straightforward exception is easily understood by the practitioner; however, it is difficult, and at times impossible, to prove facts sufficient to bring

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[28] Of course, such a rule may occasionally produce seemingly inequitable results. In *Chapman v. Chapman*, 2003 WL 21241695 (Ky. Ct. App. 2003), the parties had been separated for ten years prior to the entry of a decree of dissolution. During this decade, the husband had acquired considerable personal property. The trial court sought to mitigate the harshness of the result, citing the "unusual situation." The Kentucky Court of Appeals, however, reversed and remanded, stating that these assets were deemed marital property.

[29] Upholding the trial court's decision to distribute the parties' post-separation income in unequal proportions.

[30] The *Shively* court considered that both parties were already entitled to a distribution of substantial assets, earned during the marriage, and that both parties continued to earn a "substantial income." *Id*. at 741.

[31] For a complete review of the prior law on this point, see Graham & Keller, § 13.04 (1st ed. 1988, and 1996-97 supplemental).

the case within the non-marital classification. When this occurs, it can obviously result in a gross miscarriage of justice. This subsection is the genesis for "tracing." Tracing, when required, is sufficiently important that it is accorded more extensive treatment below.

D. [7.27] Property Acquired During the Marriage by Gift, Bequest or Inheritance and Income Therefrom – Increase in Value of Property Acquired During Marriage – Exceptions

The remaining subsections present greater problems. Subsection (a) relates only to gifts and inheritances acquired during the marriage and excepts from the marital property classification "[p]roperty acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom[.]" KRS 403.190 (2)(a). This provision must be read in conjunction with the prefatory language of 403.190(2), which provides: "For the purpose of this chapter, 'marital property' means all property acquired by either spouse subsequent to the marriage except: " (thereafter enumerating the five exceptions discussed here).

The general effect of this section is that gifts and inheritances acquired before and after the marriage are non-marital property. The remaining language of subsection (a) further extends the exemption to income earned from gifts or inheritances. Subsection (e) exempts "[T]he *increase* in value of property acquired before the marriage..." KRS 403.190(2)(e) (emphasis added).

Both subsections then place a restriction on the non-marital asset: subsection (a) which applies to gifts and inheritances provides: "...unless there are s*ignificant activities of either spouse* which contributed to the increase in value of said property..." KRS 403.190(2)(a) (emphasis added). The restriction applies to increases in the value of property acquired before the marriage as delineated in subsection (e), which provides the exemption from marital property only "...to the extent that such increase did not result from the efforts of the parties during marriage."

The practitioner should note particularly that until 1996, Kentucky treated all income from non-marital property as marital property. *See* Graham & Keller, *supra* note 8, at § 15.7. The 1996 amendment to KRS 403.190(c) enacted an exception to that exception by making income derived from the "active" appreciation of gifted or inherited property marital. Divorce counsel should realize, however, that all other non-marital property continues to follow the general rule; income derived from non-marital property is marital property. This means that income from pre-marital property, income from property acquired in exchange for pre-marital property, and income from property subject to a valid antenuptial agreement remains a marital asset.

E. [7.28] Increase in the Value of the Non-marital Property

One of the most perplexing dilemmas faced by lawyers and courts is how to assign the increased value of non-marital property, especially if that property is encumbered.[32] KRS 403.190(2) governs the issue, and provides that a business formed prior to the marriage is a non-marital asset to the extent that its value was acquired before the marriage. However, subsection (e) of that rule provides that the increased value of the non-marital property due to the parties' efforts is marital property.

The practitioner must distinguish between the increased value of marital property, all of which is divisible, and income from non-marital property received during coverture, not all of which is marital property. *Brunson v. Brunson*, 569 S.W.2d 173, 178 (Ky. Ct. App. 1978), approving, Commissioners' notes to § 307 of the Uniform Marriage and Divorce Act ("UMDA"), (from which KRS 403.190 was derived).

Case law has distinguished between "active" and "passive" increases in the value of non-marital property. A "passive" increase in value is one that is not attributable to team effort or team funds. Appreciation in value resulting from general economic conditions, market forces, or the efforts of someone other than the spouse presents the simpler case. *Sexton v. Sexton*, 125 S.W.3d 258 (Ky. 2004); *Wade v. Wade*, 325 S.E.2d 260 (N.C. Ct. App. 1985); Oldham, *supra* note 6, § 10.02[3], at 10-21 n.46; Brett R. Turner, Equitable Distribution of Property § 5.22 (2d ed. 1994).

"Active" appreciation presents a more difficult problem; it represents a commingling of interests, as the property is non-marital, but the increase in equity after marriage is attributable to the joint efforts of the parties. *Price v. Price*, 496 N.Y.S.2d 455 (N.Y. App. Div. 1985); *see also*, Wenig, *Increase in Value of Separate Property*, 23 Fam. L.Q. 301 (Sum. 1989).

After the Kentucky Court of Appeals alluded to the matter in *Brunson v. Brunson*, 569 S.W.2d 173 (Ky. Ct. App. 1978), the Kentucky Supreme Court first addressed the matter substantively in *Sousley v. Sousley*, 614 S.W.2d 942 (Ky. 1981).[33] Both courts relied on the commentary from the UMDA. The UMDA would have treated the entire increase in the value of the husband's retail business – an increase of $90,000.00 on a $30,000.00 investment – as non-marital property.

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[32] *See* Graham & Keller, *supra* note 8, at § 15.85; Revell & Skaggs, Kentucky Divorce § 12.5, 146-47 (2012 ed.).

[33] The Kentucky General Assembly subsequently, in 1996, amended KRS 403.190(4) to exempt from the coverage of the *Sousley* rule "passive" appreciation in the value of gifted and inherited property and income derived from same. While Shepard's citations indicate that this legislative enactment "superseded" the holding of *Sousley*, this is only partially correct. The holding of *Sousley* obviously applies to all non-marital property, while the 1996 amendment covers only "passive" appreciation in the value of property received by gift and inheritance. "Active" appreciation in the value of gifted and inherited property and all non-marital property acquired from any other source is not affected by the 1996 amendment and remains subject to the rule enunciated in *Sousley*.

Under Kentucky's version of the UMDA, however, the appreciation in value of non-marital property only becomes marital if it is the result of the parties' efforts.

The Kentucky Supreme Court apparently would have preferred to give the wife a portion of the $90,000.00 appreciation, but was bound by the trial court's factual finding that the entire amount had resulted from inflation; *i.e.*, that it was "passive" appreciation and therefore non-marital. The court reached the desired result by holding that the husband was an entrepreneur who bought and sold businesses for a living, hence the $90,000.00 was "active" appreciation and marital property subject to division by the court.[34]

The court further refined the rule in *Walters v. Walter*s, 782 S.W.2d 607 (Ky. 1989). In that case, the husband was a coal mine operator and owned a pre-marital corporation. The husband's corporation had received proceeds of a judgment based on a lease assignment of royalties. The cause of action had accrued prior to the marriage, and the proceeds would therefore appear to have been non-marital property. *Id.* at 608-09 (Liebson, J., dissenting).

The Supreme Court, nevertheless, awarded the wife one-third of the $129,298.00 that the husband had received from the judgment, on the theory that "the husband managed the business in an entrepreneurial fashion." *Id.* at 608. While the court did not cite *Sousley*, it obviously had the *Sousley* rule in mind when it noted in the opinion that the wife was suffering from cancer at the time the divorce was filed. It seems at least arguable that this circumstance may have influenced the court's decision.[35]

Two issues raised by *Sousley* remain unresolved: (1) Kentucky courts have provided no guidance for determining when a spouse is utilizing his or her non-marital assets in such an "entrepreneurial" manner as to convert a non-marital business into a marital asset; (2) there are, clearly, occasions when extraneous circumstances, such as market forces, cause a non-marital business to increase in value. In such cases, even though one spouse may have been actively engaged in the business operations, his or her activity has not produced the appreciation in value.

Some courts have responded to this incongruity by differentiating between "active" and "passive" assets. GRAHAM & KELLER, *supra* note 8, at § 15.85 1098 n.18. The practitioner wishing to rely on such a distinction should obviously cite these cases as persuasive precedent. Moreover, since Kentucky law affords trial courts considerable discretion in characterizing the appreciation in the value of a non-marital business as either marital or non-marital, the practitioner should also advance whatever equitable arguments are available to support his or her position.

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[34] Having thus clarified the rule, the court then held that Ms. Sousley had failed to provide the required proof, and affirmed the Court of Appeals holding, awarding the entire $90,000.00 to the husband.

[35] GRAHAM & KELLER question whether a court ought to be able to reach a desired result, when the statute dictates a contrary holding, through the simple expedient of labeling the owner spouse an "entrepreneur." GRAHAM & KELLER, *supra* note 8, at § 15.85, 1095 n.8.

X. [7.29] Complexities of Classification – Joint Effort and Significant Activities – KRS 403.190(2)(a) and (e)

A related issue is the question of whether the increased value of a non-marital asset has resulted from the joint effort of both parties. Because *Colley* was decided before the enactment of KRS 403.190, the *Colley* court used a joint-efforts test to create its judicially mandated system of property division.

In *Culver*, the Court of Appeals hinted, without holding, that such a test might govern the distribution of assets acquired after physical separation but prior to the entry of a decree of dissolution. Two years later, in *Stallings*, the Kentucky Supreme Court rejected this suggestion as effectively nullifying the legislative intent.

Consequently, while KRS 403.190(2)(e) requires allocation of the increased value of non-marital property which has resulted from the efforts of the parties, the converse is not true. If the property is initially marital, it cannot acquire a non-marital character, in whole or part, by applying the increase-in-value exception. In other words, KRS 403.190(2)(e) only applies to property that was originally non-marital. Further discussion of this point may be found in PETRILLI, *supra* note 5, § 24.9; GRAHAM & KELLER, *supra* note 8, at § 15.9; and REVELL & SKAGGS, *supra* note 32, § 12.5, 139 nn.64-66.

It is not clear whether characterizing the increase as "marital" must depend on the joint efforts of both parties. In their prior work, GRAHAM & KELLER noted this anomaly, and argued that the efforts of either party should make the increase "marital." GRAHAM & KELLER, KY. PRAC. DOMESTIC RELATIONS, § 17.08, at 194 (1st ed. 1988).

OLDFATHER, *infra*, reads KRS 403.390(2)(e) as requiring a joint effort, and notes that Ohio has adopted a contrary rule. 1 OLDFATHER, *supra* note 14, § 18.06, at 18-63 nn.4, 9. OLDHAM, by contrast, suggests that *Daniels v. Daniels*, 726 S.W.2d 705 (Ky. Ct. App. 1986) (overruled on other grounds by *Underwood v. Underwood*, 836 S.W.2d 439, 445 (Ky. Ct. App. 1992)), supports a reading requiring joint efforts. OLDHAM, *supra* note 6, § 6.04 [2], at 6-23 n.12. The issue is ripe for appellate review in the appropriate case.[36]

XI. [7.30] Tracing Specific Assets

The preparation and presentation of a client's non-marital interest to a trier of fact may assume a rather nightmarish quality when the non-marital asset has changed forms. When a party no longer retains a non-marital asset in its original form, the party claiming that asset as his separate property is required to

[36] OLDHAM is evidently relying on the language of headnote 2 of the *Daniels* case.

trace the value received from the non-marital asset into a currently existing asset. The process of providing proof to the court detailing the transfer of a non-marital asset into its current form is known as "tracing," and the thumbnail description of the requirement is called the "Specific Asset Rule."

The *Sexton* Court most addressed this process in detail and defined "tracing" as "[t]he process of tracking property's ownership or characteristics from the time of its origin to the present," *Sexton v. Sexton,* 125 S.W.3d 258, 266 (Ky. 2004) (citing Black's Law Dictionary, 1499 (7th ed. 1999)).

The Kentucky Supreme Court further explained that:

> Currently, all assets belonging to married individuals at the time of dissolution are presumed to be marital property. To establish a separate interest in property, a spouse must show, through clear and convincing evidence, his or her non-marital interest in the property. The process of demonstrating a separate interest in what would otherwise be considered marital property is known as "tracing."

Sexton, 125 S.W.3d at 266, n.23 (2004) (citing Russell W. Goff, *Title Doesn't Matter, Does It? An Analysis of Kentucky's Property Disposition Law and Its Treatment of Transmutation*, 89 Ky. L.J. 255, 256 (2000-2001)).

Tracing is required because KRS 403.190(3) presumes that all assets acquired during coverture are marital. The presumption may be rebutted only by the heightened burden of clear and convincing evidence, making the task of tracing, as a practical matter, far more difficult.[37]

Several points must be noted before tracing commences. First, the tracing requirement applies to both realty and personalty. *Brunson v. Brunson*, 569 S.W.2d 173 (Ky. Ct. App. 1978).

Second, tracing is required for all non-marital assets no matter how received. To prove the value of, and retain, non-marital property for one's client post-divorce, tracing must be performed on all non-marital property, whether owned prior to the marriage or received by gift or inheritance during the marriage.

Third, the non-marital property or the property "derived" from the sale or exchange of the original non-marital property must exist at the time of dissolution. The requirement that the non-marital asset must still remain in some fashion at the time of divorce may be lost on litigants. A client who sold his inherited family farm but then spent the net proceeds on feeding his family may, in vain, ask counsel to recoup its sale price during property division. If the asset claimed to be non-marital is no longer owned, the claimant must trace that asset into a specific asset that is presently owned.

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[37] The difficulties one may encounter are illustrated by the case, *Brewick v. Brewick,* 121 S.W.3d 524 (Ky. Ct. App. 2003).

Most problematic for the practitioner, however, is that the tracing requirement itself is inimical to marriage. As Justice Vance aptly observed:

> It does not bode well for the institution of marriage if each partner must keep in the back of his mind the possible advantage to be obtained by keeping up with and being able to trace every penny brought into the marriage.

Turley v. Turley, 562 S.W.2d 665, 669 (Ky. Ct. App. 1978) (Vance, J., concurring).

Rare is the client who retains the probate file, copies of checks, deposit slips and the actual bank statement from the month in which an inheritance is received. The likelihood that a spouse in a long-term, happy marriage will retain each document necessary to prove continuous, separate ownership of a non-marital asset is virtually nil.

As an aside, parties marrying for the first time later in life, or those entering into a second or subsequent marriage, may have the foresight to meet with a family law attorney prior to the marriage. These consultations usually occur in the context of seeking an antenuptial agreement or reviewing one prepared by the other intended spouse's counsel. If no antenuptial agreement is ultimately executed, the practitioner should stress that many of the protections intended by an antenuptial agreement may be accomplished if that client simply retains each and every document regarding his or her holdings prior to marriage, or receipt of one's family money after marriage, in a secure location (ideally, a safety deposit box in the spouse's sole name).

A. [7.31] Types of Tracing

The number of permissible methods of tracing may be limited only by the imagination of counsel and the credibility of one's client; there is no statutory treatment of tracing. Guidance in this area comes entirely from judicial decisions. The case law detailing permissible methods of tracing non-marital assets, however, is extensive, extremely fact-specific, mathematically challenging, and still evolving.

The most common tracing method shows that an inheritance or gift was invested in another asset. Transactions in which the gift or inheritance is simply transferred into the party's individual name are the most straightforward. A husband or wife who inherits stock and has the original stock certificates transferred into his or her sole name is afforded the greatest protection. A certificate of deposit received by gift or inheritance that continues to roll over when due is similarly straightforward. A brokerage account held in the name of a husband or wife and his or her parents with rights of survivorship, also causes little difficulty. In this latter case, the husband or wife simply retains the entire brokerage account at divorce, unless evidence shows that marital funds have been added to the account.

Rarely are non-marital transactions this straightforward. There may have been multiple exchanges or both parties may have contributed their own

inheritances or gifts toward the purchase of the same asset.[38] In fact, instances in which spouses have both sold their own homes to purchase a new home jointly are common, especially in second marriages.

Proper tracing requires a party to establish both the chronology of the transactions and the source of the funds. Receipt of the funds may be shown by a copy of the check received, the deposit slip placing such funds into the client's account, the particular bank statement showing receipt of the funds, and additional bank statements proving that the funds were retained.

Tracing a down payment from non-marital funds into realty requires a copy of the check prior to the closing if it is earnest money, plus the check at closing representing all or a portion of the down payment. Retention of all closing documentation is essential. Contacting the closing attorney and the realtor, to obtain a copy of the complete closing file and a subpoena duces tecum to your client's bank, if the transaction is less than seven years old, may produce necessary documentation that the client is not likely to have retained.

If the mortgage on realty continues to be paid, in part or in full, from non-marital funds, the 1098 tax forms issued by the mortgage company at the end of each year in which the realty is retained, are required to identify the interest and to differentiate it from the reduction in principal resulting from the non-marital contribution. A party is entitled to recoup only that portion of funds which were expended for principal reduction and may not recoup the portion expended for interest. Therefore, payment of a mortgage from non-marital funds during the initial years of the mortgage might simply be lost.

Furthermore, all refinancing documentation must be gathered. Factors to consider are whether additional money was added to pay down the mortgage or whether cash was removed from the realty's equity at the time of refinancing.

Clients too often fail to grasp the importance of collecting their non-marital tracing documentation. Once clients understand that virtually everything that they have acquired since their marriage ceremony comprises the marital "pie" which the court apportions (ordinarily in half) and that other items owned before the marriage or acquired by gift or inheritance, are not part of that "pie" (meaning that they are not divided), the importance of the task of proving their non-marital interest may be understood.

Propounding requests for admissions pursuant to CR 36 will determine whether the opposing party spouse will acknowledge a claiming spouse's non-marital interest in an asset. A client's assurance that his or her estranged spouse would never challenge his or her non-marital interest in a particular asset is no protection for the practitioner. In the event that the non-contributing spouse formally denies the opposite spouse's non-marital claim, interrogatories and requests for production of documents pursuant to CR 33 and CR 34 are warranted to ascertain

[38] Such was the case in *Angel v. Angel*, 562 S.W.2d 661 (Ky. Ct. App. 1978).

the recalcitrant spouse's position. For example, counsel should draft discovery requiring the non-claimant spouse to explain, and prove through documentary evidence, how particular funds were obtained if they were not inherited from the client's parents.

Clients are often unable to obtain their tracing documents, as they may span many years. The vast changes in the banking industry, such as the purchase of a litigant's community bank by a national conglomerate and the resulting transfer of documents to a central, out-of-state archive, make it much more difficult to secure compliance with a subpoena duces tecum seeking this information. Furthermore, the fact that banks no longer maintain banking records after seven years greatly compounds the problem.

B. [7.32] Transmutation

Sexton is also a landmark case with respect to its ruling on transmutation. "Transmutation occurs when separate property is treated in such a way as to give evidence of an intention that it become marital property." *Sexton v. Sexton,* 125 S.W. 3d 258, 270 (Ky. 2004) (citing H. Clark, The Law of Domestic Relations in the United States, § 16.2 at 185 (1987)). It is fair to say that the Court of Appeals has flirted with, but not adopted, the concept of transmutation. Kentucky's statutory law does not mention transmutation, and Kentucky courts, until *Sexton*, had neither adopted nor rejected the doctrine.

The Kentucky Court of Appeals has twice made property awards that appeared to be based upon transmutation through family use, without specifically mentioning the term. *Calloway v. Calloway*, 832 S.W.2d 890 (Ky. Ct. App. 1992); *Bischoff v. Bischoff*, 987 S.W.2d 798 (Ky. Ct. App. 1998). More recently, however, in *White v. White*, 2001-CA-002533-MR, 2003 WL 1786639 (Ky. Ct. App. 2003), the court declined to find transmutation through family use, while again avoiding use of the specific term.

Sexton puts the issue to rest by specifically declining to apply it. Justice Keller framed the issue before the court:

> Did Appellee's non-marital interest in the apartment building transmute into marital property when the partnership interest was placed in the parties' joint names?

Sexton, 125 S.W.3d at 261, n.6. The *Sexton* court stated that the doctrine of transmutation was inimical to Kentucky's source-of-funds rule. *See* Graham & Keller, *supra* note 8, § 15.14, at 888.

The *Sexton* court concluded that (1) title is not controlling in determining a property's character, *id.* at 264, and (2) the Appellee and his parents did not intend Appellant to receive any interest in the partnership as a result of placing the partnership interest in the parties' joint names. Thus, the Appellee/husband's non-marital interest in the apartment building did not become marital property

"simply because" it was used to acquire the partnership interest in the parties' joint names. *Id.* at 271. The court, therefore, affirmed the Court of Appeals's 2-1 opinion upholding the trial court's awarding the Appellee/husband a 94% interest in the parties' partnership interest. *See also, Fehr v. Fehr*, 284 S.W.3d 149 (Ky. Ct. App. 2008) (husband's contribution of non-marital funds to purchase of villa remained non-marital despite the villa being titled in the name of company of which the wife was the sole director).

C. [7.33] Variations in Proof in Tracing Non-Marital Property

Courts may also permit proof even more informal than the documentary or expert proof cited in the preceding paragraphs. In *Allen v. Allen*, 584 S.W.2d 599 (Ky. Ct. App. 1979), the court allowed the husband to claim the amount of his non-marital contribution to a joint bank account so long as the balance in that account had never fallen below that figure. Proof of that fact was held to have fulfilled the tracing requirement.

The 2008 crash in the housing market and subsequent recession, which caused stocks to lose a significant portion of their value, should put the practitioner on notice that an inquiry might be required to ensure that the present stock balance for the opposing party did not receive an infusion of marital funds to overcome any loss due to the declining market. The balance, within a party's retirement account, during the divorce may be due largely to an influx of marital money. Simply put, a $100,000 balance currently in a retirement plan that also had the same or a similar balance years earlier when the parties married, may have been liquidated or the stock may have plummeted and new, marital funds added to obtain the current balance.

Courts have even allowed a claimant to substitute credible, uncontradicted personal testimony in the place of documentary evidence. *Chenault v. Chenault*, 799 S.W.2d 575 (Ky. 1990); *Vanover-May v. Marsh*, 793 S.W.2d 852 (Ky. Ct. App. 1990). However, it is worth noting that in *Chenault*, the other spouse had offered no alternative explanation for the acquisition of the property. The practitioner, therefore, should secure an admission in a deposition, if possible, or challenge the opposing party's position as to the source of the money.

Moreover, in *Terwilliger v. Terwilliger,* 64 S.W.3d 816 (Ky. 2002) and *Bischoff v. Bischoff*, 987 S.W.2d 798 (Ky. Ct. App. 1998), the respective courts refused to allow parol testimony to satisfy the tracing requirement. In *Terwilliger*, this distinction seems to have turned on the fact that the claimant husband was perceived as being more sophisticated than Ms. Chenault.

For an example of a court considering the limits of *Chenault*, see *Smith v. Smith*, 235 S.W.3d 1 (Ky. Ct. App. 2006). That case involved numerous gifts of money to both parties, Jim and Carolyn. Carolyn's father, Walter, gave her $2,000.00 to buy stock in his company, Eastco. Jim deposited this check into his personal account, and then wrote a check from his account to purchase the stock. Monies received from sale of the stock, settlement of a suit involving Eastco, and

other gifts from Walter were used to set up a Merrill Lynch Account, which ultimately became a USB account. Although the money given by Walter to purchase the stock was diverted through the husband's personal account, the trial court held that it retained its character as a gift to the wife. Therefore, the money from the sale of the stock, its increase in its value, as well as the money received from the litigation, were all Carolyn's non-marital funds.

On appeal, Jim argued that the stock should be held to be marital since it was purchased by a check written from his personal account. The appellate court upheld the lower court's finding. Facts which the court found dispositive were that the board of directors authorized the sale of stock to Carolyn, rather than Jim, and that Walter wrote a check to Carolyn in the exact amount needed to purchase the stock "very near" the time the stock was purchased. Stating that "a temporal coincidence is probably insufficient proof on its own," the court held that since "Carolyn testified at one of her depositions that her father bought the Eastco stock for her with a check of $2,000.00," there was substantial evidence to support the trial court's conclusion that the stock was a gift from Walter to her. *Id.* at 8.

On appeal, the wife sought to have all funds not specifically traceable to marital assets to be held her non-marital property. This the appellate court refused to do, holding:

> Carolyn pushes *Chenault*'s relaxation of tracing standards too far. Carolyn has pointed to no concrete proof showing that the deposits to the Merrill Lynch account in question originated as gifts to her by Walter. Speculation and conjecture will not suffice to meet even the relaxed burden to show that the deposits in question were non-marital gifts from Walter. Furthermore, unlike the situation in *Chenault*, the large amounts of cash flowing through Jim and Carolyn's various bank accounts means that there were other potential sources for the deposits in question.

Id. at 9.

Kentucky courts appear specifically to have rejected the comparison of a spouse's pre-marital and post-marital net worth as a method of tracing. *Brunson v. Brunson*, 569 S.W.2d 173, 177-78 (Ky. Ct. App. 1978). The Court of Appeals has also rejected the use of the "forensic tracing" method, which did not follow the *Brandenburg* formula, used by the husband in *Kleet*. *Kleet v. Kleet*, 264 S.W.3d 610 (Ky. Ct. App. 2007). The court found that the expert's use of the parties' income and living expenses to calculate the parties' interest in certain stock, rather than engaging in the traditional tracing of a specific premarital asset, amorphous. *Id*. Finally, the practitioner must consider that the Kentucky Supreme Court permitted parol testimony to establish donative intent in *Sexton v. Sexton*, 125 S.W.3d 258 (Ky. 2004).

In sum, it appears that the tracing requirement may be met through virtually any type of credible evidence. However, the provided documentation must actually serve to establish the party's non-marital interest in property. *See, e.g., Crawford v. Crawford*, 358 S.W.3d 16 (Ky. Ct. App. 2011) (overturning the lower court's classification of the husband's interest in a cabinet shop as non-marital, based upon a lack of sufficient documentary evidence). Whether documentation is required may depend on the sophistication of the claimant, the reasons for his or her alleged inability to provide documentation, whether other evidence exists, and the expense of providing documentation as compared to the value of the claimed asset.

Alternatively, one may read Kentucky case law on this point as demonstrating that tracing requirements afford courts enough flexibility to enable them to avoid seemingly harsh or inequitable outcomes and to reach a decision that is result-oriented, rather than adhering slavishly to a literal application of the rules. GRAHAM & KELLER concluded that "Nevertheless, cases like *Bischoff* leave readers with the suspicion that the tracing proof requirements have the kind of flexibility that permits a trial court to find an equitable outcome." GRAHAM & KELLER, *supra* note 8, § 15.13, at 885.

XII. [7.34] Proportionate Allocation Between Marital and Non-Marital Property

Under KRS 403.190(2)(e), any "passive" increase in the value of non-marital property retains its non-marital character; conversely, any "active" increase in the value of a non-marital asset is deemed to be marital property. Therefore, a non-marital asset whose value has appreciated during the marriage may have a dual nature, comprising both marital and non-marital property. Property with both marital and non-marital characteristics is referred to as "mixed" property or "hybrid" property.

A. [7.35] The *Brandenburg* Formula[39]

The Court of Appeals enunciated the rules regarding mixed property in *Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky. Ct. App. 1981), which remains the benchmark in Kentucky. (The Court of Appeals struggled with fashioning a suitable formulation in each of the two years preceding *Brandenburg*: *Robinson v. Robinson*, 569 S.W.2d 178 (Ky. Ct. App. 1978) and *Woosnam v. Woosnam*, 587 S.W.2d 262 (Ky. Ct. App. 1979)). Despite its near universal use by Kentucky courts and attorneys, the *Brandenburg* formula is not mandatory; however a proportionate approach like that applied in *Brandenburg* is required. *Newman v. Newman*, 597 S.W.2d 137 (Ky. 1980). A resourceful practitioner, therefore, may

[39] A worksheet, to assist the practitioner in applying *Brandenburg*, is provided at Section [7.82], *infra*.

sometimes find it possible to avoid an undesirable result dictated by application of the *Brandenburg* formula by proposing an alternative method of calculating the respective equities. *Brandenburg* introduced an entirely new terminology and tracing non-marital property in Kentucky requires mastery of the following four terms.

First, *non-marital contribution* (nmc) is defined as "the equity in the property at the time of marriage, plus any amount expended after marriage by either spouse from traceable non-marital funds in the reduction of mortgage principal, and/or the value of improvements made to the property from such non-marital funds." *Brandenburg*, 617 S.W.2d at 872.

Second, *marital contribution* (mc) is "the amount expended after marriage from other than non-marital funds in the reduction of mortgage principal, plus the value of improvements made to the property after the marriage from other than non-marital funds." *Id.*

Third, *total contribution* (tc) is "the sum of non-marital and marital contributions." *Id.*

Fourth, *equity* (e) is "the equity in the property at the time of distribution." *Id.*

The court explained that the time frame for determining the equity in an asset is either "the date of the decree of dissolution, or, if the property has been sold prior thereto and the proceeds may be traced, then the date of the sale shall be the time at which the equity is computed." *Id.*

The court then set out the following formulae:

$$\frac{nmc \times e}{tc} = \text{non-marital property} \qquad \frac{mc \times e}{tc} = \text{marital property}$$

The *Brandenburg* formula requires courts to follow a four-step approach. First, the court must determine the non-marital contribution to an asset's equity. This might include the asset's pre-marital equity, the reduction of mortgage principal through non-marital funds, and improvements made with non-marital funds. Second, the court must determine the marital contribution to the asset's equity. This would include any mortgage payments made from marital funds, if they effected a reduction in the principal amount. Third, the court determines the total of these two figures; and, fourth, the court determines what percentage each of these figures is of the total amount.

The bright line rule of *Brandenburg* is that the trial court must simply apportion the marital and non-marital components of hybrid property in the same percentages as their respective contributions to the total equity in the property. The non-marital contribution is compared to the total contribution, and the marital contribution is also compared to the total contribution. These comparisons, reduced to percentages, are multiplied by the equity in the property at the time of distribution to establish the value of the non-marital and marital shares.

Specifically, the non-marital contribution is divided by the total contribution, multiplied by the equity, and yields the value of the non-marital property. Likewise, the marital contribution divided by the total contribution, multiplied by the equity, yields the value of the marital property.

Assume, for example, that prior to marriage a husband purchased a residence for $90,000.00 and paid $10,000.00 of this amount at the closing. After the purchase and prior to his marriage, he paid an additional $1,000.00 of the principal. During the marriage, the parties paid $1,400.00 on the principal and made improvements valued at $20,000.00. At the time of dissolution, the property was sold for $130,000.00; the equity was $52,400.00. The formula would be applied as follows:

Non-Marital Contribution	$10,000.00
Additional Principal Paid Prior to Marriage	$1,000.00
Total Non Marital Contribution	$11,000.00
Marital Contribution	$1,400.00
Value of Improvements	$20,000.00
Total Marital Contribution	$21, 400.00
Total Contribution	$32,400.00
Non-Marital Contribution/Total Contribution	$11,000.00/$32,400.00 (33.95%)
Marital Contribution/Total Contribution	$21,400.00/$32,400.00 (66.04%)
Equity at Time of Dissolution	$52,400.00
Non-Marital Contribution Equity	33.95% x $52,400.00 = $17,789.80
Marital Contribution Equity	66.04% x $52,400.00 = $34,604.96

The problem for the practitioner, of course, is that documents for the purchase price, their respective down payments, and renovation costs are rarely easily available, so determining the increase in value to the realty unless sold during the dissolution requires a real estate appraiser, and the task of compiling the documents required to make these calculations can be onerous. For a thorough discussion of the *Brandenburg* formula and its implications, see GRAHAM & KELLER, *supra* note 8, § 15:65-15:70.

B. [7.36] *Travis v. Travis*

After the Court of Appeals issued *Brandenburg*, the Supreme Court waited 20 years before it chose to weigh in on the issue of proving non-marital property and its appreciation. Finally, in 2001, in *Travis v. Travis*, 59 S.W.3d 904 (Ky. 2001), Kentucky's highest court refined the rules for using the *Brandenburg* formula.

Travis involved a seven-year marriage, during which the parties obtained a $39,000.00 loan which they combined with $7,500.00 of the husband's premarital property to purchase a dwelling house and relocate it onto land owned by the husband. During coverture, the parties made substantial improvements to

the property but did not reduce the principal owed on the indebtedness. After the parties separated, but before the decree of dissolution was entered, a fire destroyed the house. After the loan balance had been repaid and the husband's $7,500.00 contribution had been set off, there was a remaining balance of nearly $16,000.00.

The issue before the court was whether this amount represented "passive appreciation" on the husband's $7,500.00 investment, or "active appreciation" which had resulted from the improvements which the parties had made to the structure.

Two rules enunciated in the opinion clarify the issue, while burdening the practitioner and client by (1) requiring the party who wants to use the *Brandenburg* formula to prove "why the increase in value occurred," and (2) requiring the party who used "sweat equity" to prove its value. *Travis*, 59 S.W.3d at 910.

The court also held that the husband had failed to prove that any of the increase in value was due to general economic conditions. The court thereby indicated that such proof was both admissible and material in cases applying the *Brandenburg* formula. During periods of inflation, this would appear to benefit the party who made the initial non-marital contribution to the asset, as that investment would be augmented by the amount of inflation during the period before being applied to the formula. It is not clear whether, in periods of deflation, the value of the initial non-marital contribution would be decreased accordingly.

Although the *Travis* court recognized a contribution for "sweat equity," it did not indicate how that value should be determined. Advising one's appraiser whether to value "sweat equity" on the basis of quantum meruit, specifically, how much it would have cost to have employed someone else to do the work, or to assign a value based on the amount which the claimant's work had added to the value of the asset, presents a dilemma.

The practical result of *Travis*, however, is that protecting the appreciation of his or her non-marital interest in mixed property presents several problems to the practitioner and client. The client must retain an expert to demonstrate why the increase in value occurred and what value it attributes to the increase. To do so, he or she must value the property at the date of acquisition and again at the date of the divorce and justify his or her opinion as to the value of the increase. Moreover, retaining an expert may not be cost effective, when the cost of doing so is balanced against the probability of proving the basis for an increase. Finally, real estate appraisers may be at least as perplexed as many members of the bench and bar when attempting to comply with the mandate of *Travis*.

XIII. [7.37] Gifts and Inheritances – KRS 403.190(2)(a)

By far, the most frequently litigated statutory exception to the marital property rule is KRS 403.190(2)(a), relating to gifts and inheritances. "For the purposes of this chapter, "marital property" means all property acquired...except property acquired by gift, bequest, devise or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom." KRS 403.190(2)(a).

All property acquired by gift, devise, or inheritance is non-marital. *Id*. However, whether any particular asset is classified as a "gift" depends upon the intent of the donor. *Adams v. Adams*, 565 S.W.2d 169 (Ky. Ct. App. 1978). Only transfers which were truly gratuitous will be classified as "gifts." If there were any type of quid pro quo in exchange for the transfer, the property will not be classified as a "gift." *Underwood v. Underwood*, 836 S.W.2d 439 (Ky. Ct. App. 1992); *Browning v. Browning*, 551 S.W.2d 823 (Ky. Ct. App. 1977).

KRS 403.190(2)(a) also classifies both the appreciation of, and the income derived from, a gifted or inherited asset as "marital property." *Hunter v. Hunter*, 127 S.W.3d 656 (Ky. Ct. App. 2003). However, since 1996, the statute has classified only "active" appreciation as "marital property." KRS 403.190(2)(e).

The practitioner should note that Kentucky cases decided prior to 1996 classified all appreciation, whether active or passive, as "marital property." *Sousley v. Sousley*, 614 S.W.2d 942 (Ky. 1981). These older cases do not reflect the current state of the law on this point.

"Active" appreciation is that caused, at least in part, by the activity of one or both spouses. *Goderwis v. Goderwis*, 780 S.W.2d 39 (Ky. 1989). Kentucky courts have not yet addressed the question of exactly how much effort is required to convert a "passive" asset into an "active" asset in a published opinion.

However, the unpublished opinion in *McCoy v. McCoy*, offers the practitioner some guidance on this issue. *McCoy v. McCoy*, 2011 WL 2162638 (Ky. Ct. App. 2011); *Wilkins v. Wilkins*, 2010 WL 2891753 (Ky. Ct. App. 2010). In *McCoy*, the parties were both employed, in management roles, by a business founded by the husband's father and grandfather, which operated a nursing home and assisted living facility. 2011 WL 2162638 *1. The husband had received shares in the company, gifted to him, which had increased in value during the course of the parties marriage. *Id*. The trial court found, and the appellate court affirmed, that this increase in value was non-marital in character. *Id*. at *3. This decision was based on the court's determination that the increase in value had resulted from the efforts of the husband's father and brother. *Id*. at *2. The court found that neither of the parties' efforts had led to the stock's appreciation in value. *Id*. at *3.

The courts of other states have devoted considerable attention to the question, and their holdings may be consulted as persuasive authority. For a comprehensive listing, see GRAHAM & KELLER, *supra* note 8, § 15.6, at 866 n.11.

A. [7.38] *Sexton v. Sexton*

The practitioner is likely to see more transfers of gifts than have occurred previously, due to the increased need to maintain the family farm or to transfer assets to reduce death taxes during inflationary times. Property obtained by a married couple via gift or inheritance is neither obtained by joint efforts of the parties nor by the effort of one partner to the marriage. Hence, excluding such property as non-marital is consistent with the partnership theory of the Kentucky dissolution statute.

In an exhaustive opinion written for a unanimous court by former Justice Keller, co-author of GRAHAM & KELLER'S treatise on domestic relations law, the Kentucky Supreme Court clarified and re-emphasized several significant issues addressed in this chapter, including gifts from parents and gifts between spouses. *Sexton v. Sexton*, 125 S.W.3d 258 (Ky. 2004). This case makes it abundantly clear that donative intent is the primary (and perhaps the only meaningful) factor to consider. The holding of Sexton is that a donor's intent regarding a non-marital transfer overrides documents depicting ownership in joint names.

In *Sexton*, the appellee husband, Larry Sexton, owned an apartment building in Lexington which he had acquired before his marriage to appellant. He exchanged the apartment building for an undivided 1/6-partnership interest in Autumn Park Partnership, which he placed in joint tenancy by the entireties with his wife.

The case involved several issues besides gifts, each of which will be addressed below. At the time of the exchange, the husband executed a promissory note to his parents for $69,000.00 which represented the remaining debt on the non-marital apartment building. The parents forgave the note over the course of several years.

The wife argued, among other things, that Autumn Park was acquired during the marriage, placed in joint names, and was, consequently, a gift from her husband; she also contended that the parents' forgiveness of the indebtedness had been a gift to the marital unit and was hence marital property. The note had been executed by the husband alone. In addition, the husband and both of his parents testified that there was no intent to donate an interest to the wife.

Moreover, before the wife's name was added to the partnership agreement, the husband's father had asked his counsel about the legal ramifications of placing title in the parties' joint names. Counsel had replied that title was not a factor, that it was a matter of the donor's intent, and that he did not believe that adding the wife's name would nullify that intent.

The court opined that:

> The donor's intent is also the primary factor in determining whether a gift is made jointly to spouses or individually to one spouse. The donor's testimony is highly relevant of the donor's intent; however, the intention of the donor may not only be 'expressed in words, actions, or a combination thereof,' but 'may be inferred from the surrounding facts and circumstances, including the relationship of the parties[.]' The determination of whether a gift was jointly or individually made is a factual issue, and therefore, subject to the CR 52.01's clearly erroneous standard of review.

Id. at 269.

One lesson of this case appears to be that an opinion of counsel may well substitute for the testimony of the donor, should that become necessary. Here, however, both parents also testified.

Citing *O'Neill v. O'Neill*, 600 S.W.2d 493 (Ky. Ct. App. 1980), a case involving gifts between spouses, the *Sexton* court quoted the Court of Appeals' opinion setting forth four factors for the trial court to consider: (1) the source of the money with which the gift was purchased; (2) the intent of the donor; (3) the status of the marital relationship at the time of the transfer; and (4) whether there was a valid agreement that the property be excluded from marital property. *Sexton*, 125 S.W.3d at 268.

Justice Keller added that when the gift came from a third party, the court should also consider whether the purported donor received compensation for the transfer. *Id.* Calling attention to the lower court's finding that the wife was added as an owner "only because of her being [Appellee's] spouse," he further added, "[W]e likewise hold that 'she was only added to the partnership agreement' because of her marriage to Appellee, and therefore she received no additional interest by reason of the partnership interest being placed in joint names." *Id.* at 269.

The court indicated that, while it considers statements of the donor, statements of the spouses, the tax treatment of a gift, whether the gift was jointly titled, the person to whom it was delivered, and the relationship between the donor and the spouses, the donor's intent is the primary factor to be considered.

While the *Sexton* court recognized the four factors from *O'Neill*, it clearly indicated that donative intent was the dispositive factor, as had previously been held in *Clark v. Clark*, 782 S.W.2d 56 (Ky. Ct. App. 1990). A close study of *Sexton* will provide the practitioner a sound understanding of the Kentucky law on gifts (as well as other issues later discussed). The cases cited in *Sexton* will afford the practitioner numerous examples of varied factual situations involving different parties to a transaction, which may provide useful precedent for his or her client's case.

A recurring question is whether assets transferred between family members are non-marital gifts or marital compensation. The *Sexton* case noted that

although the Appellee husband worked at the partnership apartment complex, the increase in value of the property was wholly due to the father's efforts. *Sexton*, 125 S.W.3d at 262.

A case involving "donative intent" is *Smith v. Smith*, 235 S.W.3d 1 (Ky. Ct. App. 2006). That case involved a number of gifts to the parties from their respective parents. In each instance, the issue was whether the gifts were to one, or both, parties. The case merits close study for its findings regarding the amount and type of proof required for such a showing.

The wife's parents set up a "second to die" life insurance policy naming the wife, Carolyn, and her sister as beneficiaries. They also established a "*Crummey* Trust" with both daughters named as beneficiaries. To lessen tax liability, Carolyn's parents gave annual gifts to both Carolyn and her husband, Jim. The trial court awarded Jim the amount gifted to him. The appellate court reversed, holding that the total sum was a gift to Carolyn.

The Court of Appeals noted the evidence showed Carolyn's father's "overriding desire to preserve as much of his estate as possible for Carolyn and her sister." As there was no evidence of any intent to give Jim the funds "as tokens of affection," but rather that Jim served only as an "available conduit for gift tax purposes," the court, using the rationale set forth in *Sexton*, found all the sums given were non-marital gifts to Carolyn alone, and that Jim had no interest therein. Of particular importance was the fact that Jim was not named as a beneficiary of either the insurance policy or the trust. *Id*. at 10-11.

The case also includes examples where the evidence failed to support such a finding. During the marriage, Carolyn's father had loaned the parties $57,000.00 as a downpayment on a residence. Although the parties were to repay the loan, no payments were ever made. Carolyn's father left a cryptic note in his lock box stating "Carolyn King Smith notes (all forgiven)." The trial court found this to be a non-marital gift to Carolyn. The appellate court reversed, noting that there was no evidence that this notation, by itself, indicated an intent to forgive the $57,000.00 loan as to Carolyn only. It then held that the forgiveness of the $57,000.00 was marital property and should be justly divided. *Smith* at * 7-8. Jim's father gave $8,000.00 toward the purchase of a farm. Jim claimed this amount was a non-marital gift to him alone. Again, the trial court allowed the claim, and the appellate court reversed, noting that there had been no evidence showing an intent that the gift benefit only Jim, rather than the parties jointly. *Id*, at 12-13.

In a recent case, the Kentucky Court of Appeals again took up the question of donative intent. *Gertler v. Gertler*, 303 S.W.3d 131 (Ky. Ct. App. 2010). In *Gertler*, the court considered the trial court's characterization of three monetary gifts, made by the husband's parents and used to obtain housing for the parties and their children, as marital property. Relying upon the factors, outlined in *Sexton*, the court considered the testimony of both spouses and of the husband's father. Though the appellate court gave deference to the trial court's analysis of the father's

testimony, which the trial court concluded lacked veracity, the appellate court stated that such testimony is not "controlling of the issue." The appellate court found that the trial court was correct in considering all of the *O'Neal* factors and the circumstances that surrounded the case in making its decision.

A related problem concerns gifts of marital or non-marital assets to the parties' children. In *Lampton v. Lampton*, 721 S.W.2d 736 (Ky. Ct. App. 1986), the court required that such gifts be apportioned between the two estates. The bulk of the parties' property consisted of stock in a life insurance company of which the husband was an officer and principal stockholder. Some shares had been acquired from his father and were non-marital; others had been acquired during coverture, and were marital property.

The couple had given large blocks of stock to their children. The husband argued that these gifts had come entirely from the marital shares. However, the court held that the property was hybrid in nature (*i.e.*, having both marital and non-marital aspects), and commented that "absent a compelling reason to the contrary, each transfer of shares as gifts should be considered to have been composed partly of marital and partly of non-marital property." *Lampton*, 721 S.W.2d at 738. This appears to mean that, absent proof, a gift must be apportioned between marital and non-marital components. The court, however, provided no further guidance for trial courts undertaking the task.

Any property which has been given by either of the parties to their children prior to the final separation remains that child's property and is not subject to division by the court. Revell & Skaggs, *supra* note 32, § 12.5, 146 n.121. However, the marital estate may recapture this property for equitable division if the court finds that the gift to the child or children was done with the intention of concealing assets or dissipating the marital estate. *Culver v. Culver*, 572 S.W.2d 617 (Ky. Ct. App. 1978); *Gripshover v. Gripshover*, 246 S.W.3d 460 (Ky. 2008). The parties, for accounts, established under the Uniform Transfers to Minors Act, KRS § 385.012, *et seq*., may continue to serve as the custodian of their child's account. *See Hempel v. Hempel*, 2012 WL 4209004 *4 (Ky. Ct. App. 2012). Such a custodian is required to keep records of all transactions with respect to said property and to allow their former spouse to review those records. *Id*.

B. [7.39] Trust Property, Partnership Interests and Corporate Stock

Prior to August 2005, Kentucky practitioners had little case law or treatise authority to assist them in the treatment of trust property. Neither Petrilli's Kentucky Family Law (1988 and 2005 supplement), nor Judge Revell and Alan Slyn's Kentucky Divorce (2005) mentions trust property. Until the 2006 Supplement, Graham & Keller's treatise devoted one half page to the subject and cited only one case as authority.[40]

[40] The authority cited by Graham & Keller is *Munday v. Munday*, 584 S.W.2d 596 (Ky. Ct. App. 1979). In that case, the husband created a *Clifford* Trust for the wife's children with the principal

In *Gripshover*, the Supreme Court of Kentucky considered a case on appeal from the Boone Circuit Court in which the parties had conveyed their interest in farm property and in farm equipment to a family limited partnership. *Gripshover v. Gripshover*, 246 S.W.3d 460 (Ky. 2008). The husband and his brother engaged in an extensive farm operation on land having a value of over three million dollars that was partly inherited and partly purchased. Husband and wife transferred their interest in the real estate used by the husband and his brother to a family limited partnership (the *Gripshover* #1 Family Limited Partnership Ltd.), and their interest in the personal property to a second family limited partnership (the *Gripshover* # 2 Family Limited Partnership Ltd.). The husband and brother were both limited partners and general partners, each having a 26% interest in the partnerships. The husband's wife and the brother's wife were both limited partners, each having a 24% interest. Apparently, there was no dispute that the transfer was made for estate tax purposes.

As general partners and controlling partners, the husband and brother assigned the partnership rights to the Gripshover #1 Family Limited Partnership Ltd. to the George Gripshover Family Trust (husband) and the Camillus Gripshover Family Trust (brother). Both were irrevocable trusts. The brother was the trustee of the husband's trust and the husband was the trustee of his brother's trust. They also transferred the partnership interests in the Gripshover #2 Family Limited Partnership Ltd. to two revocable trusts, one for each brother.

The beneficiaries were the husband's children by a previous marriage and those by his current marriage as well as any children he might have in the future. The wife's children by a previous marriage were excluded. The husband's living expenses and a monthly allowance were paid by the trust, but no monies were paid to the children. The trial court held that the land was no longer a marital asset subject to division in the dissolution action.

The Court of Appeals, overturning the ruling of the trial court, had previously ruled that the transfer of the realty to the limited partnership and the assignment of that realty to an irrevocable trust had not extinguished the wife's equitable interest in the realty, for the purpose of dividing the parties' property. In overturning the appellate court's decision, the Supreme Court found that the husband had not

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to revert to the husband. A *Clifford* Trust is a tax savings device in which a grantor conveys an income producing asset to another for a term of years and which, unless the grantor retains too much dominion and control, will be taxable to the grantee during the term of years. George Gleason Borgert and George Taylor Borgert, The Law Of Trusts And Trustees (Rev. 2d ed. 1992). A reverter is the trust res which "reverts" to the grantor upon the expiration of the trust. However, the trial court awarded the trust's reverter to the wife and charged her with the trust's face value. The Court of Appeals considered valuing the wife's marital interest at face value instead of its actual value at the time of the judgment as being inequitable, and reversed.

The appellate court called attention to the fact that, without the wife's knowledge, the husband had transferred $23,000.00 to a custodial account for his own children, but it did not address disposition of that account. Perhaps, the court intended the trial court to address this issue upon retrial, for it directed the lower court to "make new findings of fact." *Munday* at 599.

engaged in a fraudulent or dissipative transfer of martial property. The court noted that the there was no evidence that either party was contemplating divorce at the time of the transfer and that the wife had "joined in the estate plan knowingly and voluntarily." As such the realty was not subject to division as marital property.

This writer suggests that the practitioner carefully question his or her client to ascertain the source of the trust funds as a gift or inheritance. The practitioner must also make certain that no additions have been made with marital funds to an otherwise non-marital trust.

A different type of trust which is increasingly popular is the revocable living trust which, of course, may include marital property, non-marital property, or a combination of both. The principal of such a trust should be included as an asset of the marital or non-marital estate and distributed according to its classification. If a party in a dissolution action is a settlor or beneficiary, the practitioner may need to review whether the income is marital or non-marital.

Citing *Sousley v. Sousley*, 614 S.W.2d 942 (Ky. 1981), Graham & Keller explain that even if the trust property were non-marital as a gift or inheritance, "if trust income is the product of either spouse's *significant activities* it will be marital property" (emphasis added). Graham & Keller, *supra* note 8, § 15.88, at 1105. The claimant has the burden of proof. KRS 403.190(3). These issues can present particularly difficult discovery problems, especially when the trust is created by a nonparty to the dissolution action who has not been interpled, or when the trust situs and parties to the trust creation or its trustee are outside Kentucky.

The ownership of partnership interests and corporate stock has been an issue in numerous dissolution cases over the years. *See generally* Graham & Keller, *supra* note 8, § 15.71. However, since the limited liability partnership ("LLP") and the limited liability company ("LLC") have become available under Kentucky law, persons of means frequently utilize these business entities. All such entities provide a ready vehicle for the spouse seeking to transfer property in fraud of spousal rights.[41]

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[41] Another Kentucky case involving a trust dealt with dower rights instead of spousal rights upon divorce. It merits consideration. In *Mathias v. Martin*, 87 S.W.3d 859 (Ky. 2002), the facts as stated in the opinion reveal that Joseph V. Martin presented an antenuptial agreement to his fiancée, Lillian, which she refused to sign. She only advised her intended husband of this decision the day before the wedding. He then informed her that he had conveyed Highcroft Farm to an irrevocable trust controlled by himself with the effect of preventing Lillian from acquiring any rights in the real property as a result of the marriage.

The issue, as stated by Chief Justice Lambert in an unanimous opinion, required the court to determine: "[W]hether and to what extent engaged persons acquire dower rights in the property of the other." *Id.* at 860.

After acknowledging that the decisions were "somewhat divergent," the court analyzed the cases in depth and finally concluded:

> There appears to be a dichotomy between the older and more recent cases, the latter recognizing broader rights in spouses with respect to the property of the other. *Harris v. Harris*, 799 S.W.2d 10 (Ky. 1990), is a notable example of what appears to be the

The practitioner should closely question his or her client, looking especially for the disposition of any marital asset owned during coverture and the use of the funds from any such disposition. The business record's portion of the Kentucky Secretary of State's website, <http://www.sos.ky.gov>, should be searched to discover all business entities in which the parties have an interest or are involved. The practitioner should also examine any corporation, the individual's income tax returns schedule for capital gains, the creation of any LLP, LLC, or sub-chapter S corporation as well as the party's reported interest in such entity. One should inquire whether any gift tax return has been filed or is required to be filed by the IRS, and, of course, obtain a copy.

As second, and even third, marriages have become commonplace, many involving children from a first or second marriage, the practitioner is well-advised to review carefully the client's financial holdings at or near the time of the marriage, as well as transfers during coverture and prior to filing a petition for dissolution.

XIV. [7.40] The Marital Residence, Its Contents and Other Tangible Personal Property

In today's Kentucky, the personal residence is the most frequently included (and likely most valuable) asset in a dissolution action in urban areas; while the farm, with or without a residence, may be the most valuable asset in rural areas. Whether titled in a spouse's name or in their joint names, a client generally knows the value at which the property is assessed by the Property Valuation Administrator. He or she likely knows realtors who buy and sell residential and farm property, and perhaps, even the price at which similar property has sold. The client may have also formed an opinion as to the property's value and may want to testify. Nonetheless, unless the client is otherwise credentialed, in any case that goes to trial, the client must provide an expert's testimony to establish a value, or else take a substantial risk for failure to do so. *Robinson v. Robinson*, 569 S.W.2d 178 (Ky. Ct. App. 1978). Valuation of real estate is obtained through use of one of three methods: market approach, income approach and asset-based approach, referenced later in Section [7.46], *Business Assets, infra*.

The possession and valuation of tangible personal property may be hotly contested. These assets are often sentimental objects, collected over a lifetime,

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more recent trend, so much so that Justice Leibson commented in dissent that "a married person cannot [now] dispose of his or her own money unless his spouse joins in the transaction." Of our more recent cases, however, most involve the transfer of cash or its equivalent by married persons to persons other than their spouses, usually children by a previous union, creating the inference that fraud upon the spouse was intended. In this case, while the intention may have been the same, the transfer occurred prior to the marriage and with the knowledge of the intended spouse. In our view, this is a sufficient distinction to control the outcome. *Mathias v. Martin*, 87 S.W.3d at 864.

which cause great emotional turmoil. There is some treatise authority that an owner of a particular object may give his or her opinion as to its value, and if the object is of negligible worth, the court may accept this opinion. 2 OLDFATHER, *supra* note 14, § 21.07[2], at 21-74.

Kentucky case law provides limited guidance in this area. *O'Neill v. O'Neill*, 600 S.W.2d 493 (Ky. Ct. App. 1980), concerned the valuation and assignment of jewelry and other personalty. *Calloway v. Calloway*, 832 S.W.2d 890 (Ky. 1992), concerned the valuation and assignment of an automobile. *Sexton v. Sexton*, 125 S.W.3d 258 (Ky. 2004), concerned the valuation and assignment of a 1/6-partnership interest in a real estate partnership.

As a general matter, it will be necessary to employ an appraiser, at least for more valuable items. The practitioner may find it preferable to employ a collector or a dealer of such items, rather than someone who may be designated a personal property appraiser but have no actual personal experience with the market in question. Factors to be considered are the original cost of the item, the quality of the chattel, its uniqueness, its availability, and, most important of all, its sale value.

Specialty appraisers will be needed to establish the value of silver, art objects, antiques, and collectibles. Attention must also be given to the rarity and desirability of various items. Other considerations are artistic taste, the geographic area, and the particular artistic period or movement. For example, Chinese porcelain may be unsellable in a rural community but be in great demand in a metropolitan area.

The appraiser should have a working knowledge of what is currently available and what is in demand. Sources of this information include auctions, garage sales, and second hand furniture stores. For example, a local artist's work may be in demand in a defined area, but be of limited value elsewhere.

The practitioner should also be aware of the possibility that an item may be fake. Appraisers cannot usually authenticate items, and an authenticator should be employed if the item in question is suspect. An authenticator should confirm the date, state of repair, and workmanship of the item. He or she should state, for example, that all parts of a piece are from the same period and workmanship and that the item has not been refinished.

Care must be taken with respect to the contents of a safety deposit box. At least one court has held that the contents of a safety deposit box can only be valued if an inventory is made and the box sealed before the commencement of litigation. *See* 2 OLDFATHER, *supra* note 14, § 21.07[2], at 21-75; *Ex parte Butler*, 523 S.W.2d 309 (Tex. Civ. App. 1975) (enjoining removal of contents from safety deposit box).

Jewelry and gems may be appraised by a local jeweler at sale value, not insurance or retail value, which may be grossly in excess of the price at which the owner could sell the item.[42]

Typically, motor vehicles may be valued according to the NADA guide, available at: <http://www.nada.com>.[43] *Hess v. Riedel-Hess*, 794 N.E.2d 96, 103-04 (Ohio Ct. App. 2001); *Estate of Adams v. Comm'r*, 32 T.C.M. (CCH) 503 (1973), 1973 WL 2312, Tax Court 1973 (May 21, 1973). Marketable securities and bonds may be valued by contacting a reputable brokerage house or newspaper. Current stock prices and mutual fund information is available at: <http://www.morningstar.com>. Bank accounts are usually valued by making reference to the most recently received bank statement.

Moreover, judges often recognize the "white elephant" nature of a piece of art. For example, an enormous piece may be very difficult to sell, or the piece may be out of fashion; a court is apt to ask what price other pieces by the same artist have commanded in the past.[44]

For unusual items, and also for musical instruments, courts have often accepted reproduction cost as an alternative to looking at the fair market value. Old evaluations for insurance purposes do not govern, but may provide additional evidence of true value.

Another source for evidence of value is to look at the excise tax that was imposed on large articles on which such taxes were paid. Rev. Rul. 55-71, 1955 C.B. 110. Courts have also looked at the deductions taken on tax returns for sales tax to determine the value of large household items such as appliances. Art work and antiques are often imported, and customs duties imposed on them.

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42 *See generally* Robert D. Feder, VALUING SPECIFIC ASSETS IN DIVORCE § 21.01 *et seq.* (2005); GOLDBERG, *supra*, § 14.23; *but see Ross v. Ross,* 734 N.E.2d 1192, 1196-97 (Mass. App. Ct. 2000) (court may use insured value of jewelry and gems, where no "creditable alternative evidence" is provided to it).

43 The practitioner should be always be cautious concerning the introduction of such evidence, making sure to provide the proper foundation for its introduction.

44 As an illustration of a court's approach to valuation issues, see *Estate of Smith v. Comm'r*, 57 T.C. 650 (1972), 1972 WL 2557, *aff'd*, 510 F.2d 479 (2d Cir. 1975), in which the tax court listed the criteria by which it valued for estate tax purposes a large collection of sculpture retained by the artist at the time of his death. The court first noted that a large block of an artist's work placed on the market at one time necessarily depresses its market value.

It then listed the following evaluation factors:

1. The decedent's reputation as a sculptor;
2. The type of the medium and style in which the artist worked;
3. The size, period, and quality of the particular works involved;
4. Whether the collection constitutes a complete series and is therefore best sold together;
5. The number of sales in the years preceding the artist's death; and
6. The convenience of location and transport.

The court may want to base the value on the "best use" of a piece of property if it has more than one use. For example, a collectible plate may be worth $100.00, but as dinnerware it could substitute for an inexpensive item. For example, one spouse may wish to evaluate the family silver at its "market price," even though both parties understand that no family member would actually sell this heirloom.

A trial court in Washington ordered the parties to conduct an auction of the personalty between themselves. *Marriage of Soriano*, 643 P.2d 450 (Wash. Ct. App. 1982). The husband objected to this procedure, and the appellate court ruled that valuing and disposing of the parties' personalty was the responsibility of the trial court and that the trial court could not avoid the responsibility in that fashion.[45] The appellate court indicated, in a footnote, that the method might be acceptable if both parties agreed to its use. A Montana trial court adopted in toto what it characterized as the husband's "give-or-take" valuations, but the appellate court rejected this method of evaluation. *In re Marriage of Gilbert*, 628 P.2d 1088 (Mont. 1981).

Items of tangible personal property to be valued and assigned are so varied that an exhaustive listing is hardly possible. Items of personalty which have been valued and assigned in reported cases include automobiles, *In re Marriage of Balanson*, 996 P.2d 213 (Colo. Ct. App. 1999) *aff'd in part and rev'd in part*, 25 P.3d 28 (Colo. 2001), *appeal after remand*, 107 P.3d 1037 (Colo. Ct. App. 2004); boats, *Reis v. Reis*, 739 So. 2d 704 (Fla. Dist. Ct. App. 1999); bonds, *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982); brokerage accounts, *Michaelson v. Michaelson*, 580 N.Y.S.2d 87 (N.Y. App. Div. 1992); calves, *In re Marriage of Popp*, 767 P.2d 871 (Mont. 1989); cattle, *In re Marriage of Drake*, 670 N.W.2d 431(Iowa Ct. App. 2003), *Grossnickle v. Grossnickle*, 935 S.W.2d 830 (Tex. App. 1996); cod pots, *Berg v. Berg*, 983 P.2d 1244 (Alaska 1999); a seat on the commodities exchange, *In re Marriage of Wright*, 536 N.E.2d 700 (Ill. App. Ct. 1986); crops, *In re Marriage of Martin*, 436 N.W.2d 374 (Iowa Ct. App. 1988); a country club membership, *Cluck v. Cluck*, 647 S.W.2d 338 (Tex. App. 1982); farm assets, *In re the Marriage of Schaufelberger*, 457 N.E.2d 993 (Ill. App. Ct. 1983); a farm trailer, *In re the Marriage of Ruff,* 807 P.2d 1345 (Mont. 1991); furniture, *Wolfburg v. Wolfburg,* 606 A.2d 48 (Conn. App. Ct. 1992); gifts, *Gervais v. Gervais*, 688 A.2d 1303 (R.I. 1997); grain, *Studt v. Studt*, 443 N.W.2d 639 (S.D. 1989); a gravel pit, *Kitchar v. Kitchar*, 553 N.W.2d 97 (Minn. Ct. App. 1996); guns, *In re Marriage of Thornton*, 412 N.E.2d 1336 (Ill. App. Ct. 1980); a horse, *Berge v. Berge*, 552 N.Y.S.2d 779 (N.Y. App. Div. 1989) (appellate court reduced value of breeding mare from $226,500.00 to $5,000.00); a horse trailer, *In re Marriage of Tatham*, 527 N.E.2d 1351 (Ill. App. Ct. 1988); and household goods, *Kreidler v. Kreidler*, 348 N.W.2d 780 (Minn. Ct. App. 1984).

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[45] The auction was limited to the husband and wife. The Washington Supreme Court reasoned that this violated "the court's statutory duty to determine the parties' respective interest," and instead ordered the parties to settle the matter themselves. *Marriage of Soriano*, 643 P.2d at 452-53.

Although not admissible in court as evidence of value, there are a number of online sites which may give the practitioner a "starting point," for an item's value. These include cites for homes <http://www.zillow.com>, <http://www.housevalues.com>, <http://www.homevaluehunt.com>, <http://www.electronicappraiser.com> and <http://www.homeinsight.com>. Information regarding motor vehicles is available at <http://www.kbb.com>, <http://www.nadaguides.com>, <http://www.autobytel.com>, <http://www.Edmunds.com> and <http://www.ebay.com>. Valuation of boats is available at <http://www.nadaguides.com>, <http://www.yachtworld.com>, <http://www.theyachtmarket.com>, <http://www.boats.com>, <http://www.boatsandoutboards.com>, and <http://www.boat-finder.com>. Some of these websites are more easily accessed through <http://www.google.com>.

Should sizeable holdings of livestock be involved, the practitioner should contact the International Society of Livestock Appraisers, a division of the American Society of Agricultural Appraisers. They do not provide a listing of certified individuals. When contacted with a request for an expert in a certain area or breed, they will provide the name and number of a qualified individual or individuals. Additional information on these organizations may be found at: <http://www.amagappraisers.com>. Kentucky does not have an association for certifying livestock appraisers. However, the Kentucky Beef Council and National Cattleman's Beef Association are good sources for local references. Individuals seeking appraisals are frequently referred to local owners, members of the Livestock Marketing Council, or operators of local slaughterhouses, who would have knowledge of the current market value of animals in that county.

A useful and interesting treatment of various items of unusual property may be found in a presentation entitled *Unusual Property Issues: Who to Contact and How to Pass Title*, Brenda Keen Schwartz, Paper, American Academy of Matrimonial Lawyers Conference, March 2002, Sanibel, Florida. This document includes discussion of vehicles, firearms, livestock, art, frequent flyer miles and financial holdings. Of particular interest are the sections regarding United States Savings Bonds and Treasury Securities, a not uncommon component of marital estates. Information is provided regarding how to transfer these holdings. Additionally, contact information is provided for numerous cattle and equine breed registries, as well as the American Kennel Club.

Another useful source for breed register information may be found at: <http://www.ansi.okstate.edu/breeds>. This site is quite extensive, and provides information on a large number of livestock breeds, their registries and contact information.

XV. [7.41] Special Farm Problems

Kentucky remains a largely agrarian state. Tobacco and horse farms have historically been a major component of our economy. Thus, many practitioners will face the difficult task of evaluating horse-related operations and assets, as well as the categorization of money received from the tobacco buy-outs and settlements.

A. [7.42] Horse Operations

In Kentucky, as in other agricultural areas, courts may be called upon to value and assign farm animals. The parties may own a horse or horses which the court must consider as an item of marital property.

The initial task is to determine whether the horse was owned prior to marriage, or whether it was purchased with marital funds. Assuming the horse is marital property, the court must then determine its value. The practitioner should employ an expert witness. In the unreported case *Callender v. Callender*, 2004 WL 549484 (Ohio Ct. App. 2004), the husband challenged the valuation placed on six horses by an appraiser. He did not, however, employ his own appraiser, nor did he call the appraiser as a witness, and at trial merely assailed the methodology employed by the court-appointed appraiser.

The trial court accepted the appraiser's testimony, and the Ohio Court of Appeals upheld this verdict. The court wrote:

> While a court is not bound to accept an appraisal or valuation by an appraiser, it is certainly within the court's discretion to do so... As to the horses, appellant did not offer an opinion as to what he thought they were worth. The court was left to consider the appraisal and the appellee's opinion... Additionally, appellant never called [the appraiser] to testify. Appellant was aware of the appraisal before trial. If he believed the values placed on the horses...were off by so much, he should have called [the appraiser] as a witness to determine how he arrived at the values he did. In addition, he could have obtained his own appraisal.

Id. at *2.

Among the factors to be considered are the purchase price of the horse, the current state of the market, the pedigree and blood lines of the horse, and its accomplishments. *See Mayes v. Mayes*, 2006 WL 572921 (Ky. Ct. App. 2006); *Swift v. Swift*, 2005 WL 3543341 (Tenn. Ct. App. 2005).

Valuing a single horse, a string of polo ponies, a family-owned public riding stable, a breeding operation or thoroughbred syndication may be one of the most difficult valuation issues a practitioner may face. If there are substantial equine assets involved, the practitioner should retain an expert to fix their value at

the outset. There are 112 recognized registered horse breeds in the United States, and an expert for one breed may be of no value for another breed. Thus, the first step for the practitioner is to identify the horse breed, or breeds, involved. A useful resource in locating an expert for a particular breed is the American Horse Counsel, <http://www.horsecouncil.org>.

Many horse operations are husband-wife teams, with one or both spouses acting as trainers. Since the trainer is a crucial factor in any horse operation's success, it is appropriate to include key-employee discounts, defined in Section [7.46], *Business Assets, infra*. Additionally, any individual horse's value cannot be determined without reference to the depreciation schedule applicable for that particular animal. In 2002, Congress enacted a "bonus depreciation" of an additional 30 percent in the first year after purchase of a horse, if the horse were purchased between September 11, 2001 and September 11, 2004, and the horse is used for its intended original use. There are specific provisions for race horses over two years of age, and for all horses over twelve years of age.

Given these facts, it will be necessary to locate both (1) an expert to fix the value of individual horses, and (2) an accountant to review relevant tax issues, key-person discounts if applicable, as well as other business aspects of the operation, its value and continuing viability.

The American Society of Equine Appraisers ("ASEA") is an organization which certifies appraisers in this field. However, it may not be possible to obtain a professional from such an organization. Should such be the case, an individual with recent and long-standing, high-volume sales experience of horses is necessary. An auctioneer who conducts sales in the requisite breed, or a trainer who has sold a large number of horses over long periods of time, are good choices for an expert. The process of fixing the value of an individual horse is very similar to that involved with real estate appraisals. Sales of comparable animals are the best indicators of value. Once the sales value and insured value of the horse is established, the horse's soundness must be verified by a veterinarian. Additionally, syndication or buy-sell agreements of jointly owned animals may value an owner's interest and may or may not be binding upon him or her. Wynter Reneaux Collins, *Equestrian Holdings*, Winter 2003 A.B.A. Sec. Fam. L. Fam. Advoc. 40. A copy of the above-cited article may be obtained by contacting the writer at reneauxcollins@aol.com. A copy is also available from the ABA. Information on how to obtain a copy is available at: <http://www.abanet.org/family/advocate/pubinfo.html>.

Historically, horses were sold with a "wink and a nod." However, Kentucky's legislature has passed a law requiring a written contract for the sale of horses used for racing and showing, where the purchase price exceeds $10,000.00. The contract must set forth the purchase price of the animal. Although not determinative of the horse's value, this figure should furnish the practitioner a starting point for determining the animal's worth. The law also covers the sale of seasons or fractional interests in a breeding stallion and may come into play when the marital estate

includes syndication agreements. The new legislation will be added to KRS Chapter 230, and is available at: <http://www.lrc.ky.gov/RECORD/06RS/HB446/bill.doc>.

B. [7.43] Tobacco Growers' Settlements, Buy-Outs and Litigation

Since tobacco has historically been Kentucky's primary cash crop, issues arising from the government settlement and buy-out are likely to affect divorce litigation throughout the state. Income from these sources should be available on the parties' Schedule F "Profit or Loss from Farming," on their individual or joint tax return. The parties to the litigation are apt to be well aware of the payments; however, a practitioner may overlook them to his client's detriment.

There are currently four different programs the practitioner may encounter. In 1999, the tobacco companies entered into a Master Settlement Agreement ("MSA"), whereby they were to pay $206 billion to 46 states over 25 years to compensate for smoking-related expenses. This is referred to as Phase I of the National Tobacco Settlement, of which Kentucky received $3.45 billion. These funds were allocated, in various proportions, to education, health care, and to agricultural development, via state and county agricultural boards. A sizeable portion was held in reserve to assure Phase II payments. Although no monies were specified for distribution to individual growers, farmers may receive sums from the aforementioned boards and agencies. Information on the MSA may be found at KRS 248.701, *et seq*.

A second program, referred to as the National Tobacco Grower Settlement Trust was also established. This consisted of $5.15 billion paid to 14 tobacco-producing states over 12 years. This is referred to as Phase II, and was to be paid to tobacco growers and quota holders to compensate for expected losses due to the MSA. These payments were to be made to growers, quota owners and farms. This program ended in December 2005, due to the Tobacco Quota Buy-Out. Information about Phase I and II is available on the University of Tennessee's Agricultural Policy Analysis Center's website at: <http://apacweb.ag.utk.edu/tobinfo.html> and on the Kentucky Governor's Office of Agricultural Policy's website at: <http://agpolicy.ky.gov>.

In 2004, a program came into effect under the "Tobacco Payment Program" or buy-out, which eliminates the present quota and price-support system. It also eliminated Phase II payments, and will pay out over a 10 year period. The program differentiates between "grower" and "owner," and it is possible for an individual to receive pay-outs from this program as both the "owner" of a tobacco quota and as a "grower." Financial institutions may make a discounted lump sum payment to farmers in exchange for receipt of their annual payments.[46]

[46] For a discussion of the classification, as either marital or non-marital property, of payments from the Tobacco Transition Payment Program ("TTPP"), see *Jones v. Jones*, 245 S.W.3d 815, 817-820 (Ky. Ct. App. 2008).

Another program stems from litigation arising in the United States District Court in Greensboro, North Carolina, *Deloach v. Philip Morris*. There have been two settlements reached in that action. Payments from these settlements differentiate between "grower" and "owner," and the same individual may receive payments as both an "owner" and a "grower."

XVI. [7.44] Requirement of Financial Disclosure at Beginning of Case

In 2011, the Kentucky Supreme Court issued the Family Court Rules of Procedure and Practice ("FCRPP", which governs all family courts, and requires both parties to exchange a Preliminary Verified Disclosure Statement (AOC-238) and file a Final Verified Disclosure (AOC-230)). FRCPP 2(1), 3(3). These forms include the disclosure of the address where property is located, fair market value, debt and equity, and to provide opposing counsel with a copy of the deed to the property, documentation of all indebtedness, including the unpaid balance and the payoff, for each debt, and the current tax assessment. This rule applies to all real estate, residential or business and is required early in the case. A party is also required to disclose any claims to a non-marital interest in property and their basis for asserting such a claim.

XVII. [7.45] Expert Witness/Assembling Documents

When choosing a valuation expert, it is preferable to retain an individual holding professional certification. There are a number of certifying agencies and designations. These certifications include Accredited Senior Appraiser ("ASA") and Accredited Member ("AM") of the American Society of Appraisers, Accredited in Business Valuation ("ABV") from the American Institute of Certified Public Accountants, Certified Valuation Analyst of the National Association of Certified Valuation Analysts, Certified Business Appraiser ("CBA") of the Institute of Business Appraisers, and the Chartered Financial Analyst ("CFA") of the Association for Investment Management and Research, and Senior Residential Appraiser ("SRA") and Member Appraisal Institute ("MAI") for realtors.[47]

Unless otherwise specifically noted, all references to Pratt are to the fifth edition. This work is the seminal resource on appraisals. While this chapter refers extensively to Pratt, for a less detailed analysis on practical problems of valuation

[47] The requirements involved for receiving most of these certifications and information involving the certifying organization can be found in Chapter 1 of Shannon P. Pratt & Alina V. Niculita, Valuing a Business: The Analysis and Appraisal of Closely Held Companies, (5th ed. 2008), hereafter Pratt.

and with a greater focus on case law, see GRAHAM & KELLER, *supra* note 8, REVELL & SKAGGS, *supra* note 32, OLDFATHER, *supra* note 14; and OLDHAM, *supra* note 6.

In domestic relations, as in all litigation, the expert must be selected with care. When valuing real estate, the expert preferably should be credentialed as a MAI or SRA, be intimately familiar with the local real estate market, and be experienced on the witness stand. It is advantageous to have an expert who has already qualified in the court in which the case is to be heard and who has a successful track record in that court. In other words, the expert must be able to (1) make a sound appraisal or evaluation of an asset's worth, and (2) adequately explain and defend the appraisal to the court. Counsel and appraiser should work closely together in order to assure that all legally relevant factors have been considered in the final evaluation.

The appraiser must also thoroughly prepare the documentation underlying his or her evaluation, and have it in a format appropriate for the court. One factor that the appraiser should remember is that the court may not have the background or expertise to readily understand the information given, and that additional steps may be required to make it comprehensible to the trier of fact.

Another important area in which an appraiser or expert may be of use is assisting in pre-trial discovery. Discovery efforts may prove largely worthless if they fail to provide the expert with the necessary information on which to base his or her evaluation. Documents that are almost always required are operating statements, income tax returns, ownership lists, prior transaction information and documentation of ownership of the subject assets. PRATT, *supra* note 48, 1019. A useful and comprehensive discussion of the expert's role in litigation and preparation may be found in Chapters 40 and 41 of the PRATT treatise.

The practitioner will want to assemble all documentary evidence required by the expert witness for establishing the value of the corporation or business entity. Such evidence would ordinarily include corporate or business tax returns, financial statements, when available, loan applications, other corporate records, such as minutes of stockholder or owner meetings, buy/sell agreements and stockholder or owner employment or compensation agreements. However, courts occasionally reject such documentation as not reflecting the actual value of the business. *Belt v. Belt*, 672 P.2d 1205 (Or. Ct. App. 1983) (loan application not dispositive); *In re Marriage of Rieb*, 449 N.E.2d 919 (Ill. App. Ct. 1983) (corporate tax returns not dispositive).

Discovering the value of the marital business may prove difficult, as the non-owner spouse may not have access to the business records. The business entity will ordinarily not be a party to the divorce proceedings and so must be served with a subpoena duces tecum pursuant to CR 30.02. In *Broida v. Broida*, 388 S.W.2d 617 (Ky. 1964), the court upheld such discovery over a husband's objections. The business party may request that the spouse execute a confidentiality agreement. Taking steps to protect an entity's customer list and other proprietary information

is appropriate and frequently done. Once assurance is given, the trial court usually compels production of documents or discovery, but the process is not foolproof.

XVIII. [7.46] Business Assets

One of the most difficult tasks a family law practitioner is likely to face is the valuation of the parties' business assets and holdings. Valuation of businesses is a highly specialized field, and expert assistance is essential, both in the preparation, and presentation, of the case. This scenario is particularly true in cases involving individuals who have high incomes and/or substantial financial holdings.

A. [7.47] Forms or Entities for Doing Business

The practitioner must have a basic knowledge of the business form or entity involved in order to judge the sophistication of the expert witness needed to be engaged, to allow him or her to properly cross-examine that expert and understand any special rules and restrictions that may apply. Sole proprietorships remain the form in which many small businesses are conducted, but there is an increasing tendency for business owners to seek the varied protections available from other business entities. The corporate form of business has been in existence for many years as a separate entity which provides the client with insulation of his or her personal wealth. Unless a Subchapter S election is made, the disadvantage of selecting the corporate form is that the income is taxed at both the corporate and individual level.

Likewise, the general partnership has a long history in law. Since all partners to the partnership are jointly and severally liable for the obligations of the partnership, this entity presents significant risks to owners of partnership interests.

To eliminate these drawbacks and allow for other advantages, such as of continuity of life, free transferability, organized management, and most importantly limited liability and one level of taxation, the traditional forms of business entity (sole proprietorship, general partnerships and corporations) have "morphed" into several types of business entity created to meet the pass-through tax advantages under the Internal Revenue Code. These include:

The limited liability partnership ("LLP");

The sub-chapter S corporation ("Sub-S"); and

The limited liability company ("LLC").

Valuation of partnership interests is similar to valuing interests in closely-held corporations, discussed below; *see* Barth H. Goldberg, VALUATION OF DIVORCE ASSETS § 15.553 (rev. ed. 2005).

The practitioner should familiarize himself or herself with the rudiments of partnership law. Kentucky adopted the Uniform Partnership Act in 1954, KRS 362.150 *et seq.* and the Uniform Limited Partnership Act in 1988.

In addition to general partnerships, the Act provides for the establishment of limited partnerships, the names of which must contain either the word "limited," or the abbreviation "Ltd." or "LLP," and limited liability limited partnerships, which must be abbreviated as "LLLP." It adopted the amendments to the Uniform Partnership Act approved by the National Conference of Commissioners on Uniform State Laws in 1994 and 1997 and the Uniform Limited Partnership Act approved by the Commissioners in 2001.

While a comprehensive analysis of the Act is beyond the scope of this work, the practitioner seeking to divide partnership assets should carefully examine Chapter 362 of KRS before proceeding, and should look specifically for provisions which may restrict the partners, thus becoming an issue in the valuation of the asset. *See* GRAHAM & KELLER, *supra* note 8, § 15:81, for a tax sheltered partnership interest.

S corporations allow the taxpayer to elect to have the entity's income taxed at the shareholder level, but there are certain limitations involved: there can only be a limited number of shareholders, only one class of stock and all shareholders have to be U.S. citizens.[48] Though the S corporation is popular, the use of limited liability companies is growing in popularity.

The limited liability company, taxed as a disregarded entity or sole proprietorship, likewise offers the pass-through tax benefits of a Sub-S or LLP, requires only one owner and has no restrictions on foreign membership. *See* Thomas E. Rutledge & Lady E. Booth, *The Limited Liability Company Act: Understanding Kentucky's New Organizational Option*, 83 KY. L.J. 1 (1995). It is an entity through which a sole proprietor can enjoy both a single level of taxation and limited liability. *Id*.

The type of business entity has no bearing upon the asset's classification as marital or non-marital. However, the practitioner should be generally familiar with the statutory requirements and rights and privileges of each type of entity. With an LLP, LLC, or even a trust's income, if 100% of the ownership of the entity is by a single individual or jointly by husband and wife, the income may be reported solely on the individual's tax return or on the couple's joint tax return.

In viewing valuation issues, practitioners must remember that:

1. There is no single best approach for valuing all businesses. All approaches, and the methods within those approaches must be considered.
2. The trial court's approach must reasonably approximate the net value of the business,

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[48] *See* KEATS, 4A KY. PRAC. METHODS OF PRAC. § 13:5 (2011).

3. The appellate court will not disturb the lower court's finding unless "it is clearly contrary to the weight of the evidence," *Clark v. Clark*, 782 S.W. 2d 56, 59 (Ky. Ct. App. 1990).

GRAHAM & KELLER made an exhaustive analysis of factors to be considered in valuing a closely-held business citing a number of out of state cases. GRAHAM & KELLER, *supra* note 8, § 15.74. Those factors include nature and history of the business, financial condition and outlook of the particular business, earning capacity of the business, goodwill or other intangible value, initial capitalization, industry outlook, book value of the stock, size of the block of stock to be valued, dividend paying capacity of the company, and corporate principal's services.

The field of appraisal is made up largely of real estate appraisers, and in more limited numbers, members of the securities or financial sectors. PRATT explains that the resulting American Society of Appraisers Business Valuation Standards recognize an "income approach," a "market approach," analogous to the realtors' sales comparison approach, and an "asset based approach," which Pratt concludes is "somewhat analogous to real estate's 'cost' approach..." PRATT, *supra* note 48, at 62. All are interrelated. These broad approaches may include different methodologies, which "refer to more specific ways to implement a business valuation within one of the three broad approaches." *Id*. For example, "discounted cash flow" method (income approach), adjusted net asset method ("asset based approach"), and "guideline company method" ("market approach"). *Id*. at 62. For further explanation of the methodology in the approaches cited above, see PRATT, *supra* note 41, at 62-65. For the many other methodologies used, see Chapters 9-14 of PRATT.

These approaches apply to all forms of ownership, although the final result may vary due to the restrictions resulting from corporate or partnership ownership. The final valuation may then be bifurcated due to hybrid property containing both marital and non-marital elements.

The practitioner must have a basic comprehension of terms used, understanding from the beginning that the term "value" means different things to different individuals. PRATT, *supra* note 48, at 41. PRATT and his co-authors (and most other professionals), use the term "Standard of Value" to define the type of value being sought, that is "fair market value," "intrinsic value," "investment value," or "fair value," or many others. *Id*. at 41-46. A Premise of Value must be distinguished as an assumption of actual or hypothetical transactional circumstances applicable to the subject valuation. *Id*. at 41. PRATT includes a chart that attempts to match the valuation purpose to the applicable Standard of Value and concludes, respecting marital dissolution cases that: "No standard of value [is] specified in most state statutes. Case law [is] inconsistent, often within the same state. Case law also tends to be confusing, *e.g.*, even if "fair market value" [is] specified in [a] decision, [the] actual valuation practice used frequently differs markedly from strict interpretation of fair market value as found in tax case law." *Id*. at 47.

Valuing a business can become quite complex unless the practitioner is closely aligned with the financial and accounting worlds.

B. [7.48] Capitalized Earnings and Capitalized Excess Earnings

The Capitalized Earnings Method is a method often used to value closely-held business interests, particularly where earnings of the business have been positive and are closely aligned with the revenue generated both on the tangible and intangible assets of a business.

The Capitalized Excess Earnings Method, is another method for valuing very small businesses, professional practices where the value of the business or the professional practice is dependent on the services of one or more individuals, and the value of the business is linked more to the value of the intangible assets, primarily good will. The Excess Earnings Method has been in existence since the 1920s, is and is discussed, at length, in Chapter 13 of PRATT.

GRAHAM & KELLER, *supra* note 8, § 15.75, at 1075-76 explain the Excess Earnings Method in much more easily understood terms. They state:

> [w]hen business success is largely dependent on factors other than tangible assets, courts from other jurisdictions have emphasized business earning capacity in valuing a closely-held corporation. Several formulas have been applied to business earnings. One popular formula involves capitalization of excess earnings, sometimes called capitalization of goodwill. Capitalization of business earning power treats the business as an income-producing unit similar to a bond or stock. This method renders the business value equal to the present worth of a series of probable incomes discounted at the rate of interest earned by similar investments. Capitalization of excess earnings may be particularly important when the closely-held corporation is also a subchapter S corporation, which pays earnings to the corporate principals so that little or no equity accumulates in the corporation.

The Capitalization of Excess Earnings Method has obtained considerable favor with the courts,[49] particularly in valuing professional practices, but is disfavored by the Internal Revenue Service. It falls within the three broad methods (Cost, Market and Income) as an "Income" methodology.

A step-by-step explanation, together with an illustrative example, is included in PRATT, and merits close study. PRATT, *supra* note 48, at 334-47. The practitioner should note that the calculations can become extremely complicated, and require expert assistance. Further, experts using the same methodology can differ significantly in selecting factors to include. *Id*. at 346-47. In *Thill v. Thill*, 26 S.W.3d 199 (Mo. Ct. App. 2000), both parties' experts used "excess earnings"

[49] Including Kentucky in *Clark v. Clark*.

to fix the value of the corporation. One, however, reduced earnings by allowing for depreciation, while the other ignored the depreciation for those assets which had not, in fact, lost value. Moreover, one expert valued only the parent corporation, while the other included the subsidiary corporations. Further discussion of this point may be found in *In re Watterworth*, 821 A.2d 1107 (N.H. 2003); *Dean v. Dean*, 275 N.W.2d 902 (Wis. 1979); and GOLDBERG, *supra*, § 6.7.

C. [7.49] Special Problems with the Capitalized Excess Earnings Method – Cap Rates and Discounts

It is this writer's experience that the two most contested issues in valuation cases are the capitalization rate and the proper percentage allowed as discount. For a more detailed explanation of capitalization rates and discounts, see Sections [7.55] and [7.56], *infra*. It is imperative for the practitioner and the expert to work together closely in preparation for trial, direct and cross-examination. In some cases, the expert may need to acquaint the judge with the methodology utilized. The respective experts often argue their positions to one another during negotiation, and then privately offer the practitioner their opinion of the strengths and weaknesses of their respective positions.

PRATT concludes that the most common errors in applying the excess earnings method are:

1. Failure to allow for shareholder/employee salaries;
2. Failure to use realistic estimate of future normalized earnings; and
3. Errors in developing the appropriate direct capitalization rates.

PRATT, *supra* note 48, page 345-46.

D. [7.50] Key Person's Income – Capitalized Excess Earnings Method

When using the Excess Earnings Method, which is a hybrid method, the practitioner must know whether or not the expert excluded the key person's income from the calculation. A business may be so dependent on a single person for its success that the potential loss of that person warrants a key person discount; simply, a reduction in the business' value to reflect the detrimental impact of the loss of a particularly vital employee. PRATT, *supra* note 48, at 460. *See* GRAHAM & KELLER, *supra* note 8, § 15.75, at 1076 for out-of-state cases requiring such exclusion.

E. [7.51] Normalized Earnings – Capitalized Excess Earnings Method

If, in order to reduce double taxation, the client pays himself or herself double compensation, or the owners choose not to create equity in the business, the expert may adjust the figure to reflect normalization of earnings. PRATT, *supra*

note 48, at 345. Normalized earnings "refers to economic benefits adjusted for nonrecurring, noneconomic, or other unusual items to eliminate anomalies and/or facilate comparisons." GRAHAM & KELLER at 1073. Failure to "normalize" the earnings results in unrealistic projections of future earnings and, since those unadjusted earnings are generally too high, the oversight leads to an overstatement of the company's value.

F. [7.52] Book Value

The term "book value" is actually an accounting term referring to the dollar amount at which the item is carried on the company's financial records and usually represents the cost of the item less depreciation. PRATT, *supra* note 48, at 350-51. The actual figures will, in today's world of increased prices, generally result in an undervaluation of the net tangible assets which in turn then requires application of a high capitalization rate, with the resultant undervaluation of the business.

G. [7.53] Capitalization Rate

The error PRATT cites, and one this writer believes to be most likely argued at the trial court level, is the proper capitalization rate. The "cap rate" is poorly understood by many people. This is hardly surprising, since, in searching for the best definition from the internet, WORDS AND PHRASES, case law and valuation treatises, it appears that most stop short of sufficiently defining it to the non-economic-minded reader. Pratt defines capitalization rate as "any divisor (usually expressed as a percentage) used to convert the anticipated economic benefits of a single period into value." PRATT, *supra* note 48, at 1070.

Another definition for legal practitioners is set out in the treatise AMERICAN JURISPRUDENCE, SECOND EDITION:

> After calculating a representative annual earnings figure (the previous step), the next step in calculating earnings...is choosing a capitalization ratio, more commonly referred to in investment circles as the price-earnings ratio. This ratio, or multiplier, reflects the prospective financial condition of the corporation and the risk factor inherent in the corporation and the industry, and indicates the stability and predictability of earnings of the corporation. The multiplier will be low if the financial outlook for a corporation is poor, or high if prospects are encouraging. Where the corporation is considered among the higher quality companies in the field, it may deserve a higher than average price/earnings ratio.

18A AM. JUR. 2D § 849 at 719 (1985) (parenthetical added).

PRATT explains capitalization as:

> *Capitalization*, for which a *capitalization rate*, is used, is a process applied to an amount representing some measure of economic income for some single period to convert that economic income amount to an estimate of present value. Capitalization procedures can be used with expected, current, historical, or "normalized" (or "stabilized") measures of economic income. If growth is expected from the base level of economic income being capitalized, then that expected growth is reflected in the capitalization rate.

PRATT, *supra* note 48, at 240. (italics in original).

Extensive research has disclosed no published Kentucky case in family law involving the capitalization rate as an issue. The practitioner should be certain that the expert is prepared to concisely and clearly justify his selection, and if the capitalization of excess earnings method is used to value a business, his selection of two capitalization rates, one for the tangible property and another for the intangible property (usually goodwill). PRATT includes an extensive discussion of the factors to be considered.

H. [7.54] Discounts and Restrictions

Pass through entities, such as partnerships and S corporations, and even C corporations when closely-held, present the practitioner with the issue of discounts and restrictions.

Although discount issues for the family law practitioner usually involve discounts for a minority interest or lack of marketability, they can apply to many factors, such as contractual restrictions (such as buy-sell agreements), key-person discounts or blockage discounts in connection with the sale of a large block of stock in the open market of a listed company. *See* PRATT, *supra* note 48, Part IV, Discounts, Premiums, and the Value Conclusion. One should note, especially, that the appraiser can add premiums to the value as well as reducing value through discounts.

PRATT defines discounting as:

> *Discounting*, for which a *discount rate* is used, is a process applied to one or a series of specific expected income amounts as of a specified time or times in the future to convert those expected amounts to an estimate of present value. The discount rate is applied to all the expected future economic income. Therefore, any expected future growth in returns is captured in the numerator of the discounted economic income formula.

PRATT, *supra* note 48, at 240 (italics in original).

There is a difference of opinion among the various states as to whether or not a buy-sell agreement should control or to what extent it should affect valuation. In *Drake v. Drake*, 809 S.W.2d 710 (Ky. Ct. App. 1991), Kentucky held that it is not dispositive, but only a factor to be considered.

I. [7.55] Going Concern Value

As with all matters of valuation, the facts surrounding the entity govern. Most entities can be valued at their going concern value, defined by PRATT as: "Value in continued use, as a mass assemblage of income producing assets, and as a going-concern business enterprise." PRATT, *supra note* 48, at 47. If the circumstances warrant a lesser valuation, the appraiser may elect to appraise the business using three lesser premises of value:

> Value as an assemblage of assets – Value in place, as part of a mass assemblage of assets, but not in current use in the production of income, and not as a going-concern business enterprise.
>
> Value as an orderly disposition – Value in exchange, on a piecemeal basis (not part of a mass assemblage of assets), as part of an orderly disposition; this premise contemplates that all of the assets of the business enterprise will be sold individually, and that they will enjoy normal exposure to their appropriate secondary market.
>
> Value as a forced liquidation – Value in exchange, on a piecemeal basis (not part of a mass assemblage of assets), as part of a forced liquidation; this premise contemplates that the assets of the business enterprise will be sold individually and that they will experience less than normal exposure to their appropriate secondary market.

PRATT, *supra note* 48, at 47.

Value as a forced liquidation is the valuation methodology often threatened by the spouse seeking to retain the business entity post-decree. Simply put, this is the proverbial "fire sale."

J. [7.56] Valuing Goodwill

Justice Story defined goodwill as follows:

> Goodwill may be...described to be the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital stock, funds or property employed therein, in consequence of general public patronage...which it receives from constant or

> habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence or punctuality.

Hon. Joseph Story, COMMENTARIES ON THE LAW OF PARTNERSHIPS § 99 (1868).

Justice Story's definition is sometimes abbreviated to the statement that the goodwill of a business is the expectation of continued public patronage. CAL. BUS. & PROF. CODE § 14.100. Economists describe goodwill in terms of any excess return on the tangible assets of the business, over and above a "fair" return on these assets. Udinsky, *An Economist's View of Professional Goodwill in a Community Property Setting*, 5 COMM. PROP. J. 91, 92-93 (1978).

Goodwill may arise from a number of factors. It may result from the location of the business, its good reputation, *In re Marriage of Hull*, 712 P.2d 1317 (Mont. 1986), or from established relationships, *Frazier v. Frazier*, 737 N.E.2d 1220 (Ind. Ct. App. 2000). Traditionally, goodwill only attached to the business; to the extent the reputation was associated with an individual, it was not considered part of goodwill. 2 OLDFATHER, *supra* note 14, § 22.05[6], at 22-72, 22-73 nn.4-5. It is not the same as the future earning capacity of the owner, or any other person. Allen Parkman, *The Treatment of Professional Goodwill in Divorce Proceedings*, 18 FAM. L.Q. 213 (1984).

Divorce courts may determine that a business has goodwill even absent customer loyalty. *Wisner v. Wisner*, 631 P.2d 115 (Ariz. Ct. App. 1981). Consequently, it is not always clear when a spouse has established a "business" that could have goodwill.

Business size does not determine the existence of goodwill. A helpful analysis is included in the Internal Revenue Rulings in which the IRS stated: "In the final analysis goodwill is based on earnings capacity," and has added that to make such an evaluation: "Detailed profit and loss statements should be obtained and considered for a representative period immediately prior to the required period immediately prior to the required date of appraisal, preferably five or more years." Internal Revenue Ruling 59-60, § 4.02 (d)(f).

In calculating average earnings, "weighting" is frequently used. Ronald L. Brown, VALUING PROFESSIONAL PRACTICES AND LICENSES, § 10.02 [b][4] (3d ed. 2006). Alternatively, it is permissible to make the determination by utilizing the "capitalization of excess earnings" method described herein. Internal Revenue Ruling 68-609.

Heller v. Heller, *infra*, was the first Kentucky case to define goodwill, which it explained as professional practices that can be sold for more than the value of their fixtures and accounts receivable. *Clark v. Clark, infra*, provided numerous definitions or explanations of goodwill. At its most basic level, "goodwill" is the expectation that business, clients, customers, or patients will return for repeat business based upon the good reputation of the entity. Goodwill has a specific pecuniary value. "Goodwill" was also defined in *Clark* as "the excess of return in a

given business over the average or norm that could be expected for that business," that is, as against its peers. 782 S.W.2d at 59.

In *Heller v. Heller*, 672 S.W.2d 945 (Ky. Ct. App. 1984), the court held that business goodwill could be treated as marital property. That case concerned the husband's accounting practice. The appellate court held that goodwill has a definable value distinguishable from the future earning capacity generated by a professional license or degree.[50]

In *Clark v. Clark*, 782 S.W.2d 56 (Ky. Ct. App. 1990), the court returned to the subject. The husband, a medical doctor, argued that the trial court had impermissibly valued and divided his future earning capacity. The appellate court disagreed, holding that because the husband's expert's testimony had been based on Dr. Clark's past earnings, his future earning capacity had not been considered.

It is worth noting that Dr. Clark was a member of a three-member professional service corporation; he was not a solo practitioner. The result would have been different if he had been in solo practice, since a number of cases have held that solo practitioners do not have goodwill. *See, e.g., Gaydos v. Gaydos*, 693 A.2d 1368 (Pa. Super. Ct. 1997).

In *Gaskill v. Robbins*, the Kentucky Supreme Court considered the valuation of an oral surgery practice, where the owner-spouse was the sole proprietor and only practitioner. 282 S.W.3d 306 (Ky. 2009). In considering the division of this marital property, the court, for the first time, made a distinction between personal goodwill and enterprise goodwill. Personal goodwill is dependent upon "the continued presence of a particular individual" as it is "attributable to the individual owner's personal skill, training, and reputation. As a consequence, it is considered only as future earning capacity of the individual and is not divisible. Enterprise goodwill is the "intangible, but generally marketable component of a business." It is affected by factors such as the business's location, its name recognition, and its business reputation, among other factors.

The Kentucky Supreme Court, in the first *Gaskill* case, rejected, in its entirety, that personal goodwill could be divisible as marital property. As will be discussed below, the court also rejected the argument that professional licenses and degrees constitute marital property. *Gaskill v. Robbins,* 282 S.W.3d 306, 312 (Ky. 2009). The court in rejecting the concept that personal goodwill can be sold held, "there can be little argument that the skill, personality, work ethic, reputation, and relationships developed by Gaskill are hers alone and cannot be sold to

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[50] The *Heller* court, *quoting Re Marriage of Nichols*, 606 P.2d 1314 (Colo. Ct. App. 1979) defined "goodwill" as follows: "A professional, like any entrepreneur who has established a reputation for skill and expertise, can expect his patrons to return to him, to speak well of him, and upon selling his practice, can expect that many will accept the buyer and will utilize his professional expertise. These expectations are a part of goodwill, and they have a pecuniary value." *Heller v. Heller*, 672 S.W.2d at 948.

a subsequent practitioner." *Id.* at 315; *see also*, Suzanne Baumgardner, *et al*., *Is Fair Market Value Really "Fair"?*, Fifteenth Annual AAML/LBA Family Law Seminar (Apr. 26, 2012).

While the learned court may be correct in many cases, the reality of the regular use of non-compete agreements in the market place stands contrary to this blanket assertion. Non-compete agreements frequently restrict the seller from competing with the buyer after the sale. Restrictions as to geographical practice and time are common place. Moreover, it is common for the seller to continue working in the business as a consultant or an employee for a specified period of time after the sale to impart his skill, reputation and relationships to the new owner. This was the original holding of the trial court and it is the law in other states, such as Wisconsin. *See McReath v. McReath,* 800 N.W.2d 399 (Wis. 2011).

In rejecting the assumption by the husband's expert that the business would be sold with a non-compete agreement to enhance the value of the business, the majority of the court stated:

> Further complicating the matter, the practice was not actually being sold and was assigned in its entirety to Gaskill. Part of the value the trial court relied on that could impact a goodwill valuation was the assumption by Callahan that a non-compete agreement should be part of the valuation. While fair market value of Gaskill's practice anticipates what a willing buyer would give a willing seller, the fictional sale must be viewed as a "fire sale," meaning that it must be valued in its existing state. This precludes factoring in a non-existent non-compete clause, as there is no requirement that she enter into one other than as a possible negotiated term of a real sale. It was improper to include such a speculative item to enhance the value of the practice.

Gaskill, 282 S.W.3d at 316.

The evaluation of the wife's surgery practice spawned an additional appellate opinion, in 2012, when the wife appealed the trial court's valuation of that business. *Gaskill v. Robbins*, 361 S.W.3d 337 (Ky. Ct. App. 2012). In this opinion, the court found that it was appropriate to evaluate the wife business at an earlier date, rather than at the date of dissolution. *Id*. at 340. This decision was based, in part, on the fact that the business, in the year that the wife proposed to be evaluated, had an unusually low revenues. *Id*.

As indicated, *Drake v. Drake*, 809 S.W.2d 710, 713 (Ky. Ct. App. 1991) holds that a buy-sell agreement can be considered as a factor, but is not a determinative factor, in the valuation of goodwill; but some courts differ with Kentucky. *See* Graham & Keller, *supra* note 8, § 15.80, at 1082 nn.1-2.

In addition to capitalization of excess earnings as found in the *Clark* case, there are a number of formulae for determining the value of goodwill; *see*

Fred Kennedy and Bruce Thomas, *Putting a Value on: Education and Professional Goodwill*, 2 FAM. ADV. 1: 4 (Sum. 1979); George M. Norton, *Professional Goodwill – Its Value in California Marital Dissolution Cases*, 3 CMTY. PROP. J. 9, 13 (1976). Other valuation formulae have been based on net profits, *see EEC v. EJC*, 457 A.2d 688 (Del. 1983), or gross receipts of the business. *Poore v. Poore,* 331 S.E.2d 266 (N.C. Ct. App. 1985). Whatever method the court chooses must have a "rational basis", be supported by "adequate evidence", and avoid "speculation and assumptions." *Gaskill*, 282 S.W.3d at 315. The court must select *a* valuation method, as averaging the results of more than one method "is nothing more than making up a number." *Id*. The *Gaskill* court further decried the use of averaging when it said, "[t]he trial court must fix a value, and there should be an evidenced-based articulation for why that is the value used. While an average may present the easiest route, it lacks the proper indicia of reliability." *Id*.[51]

In determining the fair market value of a business, the *Gaskill* court found that a trial court must be able to answer the following questions:

1. What can be earned from the business over a reasonable period of time? This value must then be reduced to present value, and includes the concept of transferable goodwill.
2. What is the value of the hard assets? This includes real estate, equipment, client lists, cash accounts or anything else the business may own or control.
3. What is the value of the accounts receivable? This has a potential discount because all the accounts may not be collectible.
4. What is the value of the training of the personnel who will remain with the practice, or what is the cost to train new personnel?
5. What are the liabilities that will remain after the purchase? This includes personnel salaries, taxes, debt service, and other costs of doing business.

Id. at 311-12.

XIX. [7.57] Degrees and Licenses

In Kentucky, as elsewhere, the divisibility of professional degrees and licenses has generated considerable litigation. *See generally* BRETT R. TURNER, *supra*,

[51] It is worth noting that four of the Justices strongly disagreed with the majority opinion on this point. Prior to *Gaskill,* it was commonplace among experts to average values derived from various accounting methods.

§§ 6.20, 6.21 (2d ed. 1994). The Ohio Supreme Court has characterized this issue as the "diploma dilemma." *Stevens v. Stevens*, 492 N.E.2d 131, 132 (Ohio 1986).

The problem typically arises when one spouse elects to enter a graduate or professional school and pursue a degree leading to a professional license, while the other spouse assumes primary responsibility for supporting the family. If the student spouse then files for divorce shortly after completing his or her studies and obtaining a professional license, the other spouse feels, not unnaturally, that he or she should receive a portion of the enhanced earning capacity the degree and/or license represents. Fairly compensating the non-student spouse has not proved to be a simple matter.

Much of the conflict between established legal principles and the court's desire to treat the non-student spouse equitably arises from the fact that degrees and licenses lack most of the attributes commonly associated with "property." They have no objective transferable value in the open market. They are personal to the holder, terminate on his or her death, and are not inheritable. They cannot be assigned, sold, transferred, conveyed, or pledged. They do not possess the usual attributes of property. They instead represent, "an intellectual achievement that may potentially assist in the future acquisition of property." *In re Graham*, 574 P.2d 75, 77 (Colo. 1978) (disapproved), *In re Marriage of Olar*, 747 P.2d 676, 682 (Colo. 1987)), *cited with approval* in *Inman v. Inman*, 578 S.W.2d 266, 268 (Ky. 1979).

Therefore, while New York, Michigan, and Oregon have chosen to treat professional degrees and licenses as marital property, *O'Brien v. O'Brien*, 66 N.Y.2d 576 (N.Y. 1985); *Postema v. Postema*, 471 N.W.2d 912 (Mich. 1991); all other states, including Kentucky, have chosen to address the "diploma dilemma" through other remedies.

The value of an individual's professional license, degrees, and personal skills is often tied to the value of an individual's professional practice. The Kentucky Supreme Court in the first *Gaskill* case, rejected the concept of personal goodwill as marital property and rejected the argument that professional licenses and degrees constitute marital property. The court held that professional licenses and degrees are excluded as marital property as they are "personal to the holder and cannot be transferred to another." *Gaskill v. Robbins,* 282 S.W.3d 306, 312 (Ky. 2009). The court made a comparison between the transferability of personal goodwill and the transferability of a professional license or degree and held, "there can be little argument that the skill, personality, work ethic, reputation, and relationships developed by Gaskill are hers alone and cannot be sold to a subsequent practitioner." *Id.* at 315.

In *Coots*, the Court of Appeals determined that a wife was not entitled to a share of her husband's retirement account as her interest in the account was offset by the two degrees that she earned during the course of the parties' marriage. *Coots v. Coots*, 2006 WL 2328487 (Ky. Ct. App. 2006).

The *Shively* court, relying upon *Schmitz*, reaffirmed that, while a professional degree is not marital property, it can be used as a factor in determining the distribution of marital property. *Shively v. Shively*, 233 S.W.3d 738 (Ky. Ct. App. 2007) (finding, however, that appellant had not contributed to her spouse's degree, as the appellee's employer had paid for the degree and the appellee had not taken a break in his employment while earning the degree).

While it is clear from the above case law that professional licenses and degrees are nonmarital property even if the other spouse supported the degreed spouse while in school, Kentucky courts still have some ability to compensate the other spouse such as through maintenance or making an unequal division of property.

XX. [7.58] Valuing Closely-Held Businesses in Kentucky

The seminal case on valuing closely-held businesses in Kentucky is *Clark v. Clark*, 782 S.W.2d 56 (Ky. Ct. App. 1990). The court stated:

> Kentucky courts have not specifically adopted an approach in valuing such assets. Other states have applied a "book value" approach or a fair market value approach. In no case cited by appellant however would a court solely use a book value approach when this method would not correctly value a corporation's assets. When the terms of a partnership agreement are used, however, the value of the interest calculated is only a presumptive value, which can be attached by either plaintiff or defendant as not reflective of the true value. There is no single best method. The task of the appellate court is to determine whether the trial court's approach reasonably approximated the net value of the partnership interest.

Id. at 59.

The court explained that when a business entity's agreement stated a certain value for that business, that sum would be only a presumptive value subject to attack, if not reflective of true value. The *Clark* court explicitly stated that the trial court's task was to determine whether its approach reasonably approximated the net value of the partnership interest. *Clark* also held that a corporation's goodwill was appropriate for division in dissolution of marriage actions and that corporate bylaws forbidding consideration of goodwill in future purchases did not preclude considering goodwill in a divorce. Citing *Heller*, the *Clark* court reiterated that a business's goodwill was subject to valuation and division in a divorce.

In *Clark*, the court held that the standard of review on appeal is whether the trial court reasonably approximated the company's net worth, and that the trial court's determination would not be disturbed unless clearly contrary to the weight

of the evidence. *Clark* at 58, citing *Heller*. The *Clark* court extensively examined the methodology used by two experts in valuing the professional corporation, *i.e.*, a medical practice composed of three doctors specializing in obstetrics and gynecology. The successful litigant in *Clark* had utilized the capitalization of excess earnings method, but the Court of Appeals explained that no single valuation methodology is best.

The expert who used the capitalization of earnings method believed this method best reflected the actual value of the business as it took into consideration such items as collectability of aged receivables, while factoring in the value of inventory, equipment and the insured value of the practice. The court felt that the fair market value afforded more opportunities to address the specifics of a business entity and was therefore preferable to book value. The fact that the trial court had considered the value of goodwill was specifically attacked on appeal.

Accountants specializing in valuations freely admit that this area is one of art rather than science. As a practical matter, wide discrepancies in the estimated values of businesses, referred to as "the battle of the experts," can occur as certain adjustments, albeit somewhat subjective, are made to normalize earnings. Rarely are entirely divergent methodologies used to value a business. Rather, one sees subtle disputes over capitalization rates or the extent to which earnings were normalized and almost always a difference of opinion as to marketability discounts.

The *Clark* court applauded the excess of earnings method as the most widely accepted and used methodology nationwide, a truism in 1980 as well as today. Later cases have only recognized additional factors to be considered in valuing businesses and have in no way sought to supplant *Clark*'s guidelines in this area.

In the second *Gaskill* case, the Court of Appeals in holding that the trial court is not limited to a specific valuation method, as set forth in *Clark*, held that:

> Gaskill first argues that the trial court abused its discretion by failing to adopt the business valuation performed closest to the date of the decree. We disagree. Contrary to Gaskill's assertions, there is no presumption that assets should be valued within close proximity to the date of the decree. While other jurisdictions have applied a "book value" approach to valuation, Kentucky law has not specifically adopted one method of valuation. The trial court must consider a variety of factors to properly value a business, including which calculations best represent the business's value.

Gaskill v. Robbins, 361 S.W.3d 337, 340 (Ky. Ct. App. 2012). Accordingly, the second *Gaskill* court upheld the trial court's discretion to choose a date to value a business other then the date of the decree.

Drake v. Drake, 809 S.W.2d 710 (Ky. Ct. App. 1991), reaffirmed the *Heller* and *Clark* courts' recognition of goodwill. The court upheld the wife's expert's capitalization of excess earnings value. The trial court rejected the husband's

buy-sell agreement as the basis for valuing the husband's one-fourth interest in a medical practice, holding that the buy-sell agreement established artificially low values for the shares. The *Drake* court addressed, as a matter of first impression, whether a buy-sell agreement is binding on a spouse in divorce. Kentucky endorsed the majority rule that buy-sell agreements are not enforceable against a spouse for dissolution of marriage purposes, concluding that such agreements are only a factor to be considered in the valuation of the business. The *Drake* court stated that the majority "position is sound because that approach would produce a value closer to what one could receive in a free and fair market." *Id.* at 713. The *Drake* court recognized that one, if not more, states had held buy-sell agreements to be enforceable against the opposite spouse, but they squarely rejected this conclusion.

In *Gomez v. Gomez*, 168 S.W.3d 51 (Ky. Ct. App. 2005), the Court of Appeals "reluctantly affirm[ed] the court's ruling as to the valuation of a husband's one-third interest in a medical/radiology practice." The husband's valuation expert relied solely on book value, attributing no goodwill to the practice. The wife's expert relied on a capitalization of excess earnings method. The Court of Appeals' decision strongly reaffirmed the rulings in both *Heller* and *Clark* and flatly stated that it would have reached a different conclusion as to the value of the business.

Relying heavily on *Heller*, and pointing out that the *Heller* decision did not mandate that all businesses would have goodwill, the *Gomez* court revisited *Heller* and *Clark* and reiterated that *Clark* remains the seminal case. *Gomez* at 55. *Gomez* points out that *Clark* "discussed at length the task of properly valuing a professional practice for dissolution purposes and concluded the use of the capitalization of excess earnings method to value the husband's medical practice was an acceptable approach." *Id.* The *Gomez* court further stated, however, that "*Clark* does not require a trial court to use the capitalization of excess earnings method", *id.*, and explained that the appellate court's task was to determine whether the trial court's approach fairly estimated the value of the business and the individual's interest.

The Court of Appeals disagreed with the trial court's conclusion that the husband's hospital-based medical practice, which had no patient list or patient contact, was so dissimilar to the medical practice in *Clark* as to justify attributing no goodwill. The *Gomez* court further stated that it would have reached a different conclusion on the evidence. However, it could not conclude that the trial court's decision was not supported by substantial evidence, and therefore, they reluctantly affirmed the trial court's valuation of the medical practice. *Gomez* at 56.

In an unpublished 2004 case involving a medical practice from Jefferson County, *Sweet v. Sweet*, 2004 WL 2153063 (Ky. Ct. App. 2004), the Kentucky Court of Appeals, Judges Minton, Schroder and Taylor, refused to apply a minority discount, citing Shannon Pratt, co-author of the treatise so frequently referenced in this chapter. Judge Schroder, writing for the panel, explained the parties' respective arguments:

> [Dr. Sweet's expert] maintains that the restrictive buy/sell agreement between the parties which does not contemplate any value for goodwill is conclusive as to Dr. Sweet's interest in the practice. [Mrs. Sweet's expert] contends that various valuation approaches must be considered and he opined that the most appropriate valuation approach involves calculating the capitalization of excess earnings in Dr. Sweet's practice, basically, the intangible asset defined as goodwill... [He] explains that the "capitalization of Excess Earnings" method is an income-oriented approach used to value the interests of a physician in a medical practice based on future estimated earnings of the physician. Excess earnings are those available after a fair return on tangibles and are attributable to intangible assets or goodwill.
>
> [He further stated that he] "used the capitalization of excess earnings method to arrive at a value of $810,000.00. [He] further acknowledges that while he utilizes 'boiler plate' Internal Revenue Service terminology defining fair market value, he is in reality using a standard of value often referred to as 'intrinsic value' which refers to the value as a going concern to the owner, regardless of whether or not his interest could be sold. Although [Dr. Sweet's expert] looked at Dr. Sweet's income for the past five years, he used only his wage earnings for the year 2001 to perform his evaluation. [He] notes that the value of a medical practice within the context of a dissolution proceeding is the value of the overall investment to the shareholder rather than what, if any amount, the practice could be sold for."

Sweet at * 6-7.

The lower court refused to apply a minority discount because marketability was not a factor. Shannon Pratt opines that "minority discounts are commonly not relevant to small professional practices where each partner exercises considerable decision-making regarding his practice even though he does not have a majority interest." *See also*, *Cornett v. Cornett*, 2005 WL 2323363 (Ky. Ct. App. 2005), *Tatum v. Tatum*, 2004 WL 1488307 (Ky. Ct. App. 2004) and *Zambos v. Zambos*, 2004 WL 594990 (Ky. Ct. App. 2004), all of which should be studied.

For the Kentucky Supreme Court's recent pronouncement, concerning the valuation of goodwill, and its effect on the value of a small business, see the discussion of *Gaskill v. Robbins*, at Section [7.56], *supra*.

A. [7.59] Fair Market Value Versus Fair Value

In conformity with the definition of "Fair Market Value" found in the Internal Revenue Code and Revenue Ruling 59-60, the American Society of Appraisers defines "Fair Market Value" as:

> The amount at which property would change hands between a willing seller and a willing buyer when neither is acting under compulsion and when both have reasonable knowledge of the relevant facts.

In divorce cases, the trial court is usually faced with the obligation to value a closely-held business specifically because the business is not being sold and one party wishes to retain the business. As discussed above, Kentucky case law does not require the trial court to utilize the fair market value approach. As noted above in *Gomez,* the trial court is free to utilize a variety of standard of values that the court can employ. As in *Gomez,* the court can utilize a book value approach that will generally result in a lower value than the utilization of the fair market value approach.

A concept now gaining currency is the standard of "fair value", which is employed in divorce cases of other jurisdictions. *See Grelier vs. Grelier,* 44 So. 3D 1092 (Ala. Civ. App. 2009); *Brown v. Brown,* 792 A.2d 463 (N.J. App. Div. 2002). "Fair Value" generally results in a higher value than the fair market value approach, especially when valuing a minority interest. This concept is also referred to as "intrinsic value" and has been adopted by Indiana courts. "Fair value" recognizes that a business has greater value to the business owner than the hypothetical sale that the fair market value model recognizes. The fair value standard recognizes that a doctor, for example, is not going to sell his or her medical practice or a lawyer his or her legal practice, simply because he or she is going through a divorce. The fair value standard recognizes fewer discounts, such as lack of marketability, because the entity will likely not be sold. This concept may gain ground as many argue that it more genuinely reflects the nature of what is occurring that a business owner will continue to operate the company long after the spouse receives his or her proportional marital share of its value.

The fair value standard is a recognized concept under Kentucky law and is the standard for valuing minority stock in dissenter's rights cases, KRS 271B.12-300. Recently, the Kentucky Supreme Court, engaged in a thorough discussion of the concept of "fair value." *Shawnee Telecom Resources, Inc. v. Brown*, 354 S.W.3d 542 (Ky. 2011).[52] The court defined fair value "not as a hypothetical price at which the dissenting shareholder might sell his or her particular shares, but rather as the dissenter's proportionate interest in the company as a going concern. *Id*. at 588. Based upon this definition, the court found that it would be inappropriate to apply discounts for lack of control or lack of marketability in determining the fair value of a closely-held corporation. *Id*. Though the *Shawnee* court was discussing fair value in the context of Kentucky's dissenters rights statues, a reading of this opinion may be useful to the family law practitioner's understanding of this concept. In *Shawnee,* the Kentucky Supreme Court held that the dissenting shareholder is entitled to the "fair value" of his shares as measured by the proportionate interest

[52] A related case *is Brooks v. Brooks Furniture Manufacturers, Inc.,* 325 S.W.3d 904 (Ky. Ct. App. 2010).

those shares represent in the total value of the company, a value determined in accord with generally accepted valuation concepts and techniques, but without shareholder-level discounts for lack of control or lack of marketability. *Id.* at 564. In applying the fair value standard, the company is valued as if all shares were sold to one buyer and then the minority shareholder's interest is determined by his percentage ownership of the business without any discounts attributed to his lack of control or minority interest.

XXI. [7.60] Corporate Stock and Related Issues

Many dissolution of marriage proceedings, particularly those involving high income spouses, involve stock and stock options. Categorizing these items as marital or non-marital, and fixing their value, is extremely complex, and likely to be hotly litigated.

A. [7.61] Retained Corporate Earnings

Although a corporation may distribute income, it is not required to do so. *Thomas v. Thomas*, 738 S.W.2d 342, 344 (Tex. App. 1987). Corporations may accumulate profits, referred to as "retained earnings." Retained earnings are the net sum of a corporation's yearly profits and losses. *In re Marriage of Brand*, 44 P.3d 321, 325 (Kan. 2002). It retains the same classification it would have had had the income been distributed, that is, marital or non-marital.

The Kentucky Court of Appeals has twice considered retained corporate earnings as one factor in determining a corporation's value for purposes of a divorce property settlement. *Rupley v. Rupley*, 776 S.W.2d 849, 850 (Ky. Ct. App. 1989); *Culver v. Culver*, 572 S.W.2d 617, 622 (Ky. Ct. App. 1978).

B. [7.62] Stock Dividends and Appreciation

A stock dividend constitutes a portion of the company's earnings or profits that are distributed pro rata to its shareholders. Black's Law Dictionary (9th ed. 2009); *Petty v. Hagan*, 205 Ky. 264, 270, 265 S.W. 787 (Ky. 1924).[53] Kentucky courts have held stock dividends to be marital property, even if the stock was owned before the marriage. *Sousley v. Sousley*, 614 S.W.2d 942, 944 (Ky. 1981) ("income produced from non-marital property is marital property"). Dividends paid on stock acquired during the marriage are obviously marital property. However, under KRS 403.190(2)(e), the dividend may not be treated as a marital asset if the stock

[53] Since they reduced the corporation's property and increase the recipient's net worth, Wm. Meade Fletcher, Cyclopedia of the Law of Corporations § 5318 (2003), they are considered income. *E.C.W. v. M.A.W.*, 419 A.2d 934, 937 (Del. 1980) (overruled on other grounds, *Lyman v. Gallagher*, 526 A.2d 878, 881 (Del. 1987)).

were acquired by gift or inheritance and neither spouse contributed significantly to produce the dividend, *i.e.*, if it were "passive" appreciation.

Any active increase in the value of stock acquired prior to marriage, or purchased subsequent to marriage with non-marital funds, is marital property. KRS 403.190(e). If the stock were acquired by gift or inheritance during the marriage, any passive increase in the value of the stock is non-marital in nature, while any active increase in the stock's value constitutes marital property. *Holman v. Holman*, 84 S.W.3d 903, 907 n.14 (Ky. 2002).

C. [7.63] Stock Splits

"A stock split is a dividing up of the outstanding shares of a corporation into a greater number of units, without altering the stockholder's proportional ownership in the corporation." *Satterfield v. Monsanto Co.*, 88 F. Supp. 2d 288, 292 (S.D.N.Y. 2000) (citing *Lynam v. Gallagher*, 526 A.2d 878, 882 (Del. 1987)). The stock retains the same classification it had before the split.

D. [7.64] Stock Options

Many businesses include stock options as part of an employee's compensation plan. A stock option involves a contract in which the option holder is given the right to buy stock in the grantor of the option at a predetermined price called the exercise or strike price. Jos. W. Bartlett, VENTURE CAPITAL, 266 (1988). Options may be offered to reward the employee for past or present services, or as an incentive to continue working for the employer. 2 OLDFATHER, *supra* note 14, § 23.02A, at 23-75. These stock options give the employee the right to purchase stock in the employer at a price less than fair market value. Frequently, the options are restricted so that they cannot be exercised immediately upon receipt. Instead, the employee must remain with the company for a minimum amount of time before the options vest. The purpose of the restriction, obviously, is to encourage the employee to continue working for the employer. *In re Marriage of Cheriton*, 111 Cal. Rptr. 2d 755, 767 n.6 (Cal. Ct. App. 2001).

Kentucky courts have not addressed the question of stock options in any reported case.[54] There are two lines of cases from other jurisdictions, as to whether employee stock options that are not exercisable at the time of divorce should be treated as marital property. The minority view holds that these rights are simply an expectation contingent upon continued service and thus not property subject to division. In *Hann v. Hann*, 655 N.E.2d 566 (Ind. Ct. App. 1995), the court noted

[54] The Kentucky Court of Appeals has, however, addressed the treatment of stock options upon divorce in an unreported case. *Kaelin v. Meiners*, 2009 WL 2707562 (Ky. Ct. App. 2009). The *Kaelin* Court adopted a two-step approach in determining how to divide stock options. *Id*. at *4. First, the court should "determine whether and to what extent the [stock] options were granted as compensation for past, present, or future services." *Id*. (internal citations omitted). "Then the trial court should determine what percentage of each portion thereof was accumulated and acquired during the marriage." *Id*.

that the employee would lose the rights if he or she quit or were fired before the options were exercised. The majority view holds that unexercised stock options are property subject to division upon divorce. These courts often cite pension rights as a parallel and find that even though the options are subject to various contingencies, they could become valuable rights: *Jensen v. Jensen*, 824 So. 2d 315 (Fla. Dist. Ct. App. 2002); *Otley v. Otley*, 810 A.2d 1 (Md. Ct. App. 2002); *In re Marriage of Valence*, 798 A.2d 35 (N.H. 2002); *see generally* Akers, *The Valuation of Stock Options in Divorce and Dissolution Cases*, 1990 A.B.A. Sec. Fam. L. Compendium at 5-94.

It should not be difficult to classify stock purchased with stock options if the spouse were married when he or she received the options and all options were exercised with marital funds before divorce. The stock should be 100% marital property, so long as the options were not intended to reward services rendered before marriage. *Stachofsky v. Stachofsky*, 951 P.2d 346 (Wash. Ct. App. 1998).

E. [7.65] Special Problems Involving Stock Options: Date of Acquisition

Kentucky courts thus far have provided no guidance as to the date when employee stock options are considered to have been acquired. Under Kentucky law, a court can only divide property that has been acquired by either spouse during the marriage. The question becomes exactly when the stock option was "earned." *See* Lee R. Russ, Annot., *Proper Date for Valuation of Property Being Distributed Pursuant to Divorce*, 34 ALR 4TH 63 (1984). An employee is granted an option at a particular time, and some courts treat that date as the time of acquisition. Therefore, the options granted during marriage would be treated as marital property, even if the divorce occurred before the options became exercisable. *See Warner v. Warner*, 46 S.W.3d 591 (Mo. Ct. App. 2001); *MacAleer v. MacAleer*, 725 A.2d 829 (Pa. Super. Ct. 1999).

If options are received during marriage for work performed during the marriage and marital property is used to buy the stock, all profits on the stock (until divorce) should be marital property. *Petersen v. Petersen*, 1993 WL 267460 (Del. Fam. Ct. 1993). If options are received during marriage solely for work performed prior to the marriage, and only separate funds are used to exercise the option, the shares should be separate property. *Moss v. Moss*, 829 So. 2d 302 (Fla. Dist. Ct. App. 2002). However, when options are received before marriage, but are exercised during marriage with marital funds used to buy the stock, there could be a marital claim. *In re Marriage of Renier*, 854 P.2d 1382 (Colo. Ct. App. 1993). When options are granted during marriage to compensate work performed during the marriage, and non-marital funds are used to buy the stock, the non-marital estate should be refunded the amount so advanced. *Chumbley v. Beckmann*, 43 P.3d 53 (Wash. Ct. App. 2002). If options are granted during marriage to compensate for services rendered both before and during the marriage, a time rule approach would be needed to calculate the amount of the separate property claim. *DeJesus v. DeJesus*, 694 N.Y.S.2d 436 (N.Y. App. Div. 1999). Options granted after divorce

should be the separate property of the employee, unless the options are found to be compensation for services rendered during marriage. *Peterson v. Peterson,* 26 FAM. L. REP. (BNA) 1023 (Ohio Ct. App. 1999).[55]

Options not exercisable at divorce present a number of different issues. For example, what would happen if the company's stock price falls post-divorce, and the company cancels the options and issues new options at a lower price? *See* Rosettenstein, *Exploring the Use of the Time Rule on the Distribution of Stock Options on Divorce*, 35 FAM. L. Q. 263 (2001). A different question arose in *In re Marriage of Walker*, 265 Cal. Rptr. 32 (Cal. Ct. App. 1989), namely, if the options are divided based on the date(s) they become exercisable, what should happen when the options become exercisable at a date earlier than assumed, because of acceleration due to, for example, a merger? A Kentucky case, *McGinnis v. McGinnis*, 920 S.W.2d 68 (Ky. Ct. App. 1995), did not characterize the restricted stock as a stock option. There, the president of the company was given the right "to purchase certain shares of [the corporation's] common stock pursuant to a vesting schedule." *Id.* at 69. The question was, whether the shares that had not vested at the time of the dissolution constituted marital property. *Id.*. The rule to be deduced from that opinion is that the shares are 100% marital if they were purchased during marriage with marital funds.

F. [7.66] Special Problems Involving Stock Options: Valuation Issues

In addition, there must also be evidence presented concerning the value of the stock. One court has stated:

> [T]he court must attach a value to options as of the date of the decree. That value may be determined by taking into consideration the market value of shares of [the stock] as of the time of that decree, and the cost to the [husband] of exercising the options.

Green v. Green, 494 A.2d 721, 729 (Md. Ct. Spec. App. 1985).

Under this approach, it would appear that the non-employee spouse cannot share in any stock appreciation after the divorce. Moreover, the court referred to computing the "value" of the options as of the date of divorce. What remains unclear is whether this means a present value computation, and, if so, whether the value should be discounted for all contingencies affecting the ability to exercise the options, such as the possibility that the employee will resign or be discharged before the waiting period ends. Additionally, since the option "profit" will be realized in the future, it is unclear whether the option value should be discounted for that reason.

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[55] Dividing qualified options at divorce presents potential tax problems. A recent IRS letter ruling concluded that, when an employee transferred some of the options to the non-employee spouse at divorce, this made the options non-qualified. IRS Field Serv. Adv. Rul. 20000-5006 (Nov. 1, 1999).

If the employer offers stock options which are publicly traded, their value may be determined on the basis of the market price. OLDHAM, *supra* note 6, § 7.11[3], at 7-156. On the other hand, employee stock options usually cannot be transferred. Consequently, employee stock options may be worth more, or perhaps less, than publicly traded options. Furthermore, an option may retain some value even when the stock's current price on the market is less than the option's strike price. OLDHAM, *supra* note 6, § 7.11[3], at 7-156 n.20 *(*citing *Banning v. Banning*, 1996 Ohio App. LEXIS 2693, 1996 WL 354930 (Ohio Ct. App. 1996)).

1. [7.67] The "Intrinsic Value" Approach

One approach to valuing stock options is known as the "intrinsic value" approach.[56] An option's "intrinsic value" is its market price on the date of the dissolution decree, less the strike price of the option. Andrew C. Littman, *Valuation and Division of Employee Stock Options in Divorce*, COLO. LAW., May 2000 at 62; Lynn Curtis, *Valuation of Stock Options in Dividing Marital Property Upon Dissolution*, 15 J. AM. ACAD. MATRIM. LAW. 411, 439 (1998).[57] While using intrinsic value to determine the option's worth has the advantage of simplicity, it does not take into account the volatility of stock prices, the possibility that the employee might not survive until the exercise date, and other similar contingencies.

Some courts, therefore, have declined to adopt the intrinsic value method on the grounds that it was unacceptably speculative, and have sought to utilize other methods considered to be more reliable. These courts have used other, more sophisticated accounting formulae that provide a present value for the option by factoring in all relevant variables. *Hansel v. Holyfield*, 779 So. 2d 939 (La. Ct. App. 2000); Sandra G. Musser, *A Discussion of In-Kind Division of Vested and Contingent Stock Options in California*, 15 COMM. PROP. J. 19, 22 (1989).

The intrinsic value method does not require the use of expert testimony, at least as to publicly-traded stocks. In *Maritato v. Maritato*, 685 N.W.2d 379, 388 (Wis. Ct. App. 2004), neither party had introduced expert testimony as to the stock option's present value. *Id.* at 387. The *Maritato* court observed, in a footnote, that in an earlier case, the court had held itself bound by a trial court's determination "that it was impossible to determine the present value of stock options." *Id.* at n.8 (citing *Chen v. Chen*, 416 N.W.2d 661, 662 (Wis. Ct. App. 1987)).

2. [7.68] *Wendt v. Wendt*

Wendt v. Wendt, 1998 WL 161165 (Conn. Super. March 31, 1998); *aff'd,* 757 A.2d 1225, 1232 n.4 (Conn. Ct. App. 2000), *cert. denied* 763 A.2d 1044 (Conn.

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[56] The seminal case on intrinsic value is *Richardson v. Richardson*, 659 S.W.2d 510, 512-13 (Ark. 1983); the matter is further discussed and clarified in *Davidson v. Davidson*, 578 N.W.2d 848, 856 (Neb. 1998), and also in the unreported case *Chammah v. Chammah*, 1997 WL 414404 at n.5 (Conn. Super. Ct. 1997). This matter is discussed in GRAHAM & KELLER, *supra* note 8, at § 15.87.

[57] To illustrate strike price, assume an IBM option can be purchased on December 1 for $50.00. Fifty dollars is the strike price.

2000) discusses another method for determining the value of an option that is not yet exercisable. The approach set forth in that case starts with the "intrinsic value" of the option and then discounts that amount for lack of marketability, risk of forfeiture, and future tax liability.

Additionally, the *Wendt* opinion appears to be the most comprehensive treatment of the classification and valuation of stock options extant. The Westlaw report of the trial court's opinion occupies 147 single-spaced pages; the court's memorandum opinion contains 494 double-spaced pages. The material on stock options is set out at pages 116 through 218 of the Westlaw report. Although governed by Connecticut law, Judge Tierney's scholarly opinion analyzes virtually every reported case, many unreported cases, and the leading treatises which discuss the treatment of stock options upon dissolution of marriage. The *Wendt* opinion should be consulted by any practitioner who wishes to familiarize himself with the finer points of law on this topic, at least as that law stood when the opinion was rendered on March 31, 1998.

While the Connecticut Court of Appeals opinion confirming the trial court's holding is a reported case, that court did not reexamine Judge Tierney's holding on stock options. Instead, the appellate court stated, in a footnote, that it regarded the issue of stock options as a question of fact, and that consequently, it was bound by the findings of the trial court, and needed not revisit the issue.

3. [7.69] The "Black-Scholes" Method

Although a number of alternatives exist, the most widely utilized appears to be the "Black-Scholes" formula. First introduced in 1973, soon after the advent of options trading on the Chicago Board of Trade, it requires consideration of the option's intrinsic value, its date of execution, the value of the underlying security, market interest rates, and dividends. The "Black-Scholes" method also seeks to integrate the exercise price of the option, the market price of the underlying security, the option's expiration date, the volatility of the underlying security, current interest rates, and the dividends of the underlying security.

Despite its widespread recognition, the Black-Scholes model has certain disadvantages. Not the least of these is its complexity. In *Wendt*, Judge Tierney meticulously explained that the Black-Scholes model is "a modern option pricing technique with roots in stochastic calculus and is often considered among the most mathematically complex of all applied areas of finance." He added: "It appears to a layman to be one of the most complicated formulas ever devised by mankind." *Wendt* at *195.

Aside from its complexity, the chief objection to using the Black-Scholes method for evaluating employment-issued unvested stock options in a marital setting, is that it was developed to value vested stock options, when these options are publicly traded. One commentator has asserted that the Black-Scholes model might nevertheless be used if the result were then further discounted for lack of

marketability, limits on transferability, and forfeiture provisions imposed by the option agreement. B. Dane Dudley, *Turbo-Leveraging Downstream Giving*, CONN. L. TRIB. MAG., June 23, 1997 p. 13.

This would, of course, further complicate an already complex formulation. The average practitioner, who is not himself an accountant, should usually not attempt to complete the procedure with a simple calculator, and expert assistance is strongly advised.

In sum, there appears to be no single best approach to valuing stock options. The trial court must base the value on competent evidence and a sound valuation method. *Fountain v. Fountain*, 559 S.E.2d 25, 32-33 (N.C. Ct. App. 2002). Other courts have concluded that valuing an unvested option is simply too speculative. *Fisher v. Fisher*, 769 A.2d 1165 (Pa. 2001).

XXII. [7.70] Retirement Benefits

In many dissolution actions, the parties' retirement benefits comprise a substantial portion of the marital estate. "Unless specifically exempt by statute, Kentucky treats all retirement benefits accumulated during the marriage as marital property subject to classification and division upon divorce." *Shown v. Shown*, 233 S.W.3d 718, 720 (Ky. 2007).[58] Their importance is even greater when only one spouse has worked outside the home. Retirement benefits are considered deferred compensation, and to have been "acquired" when they were earned, rather than when they are received. *Elkins v. Elkins*, 854 S.W.2d 787 (Ky. Ct. App. 1993). On the other hand, unlike assets which are presently liquefiable, some pension benefits involve a substantial risk of non-receipt. A detailed analysis of pension benefits and their division may be found in the GRAHAM & KELLER treatise. GRAHAM & KELLER, *supra* note 8, § 15.20-15:25.

One important issue which the practitioner must consider when dividing a defined benefit plan (Pension) in a divorce case is its survivorship benefits. Without survivorship language (both pre-retirement and post-retirement) in the Qualified Domestic Relations Order ("QDRO"), the former spouse's portion of the pension that was awarded in the property settlement agreement will terminate upon the participant's death. Including survivorship language in the QDRO will guarantee that the pension benefit will continue to the former spouse for his or her lifetime. *See* GRAHAM & KELLER, *supra* note 8, § 15.33-15:36.

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[58] A example of which is KRS 161.700, which exempts Kentucky Teacher Retirement System benefits "accumulated during the marriage from being classified as marital property subject to division." *Brooks v. Brooks*, 350 S.W.3d 823 (Ky. Ct. App. 2011). However, the spouse holding the KTRS account may only exclude as non-marital property the amounts of the KTRS account that do not exceed the amount of his spouse's retirement account. *Shown*, 233 S.W.3d at 720-21. If the other spouse has no retirement account, then all accumulation in the retirement plan during the marriage is non-marital property. *Brooks*, 350 S.W.3d at 826 (Ky. Ct. App. 2011).

The cost of survivorship benefits generally reduces the pension benefit by approximately ten percent (10%). Both parties share in the reduction as applied to their share of the monthly income. However, a party can have language included in the QDRO providing that one party or the other will absorb the total cost.

Since there is a cost involved, survivorship benefits are a property component that should be included in the property settlement agreement. To have language in the property settlement agreement regarding the division of the pension without addressing survivorship benefits is becoming more problematic. A New York case, *Irato v. Irato*, 288 A.D.2d 952 (N.Y. 2001), holds that any item not included in a property settlement agreement cannot be awarded to the other party, after the fact, without the consent of both parties. At issue was whether survivorship benefits could be included in a Domestic Relations Order if they were not awarded to the non-participant spouse in the property settlement agreement. The Appellate Court held that they could not.[59]

Recently, the Court of Appeals, in *Willis*, offered a word of caution for the drafting of a QDRO. *Willis v. Willis*, 362 S.W.3d 372 (Ky. Ct. App. 2012). The parties had divided the husband's retirement account based on specific amounts of money, rather than as percentages or based upon a formula. When the account suffered a severe loss, fifteen months after the QDRO being entered, the wife moved to have the QDRO modified. The Court of Appeals found that the QDRO could not be modified as it constituted a valid separation agreement and the wife had not made an allegation of unconscionability.

A. [7.71] Military Retirement Benefits

Division of Military Retirement Benefits is governed by 10 USC § 1408, the Uniformed Services Former Spouses' Protection Act ("USFSPA"). Military pensions are of particular interest to the Kentucky practitioner, as there are two major military bases within the state. Due to the presence of Fort Knox and Fort Campbell, domestic relations attorneys in both Hardin and Christian Counties, as well as surrounding areas, will frequently deal with the issue of dividing military retirement benefits in a divorce action.

The area of military benefits and their treatment in divorce is a highly specialized field, and fraught with peril for the general family law practitioner. The practitioner dealing with a military pension in a divorce action is well advised to consult a specialist in the field or carefully research the subject before undertaking the representation.

State law on division of property may be applied to military retirement benefits, subject to certain limitations arising from federal law. The matter is treated at length in Graham & Keller, *supra* note 8, §§ 15:40-15:45. The seminal

[59] Information regarding survivorship benefits was provided by Mary Vanderhaar, CFP, CDFA, Vanderhaar Financial, 1700 UPS Drive, Louisville, Kentucky 40223, (502) 339-1064, email: m.vanderhaar@insightbb.com.

case concerning the division of military retirement benefits is *Poe v. Poe*. 711 S.W.2d 849 (Ky. Ct. App. 1986). The *Poe* court provided a formula under which the benefits earned during the marriage must first be calculated by dividing the number of years of marriage by the total number of years of service. This percentage is then multiplied by the benefits earned by the military-member at the time of the divorce. The non-military member spouse is then entitled to a percentage, often fifty percent, of this amount.[60] Benefits that the military-member receives as a result of a disability are excluded from this division. *See* 10 USCA § 1408; GRAHAM & KELLER, *supra* note 8, §§ 15:43.

Further information on these issues is available at: <http://www.willicklawgroup.com>, the website of the Willick Law Group. When last visited on October 1, 2012 this website included, under "published works," such useful articles as *Divorcing the Military and Severing the Civil Service – How to Attack and Defend* and *Updated Model Decree of Divorce Clauses Dividing MRB*.

Another useful resource, on this issue, is THE MILITARY DIVORCE HANDBOOK, authored by Mark Sullivan. This treatise appears to be the foremost work concerning divorce of enlisted persons, and includes chapters on custody and visitation, family support, tax issues, domestic violence, the Servicemembers' Civil Relief Act as applied to divorce, as well as a lengthy chapter on pension division. Additionally, pensions for members of the Public Health Service ("PHS") and National Oceanic and Atmospheric Administration ("NOAA") are also covered by the Uniformed Services Former Spouses' Protection Act. Therefore, the order dividing the pension may be modeled upon those used for dividing military pensions.

B. [7.72] Retirement Benefits for Federal Civilian Employees

There are two retirement systems in place for civil servant employees. Those who began their service prior to December 31, 1984 are covered by the Civil Service Retirement System ("CSRS") 5 USC § 8331. Those employed after December 31, 1984 are covered by the Federal Employees Retirement System ("FERS") 5 USC § 8401. However, individuals employed prior to December 31, 1984 may elect to be covered by FERS. Foreign service retirement benefits are governed by 22 USC § 4054 and 4060(b)(1). For a more comprehensive overview of these subjects, the practitioner may wish to examine the relevant portions of GRAHAM & KELLER.

As with military pensions, the division of civil and foreign service employees' pensions and benefits is complex, and the practitioner is well advised to seek the guidance of a specialist in this area. There are a number of benefits available to former spouses under both the CSRS and FERS, including retirement

[60] *See also, Copas v. Copas*, 359 S.W.3d 471 (Ky. Ct. App. 2012) (allowing the reopening of the lower court's property order to clarify the misinterpretation that the order provided the non-military spouse with 50% of the military member's total military retirement benefits rather than those benefits that were actually earned during coverture.)

benefits, survivor annuities and, in some circumstances, lump sum distributions. The details regarding divisions of civil service retirement benefits are contained in the USC, CFR and appendices.

C. [7.73] Social Security and Other Federal Retirement Benefits

Social security benefits cannot be alienated from the beneficiary and are therefore not divisible as marital property. However, the Social Security Act does provide benefits for various classes of former spouses. To qualify as a surviving divorced spouse, the parties must have been married at least 10 years, or alternatively, to qualify as a surviving divorced parent, the parties must have a child in common, either by birth or adoption. 42 USC § 416; *see also,* GRAHAM & KELLER, *supra* note 8, §§ 15:52.

Although Social Security Benefits are not marital property, Kentucky courts have held that they may be considered when dividing the remaining property. *Gross v. Gross*, 8 S.W.3d 56 (Ky. Ct. App. 1999). In the same vein, although Kentucky courts have held that Railroad Retirement Benefits are not divisible marital property, *Elkins v. Elkins*, 854 S.W.2d 787 (Ky. Ct. App. 1993), it would appear that they, too, may be considered when making an equitable division of the marital estate. It should also be noted that the *Elkins* court did not fully discuss the pertinent federal statute, 45 USCA § 231, which does allow the division of certain benefits, though, apparently, not those at issue in *Elkins*. *See also*, GRAHAM & KELLER, *supra* note 8, §§ 15:51.

XXIII. [7.74] Worker's Compensation and Other Disability Benefits

In the past, Kentucky courts have based the classification of Workers' Compensation benefits as marital or non-marital upon the date when payment was received. Thus, amounts received prior to a decree of dissolution were held to be marital, while payments to be received post-dissolution were considered non-marital. *Mosley v. Mosley*, 682 S.W.2d 462 (Ky. Ct. App. 1985) (involving black lung benefits). That court noted that, unlike pensions, disability benefits, while perhaps arising out of an accident which occurred during marriage, are intended to replace the injured worker's lost ability to work in the future. *Id.* at 463.

More recently, Kentucky courts have adopted a different approach. In *Jessee v. Jessee*, 883 S.W.2d 507 (Ky. Ct. App. 1994), the court held that the nature of disability benefits depends upon the nature of the wages they are intended to replace. Thus, the portion of an award that replaces wages earned (or which would have been earned) during the marriage, are marital and subject to division. The portion that replaces wages earned (or which would have been earned) either before the marriage, or after the decree of dissolution, are non-marital in nature.

This same analysis was then applied by the Kentucky Supreme Court in *Holman v. Holman*, 84 S.W.3d 903 (Ky. 2002).[61] This appears to be the current rule in state, as evidenced by the decision in *Lawson v. Lawson*, 228 S.W.3d 18, 22 (Ky. Ct. App. 2007) ("Similarly, whether a worker's compensation award is divisible as marital property is dependent upon the timing of the compensatory payments."). The *Lawson* court also cautioned that trial courts should reserve the awarding of any pending wrongful termination claim "because of the speculative nature of any such award and its characterization." *Id*.

XXIV. [7.75] Personal Injury Awards

Marital property includes all rights which constitute property, were acquired during the marriage, and do not constitute separable property. Personal injury awards, obviously, were "acquired by the parties." They constitute "property" to the extent that the award was received before the date of classification. Likewise, if an existing judgment gives one spouse a right to receive a specific award after marriage, the award is "property."

The more complicated issue is whether personal injury awards are "marital property" or "separable property." Kentucky's rules for the division of personal injury awards are set out in *Weakley v. Weakley*, 731 S.W.2d 243 (Ky. 1987). They are as follows:

- If the injury occurs before the marriage, the entire compensation is deemed to be non-marital, regardless of when the recovery is received. *Id.* at 245. This holding is premised on the theory that, upon entering the marital relationship, one takes the injured spouse as one finds him or her; *i.e.*, one should have reasonably anticipated that the injury would cause a diminution in earning capacity. *Id.*
- However, when the injury occurs during the marriage, the portion of the award which represents "loss of earnings and

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[61] One vestige of marital fault remains in the Workers' Compensation law. KRS 342.075(1)(a) provides that a surviving spouse who was not living with the decedent at the time of the accident may, nevertheless, be considered "dependent" and thus entitled to benefits if he or she had "been abandoned by the decedent" and "has not engaged in such conduct since his abandonment as would at common law constitute grounds justifying the abandonment of such wife by her husband or such husband by his wife."

While this section was enacted prior to the adoption of the no-fault law, the General Assembly has not repealed it, and both the Kentucky Court of Appeals and the Kentucky Supreme Court have stated in dicta that it remains good law. *Brusman v. Newport Steel Corp.*, 17 S.W.3d 514, 515-18 (Ky. 2000); *Purex Corp./Ferry-Morse Seed Co. v. Bryant*, 590 S.W.2d 334, 336 (Ky. Ct. App. 1979); Graham & Keller, *supra* note 8, at § 15.54, 1010 n.9; *see* Ronald W. Eades, 18 Ky. Prac. (Ky. Workers' Comp.) § 17.2 at n. 5 (5th ed. 2004); Norman E. Harned, Ky. Workers' Comp. § 5.02 at n. 4 (3d ed. 2005).

> permanent impairment of the ability to earn money" while the marriage existed, is marital property. The portion which represents loss of earning power for the remaining years of life expectancy following dissolution of the marriage is non-marital property. *Id.* at 244.

The portion of the award given for pain and suffering is non-marital property. *See Holman v. Holman*, 84 S.W.3d 903 (Ky. 2002); *Lawson v. Lawson*, 228 S.W.3d 18 (Ky. Ct. App. 2007). However, if the award does not specify what portion is for pain and suffering, the entire award is deemed to be marital property. *See Reeves v. Reeves*, 753 S.W.2d 301 (Ky. Ct. App. 1988); *Hardin v. Hardin*, 2012 WL 28701 (Ky. Ct. App. 2012). This follows logically from the fact that, under KRS 403.190(3), a personal injury award received during coverture is presumed to be marital property. The spouse claiming that part of the award is non-marital has the burden of proof. *Brunson v. Brunson*, 569 S.W.2d 173 (Ky. Ct. App. 1978). Unless the decree contains specific language stating what portion represents compensation for pain and suffering, the injured spouse will be unable to meet that burden of proof.

Otherwise stated, a spouse's recovery for personal injury claims accruing during the marriage that is undifferentiated as to the components of loss compensated, is presumed to be marital property subject to equitable distribution in dissolution of marriage proceedings, and the injured spouse bears the burden of proving the extent to which the proceeds are his or her separable property. *See* Kurtis A. Kemper, *Divorce and Separation: Determination of Whether Proceeds from Personal Injury Settlement or Recovery Constitute Marital Property,* 109 ALR 5th 1, 60 (2003).

The prudent practitioner, therefore, will request that the judgment awarding recovery for personal injuries itemize specifically each category of the award, rather than simply stating a lump sum. Two cases from other jurisdictions illustrate the importance of this caveat. In *Richmond v. Richmond*, 534 N.Y.S.2d 413 (N.Y. App. Div. 1988), the amount awarded for loss of consortium was treated as the uninjured spouse's separable property. However, in *Phillips v. Phillips*, the injured spouse's personal injury claim and the uninjured spouse's claim for loss of consortium were both held to be marital property because they had settled the entire claim for one lump sum. 351 S.E.2d 178, 180 (S.C. Ct. App. 1986).

XXV. [7.76] Accrued Sick Leave and Vacation Benefits

Kentucky courts first addressed the question of whether accrued sick leave and vacation benefits are marital property in *Bratcher v. Bratcher*, 26 S.W.3d 797 (Ky. Ct. App. 2000). In that case, the court noted that, while the question "is one of first impression in Kentucky," two lines of cases had emerged in other jurisdic-

tions that had considered the question. The majority rule held such benefits to be marital property; the minority rule held that they were not.

The *Bratcher* court, *quoting* the Maryland Court of Special Appeals' decision in *Thomasian v. Thomasian*, 556 A.2d 675 (Md. 1989), adopted the minority view. *Bratcher*, 26 S.W.3d at 800-01. Thereafter, in their treatise on domestic relations law, GRAHAM & KELLER criticized the *Bratcher* decision, predicting: "[T]he court's reasoning may come back to haunt it." GRAHAM & KELLER, *supra* note 8, § 15.56.

The court thereafter, in *Overstreet v. Overstreet*, 144 S.W.3d 834 (Ky. Ct. App. 2003) reversed course. The *Overstreet* court distinguished *Bratcher* on its facts, and held that in the case before it, the value of the husband's accrued sick leave and vacation days should be divided as a marital asset. *Id.* at 840-41. In so holding, the court observed, "We believe that our holding herein addresses the concerns raised in Graham and Keller's Kentucky Practice series." *Id*. at 841 n.22.

The *Overstreet* court, however, replaced a bright line rule with one that requires practitioners to guess whether the facts of a particular case bring it within the rules of *Bratcher*, or the converse rule of *Overstreet*, and gives courts almost complete discretion to characterize such benefits as either marital or non-marital in character.

XXVI. [7.77] Life Insurance Policies

It appears that life insurance policies owned by the parties are frequently overlooked in dividing marital estates. *See* PETRILLI *supra* note 5, § 24.17. Although Kentucky appellate courts have not always done so, *see* GRAHAM & KELLER, *supra* note 8, § 15.57, at 1017 nn.4-5, the practitioner should distinguish between one's status as owner of a life insurance policy (and therefore entitled to its cash surrender value), and as a beneficiary (and therefore entitled to the proceeds upon death of the insured). The practitioner should also understand the difference between life insurance policies which have a cash surrender value and those which do not.

Two Kentucky cases show the complexities encountered when dividing life insurance policies. *Smith v. Smith*, 235 S.W.3d 1 (Ky. Ct. App. 2006), involved a life insurance policy on the wife's father, of which the wife was the sole beneficiary. The court divided the proceeds between the parties, giving the wife the greater share.

Bell ex rel. Bell v. Bell, 2005 WL 2807051 (Ky. Ct. App. 2005) involved a couple who divorced in 1984 after a fifteen-year marriage. The following year, the husband named his former wife as beneficiary of his life insurance policy. Seventeen years later, in 2002, he remarried and named his second wife as beneficiary, and died shortly thereafter. Because the forms had not been filled out correctly, the insurance company paid the benefits to the first wife. The second wife then filed a

declaratory judgment action in Fayette Circuit Court, which declined to exercise jurisdiction because both wives then resided in Florida. This case, likewise, illustrates the difficulties that may arise, even years later, from the assignment of life insurance benefits.

Whether a life insurance policy has cash surrender value ultimately depends, of course, upon the language of the insurance contract. Life insurance policies having a cash surrender value are frequently referred to as "whole life," "general life insurance," "ordinary life insurance," "old-line life insurance," or "level-premium life insurance." 44 CJS *Insurance* § 11 at nn.50-51 (1993). Life insurance policies lacking cash surrender value are generally designated "term life insurance." *Davis v. Davis*, 775 S.W.2d 942, 944 (Ky. Ct. App. 1989). The latter type of insurance attains value only upon death of the insured; it has no cash or present value and is not subject to division as marital property. *Id.* On the other hand, the cash surrender value of life insurance policies having such value is treated as divisible marital property by Kentucky courts. *Leveck v. Leveck*, 614 S.W.2d 710 (Ky. Ct. App. 1981).[62]

A different problem arises if the insured spouse retains the former spouse as the named beneficiary on his or her life insurance policy. Under the restoration statute, an absolute divorce automatically cuts off such rights. *Bissell v. Gentry*, 403 S.W.2d 15 (Ky. 1966). Such is no longer the case, however, since the adoption of KRS 403.190. Under the present scheme, the owner of the policy retains the right to change the beneficiary, as the named beneficiary acquires no right other than a defeasible vested interest, which is a mere expectancy, and not a vested right. *Davis v. Davis*, 775 S.W.2d 942, 944 (Ky. Ct. App. 1989); Revell & Skaggs, *supra* 32, § 12:5, at 146 n.117.

A different point is illustrated by the Kentucky Supreme Court's holding in *Ping v. Denton*, 562 S.W.2d 314 (Ky. 1978). The insured husband was also the owner of the policy, since it arose as a fringe benefit of his employment. His wife was named as beneficiary, and the life insurance policy was not mentioned in the divorce decree. A short time later, he died, and the right to the benefits was litigated between the former wife and the husband's estate. The Kentucky Supreme Court noted that the ownership of such a policy can, and should, be adjudicated at the time of the divorce. The trial court's failure to include this item in the divorce decree, however, left the husband as owner of the policy. The appellate court held that, as owner, the deceased husband had retained the right to make a gift of the life insurance benefits to his former wife. The ultimate question, of course, was whether the husband had had the intention to make such a gift. The appellate court found evidence of such intention in the fact that the husband had also named the former wife as beneficiary on the policy prior to their marriage.

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[62] In a unreported case, the Court of Appeals upheld the trial court's determination that the life insurance policy should be valued at the amount the insured could receive if he cashed in the policy at the time of valuation, rather than its total cash value. *Sweet v. Sweet*, 2004 WL 2153063 (Ky. Ct. App. 2004).

Of course, it seems more likely that the failure to remove the former wife as a beneficiary was simply an oversight. The practitioner should note, therefore, that a carefully drafted property settlement agreement should require the former spouse to waive all rights to life insurance benefits, unless the benefits are used to secure property or support obligations. However, the *Ping* court also stated that a general waiver clause will not divest the former spouse of the right to take insurance policy proceeds as a beneficiary. Consequently, the practitioner should note that, while the parties or the trial court have the power to divest a former spouse of any interest in insurance proceeds, this divestiture clause, to have the desired effect, must be directed at that specific goal. *See Hughes v. Scholl*, 900 S.W.2d 606, 608 n.2 (Ky. 1995) ("The divestiture language should be clear and unambiguous. A general waiver of any interest in the property of the other spouse is insufficient to destroy a beneficiary's right to receive insurance policy proceeds.")

XXVII. [7.78] Continuation of Health Insurance

One federally granted entitlement frequently involved in divorce litigation is 26 USC § 162 (Consolidated Omnibus Budget Reconciliation Act of 1985). Commonly known as COBRA, the statute provides health insurance benefits for spouses whose marriages have been terminated by divorce. To qualify, the intended beneficiary must have been covered by his or her former spouse's health insurance on the day prior to the entry of the decree of dissolution. 26 USC § 162(k)(3). Therefore, an employee who cancels coverage on his or her spouse during the divorce forever deprives the spouse of COBRA protection.

Kentucky jurisprudence contains no cases, either reported or unreported, which discuss the award of COBRA benefits as a portion of the marital property award. However, in *Murphy v. Murphy*, 2006 WL 141713 (Mich. Ct. App. 2006), the court declined to rule on the husband's request that the court order the wife to provide him COBRA coverage. The court noted that the record contained no evidence concerning the cost of such coverage, and remanded the case with directions that proof be taken on this issue. Therefore, parties requesting that COBRA coverage be awarded should submit evidence showing the cost of such coverage.

The Ohio Court of Appeals, in an unpublished opinion, has stated that a court has discretion to order one spouse to provide and bear the cost of coverage for the other spouse. *Ladman v. Ladman*, 2005 WL 3507982 (Ohio Ct. App. 2005). It appears, however, that an obligor spouse may not be required to maintain COBRA coverage on a former spouse for more than three years. *Chwalik v. Chwalik,* 2005 WL 3439784 (Mich. Ct. App. 2005).

XXVIII.[7.79] Characterization and Assignment of Indebtedness

A common scenario occurs when a party's business suffers during the pendency of a divorce, while the party spends more time and money elsewhere. Too often, the sum remaining for division at trial is many times less than the couple's net worth prior to the filing of the divorce. Kentucky's current rule that there is no longer any presumption that debt is marital may help alleviate this problem, since debt that previously was allocated equally to both parties is now more likely to be allocated to the party who actually enjoyed its benefits. It is quite expensive in both costs and attorney fees to obtain the underlying charges on credit card debt and then determine who in the family used the item for which the debt was incurred. Proof is still required, of course, but credit card debt incurred by a spouse after the filing of a divorce is likely to remain the responsibility of the party who created the debt. The leading Kentucky case on the characterization and assignment of indebtedness, to which the practitioner should refer, is *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001). To understand the holding of *Neidlinger*, however, some familiarity with the case law preceding it is necessary.

For nearly three decades after the enactment of the current dissolution statute, the status of marital debts remained unclear. KRS 403.190(3) created the presumption that all property acquired during the marriage was marital property but did not create a similar presumption for marital debt. *O'Neill v. O'Neill*, 600 S.W.2d 493 (Ky. Ct. App. 1980). Kentucky was not alone in this regard; the statutes of many states contained similar language, and thus begged the question of how marital debts were to be characterized and assigned. Oldham, *supra* note 6, § 13.03[4], at 13-33 n.29.

Writing in 1986, the author of Kentucky Jurisprudence noted: "[t]he inconsistency in granting a presumption that all property acquired during the marriage is marital property while no such presumption is granted in the case of debts incurred during marriage." William S. Haynes, Kentucky Jurisprudence: Domestic Relations § 24-7 (1986). To compound the difficulty, different panels of the Kentucky Court of Appeals had reached contradictory results. *Herron v. Herron*, 573 S.W.2d 342 (Ky. 1978) stated that, absent statutory authority, courts could not indulge in presumptions regarding the division of marital property or marital debts. The Kentucky Court of Appeals accordingly, in *Bodie v. Bodie*, 590 S.W.2d 895 (Ky. Ct. App. 1979), decided the following year, held that there was no presumption with respect to marital debts. The same court then held that debts incurred after separation but prior to entry of a decree were non-marital, *O'Neill v. O'Neill*, 600 S.W.2d 493 (Ky. Ct. App. 1980) that debts incurred for the benefit of the family were deemed marital, *Gipson v. Gipson*, 702 S.W.2d 54, 55 (Ky. Ct. App. 1985); and that debts incurred to acquire property designated as marital property, were marital debts. *Daniels v. Daniels*, 726 S.W.2d 705, 706-07 (Ky. Ct. App. 1986). Yet another opinion, *Van Bussum v. Van Bussum*, seemed to follow the rule set out in *O'Neill*. 728 S.W.2d 538, 539 (Ky. Ct. App. 1987).

However, the *Daniels* court went further and stated that all debts incurred during coverture "are presumed to be marital debts unless the presumption is rebutted." *Id.* at 706. The court subsequently reaffirmed this rule in *Underwood v. Underwood*, 836 S.W.2d 439 (Ky. Ct. App. 1992). The Kentucky Supreme Court finally ended the confusion in *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001), in which it overruled *Daniels* and *Underwood* and reaffirmed *Bodie*. The court stated, "We conclude that the Court of Appeals got it right in *Bodie v. Bodie*. Where there is no statutory presumption, one should not be judicially inferred." *Id.* at 522-23; *see also, Rice v. Rice*, 336 S.W.3d 66 (Ky. 2011) (citing both *Neidlinger* and *Bodie* with approval).

The court went on to state that several factors should be used to determine whether debts were marital or non-marital. *Neidlinger*, 52 S.W.3d at 523. These included receipt of the benefit of the debt and the extent to which a party participated in the debt's creation, *Inman v. Inman*, 578 S.W.2d 266, 270 (Ky. Ct. App. 1979), as well as whether the debt had been incurred to purchase marital assets and whether the debt were necessary to provide for the maintenance and support of the family. *Gipson v. Gipson*, 702 S.W.2d 54 (Ky. Ct. App. 1985).

The court also noted that there was no presumption that debts were to be divided equally or in the same proportion as marital property. *Neidlinger*, 52 S.W.3d at 523.[63] It is noteworthy that in *Neidlinger*, Justices Lambert, Keller, and Stumbo concurred in the final decision of the majority but believed that *Daniels* and *Underwood* correctly interpreted KRS 403.190(3); *see id*. at 523-24.

The concurring justices argued that Kentucky law permits a similar bifurcation by allowing a court to separate marriage dissolution and property disputes. Graham & Keller, *supra* note 8, § 14:3. In their view, the statute "creates a rebuttable presumption that debts incurred individually or jointly during the course of a marriage, but prior to a valid separation agreement, are marital debts which were incurred for the benefit of both parties to the marriage." *Neidlinger* 52 S.W.3d at 524 (per Keller, J., concurring). The concurrence also quoted *Gipson v. Gipson*, 702 S.W.2d 54, 55 (Ky. Ct. App. 1985), as defining the "litmus test" for characterization of debts as marital or non-marital: "[T]he litmus test to be applied is whether the debts were incurred for the benefit of both parties to the marriage." *Id.* at 524 (citing *Gipson*, 702 S.W.2d at 55).

The party who incurred the debt, and claims that it is a marital debt, bears the burden of proof. *Rice v. Rice*, 336 S.W.3d 66, 68 (Ky. 2011) (citing *Allison v. Allison*, 246 S.W.3d 898 (Ky. Ct. App. 2008)). *Bodie* indicates the type of proof necessary to establish such a marital debt. *Bodie v. Bodie*, 590 S.W.2d 895 (Ky. Ct. App. 1979). The husband had borrowed $14,610.00 over a four-year period, and stated that the money was used for living expenses. Acting on the advice of counsel, however, he refused to answer questions about the nature of the debts and

[63] The Kentucky Court of Appeals subsequently reaffirmed this rule, most recently in *Dobson v. Dobson*, 159 S.W.3d 335 (Ky. Ct. App. 2004).

produced no canceled checks, bills, or receipts. Bank notes were produced bearing the husband's name. The wife testified she had not signed them and did not know they were in debt. The court held that the burden of proof to disprove the authenticity of his own signature was on the husband. Moreover, the court noted that under the well-accepted rule, a party has the burden of proof on facts which are exclusively within his knowledge.

Moreover, the Court of Appeals has held that the "clear and convincing evidence" standard is too high a standard of proof for the issue of marital debt. Rather, it adopted the "reasonable man" standard; that is, "that amount of evidence which, in the mind of the fact-finder would cause a reasonable person to justifiably disregard the presumption that the property in question is marital property." *Underwood v. Underwood*, 836 S.W.2d 439 (Ky. Ct. App. 1992). Although the Kentucky Supreme Court has now overruled the presumption indulged by the *Underwood* court, it would appear that its ruling on the quantum of evidence remains good law. The court has also held, in an unreported opinion, that charges of financial irresponsibility and profligate spending are not, in and of themselves, determinative of whether the debt incurred was marital or non-marital. More important was whether the debt was incurred during the marriage and whether the items and services purchased were for the use of the family members. *Haydon v. Haydon*, 2003 WL 21827920 at *2-3 (Ky. Ct. App. 2003).

As Kentucky law on the subject is sparse, looking to the law of other jurisdictions for guidance is prudent. The Florida Court of Appeals has stated that the first step in distributing marital liabilities is to identify them; second, the court must designate each liability as either marital or non-marital; and the third step is to equitably distribute them. *Peacock v. Peacock*, 879 So. 2d 96, 97 (Fla. Dist. Ct. App. 2004). The principle that marital debt need not always be equally distributed is illustrated by *In re Marriage of McNeary*, 417 N.W.2d 205 (Iowa 1987). The court awarded the husband $126,893.00 in assets and directed him to pay $189,495.00 in debts. It awarded the wife $48,051.00 in assets and directed her to pay $7,500.00 in debts. The court justified its unequal distribution of the marital debt with the fact that during the marriage, the parties had transformed the husband from a largely uneducated young man of modest means into a practicing physician with great earning potential. *Id.* at 208-09.

The Kentucky Court of Appeals approved a similar scheme in *Russell v. Russell*, 878 S.W.2d 24 (Ky. Ct. App. 1994). The wife had been awarded property valued at approximately $52,000.00 and debts of approximately $1,200.00. The husband had been awarded property valued at approximately $44,000.00 and debts of more than $20,000.00. Since this would appear to leave the wife with a net award of $51,000.00 and the husband with a net award of only $22,000.00, the husband argued on appeal that the property division had been inequitable. The appellate court, however, citing *Spratling v. Spratling*, 720 S.W.2d 936, 938 (Ky. Ct. App. 1986), stated: "The [trial] court divided the couple's marital debts in light of its distribution of marital assets." *Id.* at 26. In their treatise, GRAHAM & KELLER suggest

that the property assigned to the husband may have been income producing farm property, which enabled the husband "to service the debt and also to retain excess income." GRAHAM & KELLER, *supra* note 8, § 15.89, at 1107. *Spratling*, the case cited by the *Russell* court, also appears to have involved the unequal division of marital debt as part of an overall property assignment schedule. *Spratling* at 938.[64]

Other courts have allocated debts related to property to the spouse to whom the property was awarded. *Freed v. Freed*, 454 N.W.2d 516, 521 (N.D. 1990); *see also, Viens v. Viens*, 2011 WL 1598709 (Ky. Ct. App. 2011). Courts have allocated debts of dubious existence or of only moral obligation to the spouse who incurred them. For example, in *Curda-Derickson v. Sokagon*, 668 N.W.2d 736 (Wis. Ct. App. 2003), the criminal restitution order imposed against the husband on his conviction for embezzling money from his employer during the marriage was held not to be a marital debt. In *Kroth v. Kroth*, 2005 WL 563980 (Ohio Ct. App. 2005), the marital debt was unequally allocated in the wife's favor when the majority of the credit card debt had been incurred by the husband.

It should be noted that a party may be entitled to a credit based on that party's payment of the other party's, or a joint, credit card debt after the dissolution action was commenced. *Bennett v. Bennett*, 790 N.Y.S.2d 334 (N.Y. App. Div. 2004). However, in dividing the parties' marital property, a party is not entitled to a "credit" for the amount of a loan made to the parties merely because the party claiming the credit may be related to the lender. A loan creates a marital debt, and does not give rise to a special equity merely because one of the spouses is related to the lender. In *Taaffe v. Taaffe*, 849 So. 2d 1201, 1203 (Fla. Dist. Ct. App. 2003), the court held the wife was not entitled to credit for a loan her mother made to both husband and wife. On the other hand, in *Divine v. Divine*, 752 S.W.2d 76 (Mo. Ct. App. 1988), the husband was ordered to pay a greater proportion of the marital debts, the majority of which were debts owing to his parents. Because his parents had never insisted on regular or prompt payments and had gratuitously reduced the interest rates from time to time, the court apparently concluded that he might not be required to pay the full amount.

A spouse's knowledge of, consent to incur, or receipt of a benefit for a debt is also relevant. *See Rice v. Rice*, 336 S.W.3d 66 (Ky. 2011) (where the court ruled that a husband's loans to the parties' son, made without the knowledge or consent of his wife, were the husband's non-marital debts); *see also, McGregor v. McGregor*, 334 S.W.3d 113 (Ky. Ct. App. 2011) (court found home equity loan to be wife's non-marital debt as she had taken the loan without her husband's knowledge, forged her husband's signature on loan documents, and failed to present evidence that the debt was used for marital purposes).

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[64] In this regard, the practitioner should note the holding of *Coggin v. Coggin*, in which the court stated that a court may award a greater proportion of the debts against one party in consideration of the entire property division, the nature of the debts, and other factors the court is entitled to consider, such as the earning capacity of each party. 738 S.W.2d 375, 377 (Tex. App. 1987).

Finally, it is not uncommon for a greater portion of the marital debt to be assigned to the party with the greater capacity to pay off the debt. *See Guffey v. Guffey*, 323 S.W.3d 369 (Ky. Ct. App. 2010); *see also, Afterkirk v. Blair*, 2011 WL 1706524 (Ky. Ct. App. 2011) (the parties' economic circumstances a factor in determining the division of debt); OLDFATHER, *supra* note 14, 19.12[7], at 19-103 n.63 (2005).

The only certain guidance to be deduced from the foregoing cases is that, in assigning marital debts in Kentucky, courts have great discretion. The practitioner, consequently, would be well advised to provide as much documentary evidence of the marital debts as possible and to base his or her argument upon equitable principles, rather than relying exclusively on legal arguments.

XXIX. [7.80] Unconscionability

KRS 403.180 provides that the parties to a dissolution action may enter into a separation agreement. KRS 403.180(2) states that provisions dealing with property division and maintenance are binding upon the court, unless it finds them to be "unconscionable." The court may make such a finding either on motion of a party, or sua sponte. The factors to be considered include the "economic circumstances of the parties, and any other relevant evidence produced by the parties." Should the court so hold, it may require the parties to submit a revised agreement, or it may make such disposition itself.

The practitioner should read *Rupley v. Rupley*, 776 S.W.2d 849 (Ky. Ct. App. 1989) closely to understand how the presentation of facts will lead an appellate court to remand a case for retrial to determine the conscionability of an agreement. In *Rupley*, the husband and his attorney had persuaded the wife to enter into a settlement agreement, which she later challenged on grounds of unconscionability.

The opinion focuses on the valuation of the husband's corporation. During the marriage, the husband had "bought out" his partner. To effect this transfer, both parties executed a note to the partner and took out a loan funded, in part, by a mortgage on their residence. The corporate bookkeeping entries surrounding this exchange are characterized by the court as "curious." The corporation also paid the mortgage on the parties' residence.

The commissioner held that the corporation had no net asset value. He based his evaluation of the corporate worth on testimony offered by the corporation's CPA, although the wife presented expert testimony to the effect that the corporation's books were "inaccurate," and did not represent the actual value of the business. The Commissioner then applied the *Brandenburg* formula to the parties' residence, adjudicating 93.7% of the equity to be non-marital and 6.3% to

be marital. Based upon these figures, the commissioner held the agreement to be conscionable, and the trial court agreed.

The Court of Appeals first noted that the corporation's bookkeeping was so inaccurate as to render valuation based on the net asset value shown therein impossible. Since the underlying value assigned to the corporation was inaccurate, the court held the agreement based thereon to be unconscionable. The court further held that the trial court had erroneously failed to include the amounts paid by the corporation on the mortgage as marital contributions to the equity of the residence. The court remanded the case to the trial court with directions that the actual value of the corporation and the amount of marital interest therein be ascertained, as well as the concomitant marital contribution to the residence's equity.

It is worth noting that the Court of Appeals did not reverse the trial court's finding that there had been no fraud, coercion or duress, even though the wife was not represented by counsel at the time the agreement was signed, and she relied solely upon the husband's representation of the corporation's worth. The holding of *Rupley* indicates that such a finding is not necessary, when the underlying facts make, or might make, the agreement unconscionable.[65]

[65] A useful no cost magazine produced by Willamette Management Associates, a valuation consulting firm, titled, *Insights*, provides current, sophisticated business valuation information and can be obtained by contacting Willamette Management Associates Partners, 111 S.W. Fifth Avenue, Suite 2150 Portland, Oregon 97204-3624, (503) 222-73920 Fax, jgrabe@willamette.com.

XXX. [7.81] Appendix

A. [7.82] *Brandenburg* Worksheet

APPORTIONMENT OF MARITAL PROPERTY AND NON-MARITAL PROPERTY

Brandenburg v. Brandenburg, 617 S.W.2d 871 (Ky. Ct. App. 1981)

Property: Date Bought:
Date Sold:

NON-MARITAL CONTRIBUTIONS:	
Husband's Equity at Marriage/Purchase	1
Husband's Contribution from Non-Marital Funds	2
Husband's Total Non-Marital Contribution (H)	3
Wife's Equity at Marriage/Purchase	4
Wife's Contribution from Non-Marital Funds	5
Wife's Total Non-Marital Contribution (W)	6
TOTAL NON-MARITAL CONTRIBUTIONS (NMC) (3+6)	7
MARITAL CONTRIBUTIONS:	
Marital Down Payment and FMV of Improvements from Marital Funds	8
Reduction of Mortgage:	
Balance at Marriage	9
Present Balance	10
Reduction	11
TOTAL MARITAL CONTRIBUTIONS (MC) (8+11)	12
TOTAL CONTRIBUTIONS (TC) (7+12)	13
PRESENT FMV OF PROPERTY	14
PRESENT MORTGAGE BALANCE	15
PRESENT TOTAL EQUITY	16
% OF HUSBAND CONTRIBUTION X EQUITY (H/TC X E) =	17
% OF WIFE CONTRIBUTION X EQUITY (W/TC X E) =	18
% OF MARITAL CONTRIBUTION X EQUITY (MC/TC X E) =	19

8

MAINTENANCE

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I. [8.1] Introduction

Kentucky adopted the Uniform Marriage & Divorce Act in 1972, replacing the traditional notion of "alimony" with the concept of rehabilitative maintenance. Such maintenance is intended for the rehabilitation of the spouse in need of support such that when and if possible, he or she will begin meeting his or her own needs at some point in the future without reliance on the payor spouse. *Powell v. Powell*, 107 S.W.3d 222 (Ky. 2003). While the legislature and courts have given guidance to Kentucky practitioners regarding the amount and duration of maintenance awards, there is no formula or method through which a practitioner can accurately and reliably predict the outcome of a request for maintenance. Maintenance awards are within the sound discretion of the trial court and will not be overturned absent evidence that the award was clearly erroneous. *Powell,* 107 S.W.3d at 224. The following is intended as an overview of Kentucky law regarding maintenance, and as a guide for the Kentucky practitioner.

For ease of reference throughout this chapter, the party seeking or receiving maintenance will be referred to as "Recipient" and the party paying or potentially paying maintenance will be referred to as "Payor".

II. [8.2] Maintenance

A. [8.3] Temporary Maintenance (KRS 403.160)

During the pendency of an action for divorce, legal separation, division of property or maintenance, a party may seek an order of temporary maintenance. The temporary maintenance is for the purpose of preserving the status quo while the action is pending. *Horvath v. Horvath*, 250 S.W.3d 316 (Ky. 2008). KRS 403.160 governs a request for temporary maintenance, and provides in part as follows:

> (1) In a proceeding for dissolution of marriage or for legal separation, or in a proceeding for disposition of property or for maintenance or support following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, either party may move for temporary maintenance. The motion shall be accompanied by an affidavit setting forth the factual basis for the motion and the amounts requested.
>
> ...
>
> (3) As part of a motion for temporary maintenance or support or by independent motion accompanied by affidavit, either

party may request the court to issue a temporary injunction or restraining order pursuant to the Rules of Civil Procedure.

...

(5) On the basis of the showing made and in conformity with KRS 403.200, the court may issue a temporary injunction or restraining order and an order for temporary maintenance in amounts and on terms just and proper in the circumstances.

...

(6) A temporary order or temporary injunction:

(a) Does not prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding;

(b) May be revoked or modified before final decree on a showing of the facts necessary to revocation or modification under the circumstances; and

(c) Terminates when the final decree is entered or when the petition for dissolution or legal separation is voluntarily dismissed.

In preparing a motion and affidavit in support of a request for temporary maintenance, the practitioner should consider the factors outlined in KRS 403.200, the statute which governs maintenance, along with any other relevant factors. While there will be information missing (for example, the ultimate distribution of assets probably will not have occurred by the time the temporary maintenance request is heard), KRS 403.200 nevertheless provides guidance as to the factors the court will consider even at the temporary maintenance hearing.

Also, while KRS 403.160(6) is very clear in stating that a temporary order does not prejudice the rights of the parties at subsequent hearings, the amounts set forth in a temporary order (good or bad) will, nevertheless, set the pace for the future litigation or settlement. Usually, the judge setting the temporary maintenance award will be the same judge setting the final maintenance award.

B. [8.4] Types

A "final" order of maintenance comes at the end of a litigation, whether by settlement or decree. That final order may take several forms: lump sum (a one-time payment), periodic (a set amount and duration), or permanent/open-ended (a set amount for an undetermined duration). While permanent/open-ended awards should be infrequent where the goal of maintenance is rehabilitation of the Recipient, there are some situations in which rehabilitation is not feasible (*i.e.*, a Recipient who is elderly, disabled or incapable of earning sums to support himself/herself in the standard of living to which the parties became accustomed). Obviously, these types of awards have differing financial results for the Recipient and the Payor.

C. [8.5] Statutory Criteria (KRS 403.200)

KRS 403.200 provides as follows:

(1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

  (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and

  (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

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

  (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

  (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

  (c) The standard of living established during the marriage;

  (d) The duration of the marriage;

  (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and

  (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

1. [8.6] Entitlement to Maintenance (KRS 403.200(1))

As a practitioner, you must not lose sight of the fact that a party must meet the requirements of KRS 403.200(1) to be *entitled* to an award of maintenance. To be entitled to maintenance, a Recipient must lack sufficient property to meet his or her reasonable needs. This requirement cannot be properly analyzed until there is a

determination of what property will be allocated to that party in the end. Because you usually will not know the ultimate distribution of property until the end of the case, you will have to present your proof to the court by anticipating that ultimate award. A Recipient also must demonstrate that they are not able to support himself/herself through appropriate employment, or that they are the custodian of a child whose condition or circumstances make it appropriate that the Recipient not seek employment outside of the home. Unless these two (2) requirements are met, the maintenance inquiry will end here. *Casper v. Casper*, 510 S.W.2d 253, 255 (Ky. 1974); *Age v. Age*, 340 S.W.3d 88, 95 (Ky. Ct. App. 2011).

When analyzing whether a Recipient lacks sufficient property to meet his/her reasonable needs, there are several considerations. First, to what extent does the property allocated to the Recipient reduce that Recipient's expenses? The Recipient might have received a home or car with no debt. The Recipient might be the beneficiary of a trust which produces significant income. The Recipient might have received assets which will generate income. The Recipient might have received a retirement benefit which will support him/her at the point in time the Recipient can begin receiving the benefits. In *Powell v. Powell*, 107 S.W.3d 222, 225 (Ky. 2003), the Kentucky Supreme Court found that although the court should consider the property allocated to the Recipient spouse in determining whether maintenance should be awarded, the Supreme Court does not require the Recipient to invest all proceeds into income-producing assets in order to reduce the amount of maintenance needed to meet the Recipient's needs. Additionally, a Recipient is not expected to liquidate and live on the principal of his or her assets to meet his or her needs. *Colley v. Colley*, 460 S.W.2d 821, 827 (Ky. 1970). In *Atwood v. Atwood*, 643 S.W.2d 263, 265 (Ky. Ct. App. 1982), the court found that "[w]hile there would be a reasonable expectation that the spouse entitled to maintenance would not fritter away his or her portion of the marital property and would use same properly to help provide for his needs, we will not impose on appellant a duty to invest all or nearly all of her cash portion of the marital settlement into the uninsured and speculative money market." However, *see Smith v. Smith*, 235 S.W.3d 1, 18 (Ky. Ct. App. 2006), upholding the trial court's denial of maintenance to husband who had marital and non-marital property, as well as an "advanced education background" such that "...although...[he] may not enjoy the same lifestyle he enjoyed during his marriage...he should be able to achieve a reasonable approximation of it." In setting the amount of maintenance, the court must consider *all* financial resources of both parties, regardless of whether they are marital or non-marital in nature. *Roberts v. Roberts*, 744 S.W.2d 433, 436 (Ky. Ct. App. 1988); *Qualls v. Qualls*, 384 S.W.2d 326, 327 (Ky. 1964).

Second, what are the Recipient's reasonable needs? A careful analysis of the Recipient's expenses in light of his/her established standard of living is important. Also, even where a present need for maintenance cannot be demonstrated, the practitioner should consider whether that need will occur in the future. *Frost v. Frost*, 581 S.W.2d 582 (Ky. Ct. App. 1979) (Even though he Recipient does not have present need, the court can consider future need).

If these criteria are met, then the court will proceed to consider the questions of "how much?" and "for how long?".

2. [8.7] Factors to Be Considered in Determining the Amount and Duration (KRS 403.200(2))

KRS 403.200(2) requires the court to exercise its discretion in making a maintenance award that the court deems just after considering all relevant factors and making relevant findings of fact. *Age v. Age*, 340 S.W.3d 88, 95 (Ky. Ct. App. 2011). While the statute enumerates the factors the court must consider, the court should consider and make findings on all relevant factors, even if not enumerated by statute.

a. [8.8] Statutory Factors

Again, the court must consider the following factors in determining the amount and duration of maintenance: (a) the financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian; (b) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; (c) the standard of living established during the marriage; (d) the duration of the marriage; (e) the age, and the physical and emotional condition of the spouse seeking maintenance; and (f) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

A discussion of financial resources is set forth above and applies here as well.

Considering the time needed for education or training is directly related to the goal or rehabilitation of the Recipient. In many situations, the Recipient will need to acquire or update their education or training so as to maximize their income-earning potential. Proof must be presented, where possible, regarding the cost and duration of education or training, and of potential income once that education or training has been secured.

In *McGregor v. McGregor*, 334 S.W.3d 113, 117 (Ky. Ct. App. 2011), the Kentucky Court of Appeals addressed the issue of imputing income to a voluntarily unemployed or underemployed spouse:

> ...The maintenance statute, KRS 403.200, does not explicitly include a similar provision [(as in KRS 403.212(2)(b), allowing a court to base child support on a parent's potential income)] permitting a court to impute income to a voluntarily unemployed or underemployed spouse. In determining if a spouse is entitled to maintenance, a trial court must find, among other things,

> that the spouse seeking maintenance '[i]s unable to support [herself] through appropriate employment....' KRS 403.200(1)(b). To set the appropriate amount and duration of maintenance under KRS 403.200(2), the court must consider several factors, including a spouse's financial resources, ability to find appropriate employment, and the standard of living enjoyed during the marriage. While a case of first impression, it is implicit in this statutory language that a court may impute income to a voluntarily unemployed or underemployed spouse to determine both the spouse's entitlement to maintenance and the amount and duration of maintenance. This practice has found favor in other jurisdictions throughout the United States when a trial court has imputed income to an underemployed or unemployed spouse....

(citations omitted). The trial court should consider both past earnings and present circumstances in determining a party's income at the time of the proceeding. *Brenzel v. Brenzel*, 244 S.W.3d 121, 125 (Ky. Ct. App. 2008); *Gripshover v. Gripshover*, 246 S.W.3d 460, 469 (Ky. 2008).

The court also must consider the standard of living to which the parties have become accustomed. This *does not* mean that the court must restore each spouse to the standard of living to which they became accustomed. In fact, the courts have recognized that to do so would most often be impossible. Two people simply cannot live apart on the same amount of money/expenses that they lived on together. In analyzing this factor, an examination of the parties' *actual historic* monthly expenses and habits is critical. Perhaps the easiest method of analyzing these expenses is to input all spending records (banking, investment and credit accounts) into a database which will label and sort the expenses.

A determination of duration includes not only consideration of the ages of the parties and length of marriage; it also includes consideration of the physical and emotional condition of the Recipient. For example, the court must consider whether one party is disabled, and whether they can become gainfully employed in the future. *Massey v. Massey*, 220 S.W.3d 700, 704 (Ky. Ct. App. 2006). However, a court cannot extend the duration of a maintenance award for the purpose of supporting a child where a child-support order could not have been issued. For example, in *Bailey v. Bailey*, 246 S.W.3d 895, 897 (Ky. Ct. App. 2007), the trial court extended the maintenance award because the Recipient planned to pay the college expenses of their child. The appellate court vacated that portion of the maintenance order, reinforcing the prior ruling in *Atwood v. Atwood*, 643 S.W.2d 263, 266-67 (Ky. Ct. App. 1982), which established that "...what the court may not do directly, by ordering child support, it may not do indirectly, by ordering maintenance."

Finally, the court must consider the ability of the Payor to meet his or her own needs while meeting the needs of the Recipient. At this point in the analysis, the Payor's monthly expenses and income (or income potential) become relevant,

and are subject to the same considerations as those outlined above regarding the expenses and income of the Recipient.

b. [8.9] Other Factors

i. [8.10] Fault

Kentucky is a "no-fault divorce" state. This means that neither party is required to demonstrate "fault" as a prerequisite to divorce. Nevertheless, fault *may* be relevant to the court's consideration of a claim for maintenance. Fault will not be considered in determining whether a Recipient is *entitled* to maintenance, however fault will be considered by the court in setting the amount and duration of maintenance. *Chapman v. Chapman*, 498 S.W.2d 134, 138 (Ky. 1973). Please note that the fault of the Payor is not the focus. The purpose of considering the fault of the Recipient is to avoid rewarding a Recipient for marital misconduct. Because the focus of maintenance is to rehabilitate the Recipient – not to penalize the adulterous Payor – fault of the Payor will not be considered. *Platt v. Platt*, 728 S.W.2d 542, 543-44 (Ky. Ct. App. 1987). Despite this, a practitioner might consider presenting proof of the Payor's fault as being a direct "cause" of the Recipient's fault.

ii. [8.11] Professional Degree and Personal Goodwill

Although the "value" of a professional degree is not considered marital property and, thus not subject to division, the fact that the Recipient assisted the Payor while the Payor obtained a professional degree is a factor to be considered. *Powell v. Powell*, 107 S.W.3d 222, 225 (Ky. 2003).

In *Gaskill v. Robbins*, 282 S.W.3d 306, 315 (Ky. 2009), the Kentucky Supreme Court finally acknowledged that a professional spouse's "skill, personality, work ethic, reputation, and relationships..." are the non-marital property of that spouse. "To consider this highly personal value as marital would effectively attach...[the Payor's] future earnings, to which...[the Recipient] has no claim. Further, if...[the Recipient] were then awarded maintenance, this would amount to 'double dipping,' and cause a dual inequity to...[the Payor]." *Id.*

iii. [8.12] Tax Implications

It is appropriate for the court to consider the tax implications of an award of maintenance. *Powell v. Powell*, 107 S.W.3d 222, 226 (Ky. 2003), *citing Clark v. Clark*, 782 S.W.2d 56, 61 (Ky. Ct. App. 1990) and *Broida v. Broida*, 388 S.W.2d 617, 621 (Ky. 1964).

iv. [8.13] Calculation of Amount

There is no statutory formula for calculating maintenance. Maintenance is within the sound discretion of the trial court. Reported decisions by the courts

emphasize that maintenance is to be determined on a case-by-case basis. In fact, in *Downing v. Downing*, 45 S.W.3d 449, 457 (Ky. Ct. App. 2001) the court considered a calculation made for determining child support where the parties' income exceeded the child support guidelines and found that "...a trial court abuses its discretion when it relies primarily on a mathematical calculation to set child support without any other supporting findings or evidence."

"It is undisputable that trial courts have wide discretion in determining the amount of maintenance and that no particular formula has ever been held as the method for establishing maintenance." *Age v. Age*, 340 S.W.3d 88, 95 (Ky. Ct. App. 2011). However, the practitioner has a few tools to assist them in formulating a maintenance request or considering the reasonableness of a demand. In 1992, the Kentucky Court of Appeals issued an unpublished opinion in which it set forth a formula for calculation of maintenance found in *Theories of Property Division – Spousal Support: Searching for Solutions to the Mystery*, 23 FAMILY L.Q. 253 (Summer 1989). *Luebbers v. Luebbers*, No. 90-CA-001430-MR (Ky. Ct. App. Nov. 20, 1992). The court indicated that "...there is and can be no set formula for a maintenance award", however, further stated that the formula provides "a starting point for discussion of the issue and a method of comparing awards from case to case." The formula is as follows:

A. Payor's income
B. Recipient's income
C. difference in each party's income (A - B)
D. child support (if any)
E. spousal support income factor (C - D)
F. number of years married, multiplied by 1% (yrs. of marriage x .01)
G. duration of marriage factor if marriage is more than 10 years (F + .10)
H. annual maintenance (E x G)

(A - B) - C = E

(F + .10) = G

E x G = H

H = annual maintenance

In *Luebbers*, the husband earned $76,000.00 per year (A), and the wife earned or would earn $33,000.00 per year (B). The difference in their income was $43,000.00 (C). The wife received $9,000.00 per year in child support (D). The spousal support income factor, thus, was $34,000.00 (E) ($43,000.00 - $9,000.00 = $34,000.00). They were married 11 years, thus, the duration of marriage factor (G) was .21 ((11 x .01) + .10). Annual maintenance was predicted by the formula

to be $7,140.00 per year ($24,000.00 x .21). The *Luebbers* court did not provide any guidance for predicting the duration of maintenance.

c. [8.14] MarginSoft

MarginSoft is a computer software company founded by Craig Ross. MarginSoft offers software which evaluates maintenance and child support claims. Detailed information regarding this program can be obtained at the MarginSoft website: <www.marginsoft.net>.

d. [8.15] Petrilli

In his family law treatise, Professor Petrilli suggests a method of determining the amount of maintenance to which a working spouse is entitled: determine what the wife would be entitled to if she were not working, then subtract from that amount her income and award her the difference. R. Petrilli, KENTUCKY FAMILY LAW § 25.11 (Vol. 1 1988).

e. [8.16] *Atwood v. Atwood*

In *Atwood v. Atwood*, 643 S.W.2d 263, 266 (Ky. Ct. App. 1982), the Kentucky Court of Appeals remanded a maintenance issue to the trial court and suggested that the trial court *consider* the following method of calculation: "Add the two net salaries, divide by two, and subtract from this result [Recipient's] net income and the child support [Payor] has been ordered to pay. Then order [Payor] to pay as maintenance this sum or any other sum within reason consistent with the facts, for a reasonable length of time or until there is a change in circumstances because of minor children involved." Notice that this formula was suggested for the trial court to *consider*, with a lot of limiting language.

f. [8.17] American Academy of Matrimonial Lawyers

The American Academy of Matrimonial Lawyers ("AAML") has suggested a formula for the calculation of maintenance. In that formula, maintenance should equal 30% of the Payor's gross income, minus 20% of the Recipient's gross income (with the Recipient's total income including maintenance not to exceed 40% of the combined gross income of the parties). This figure is then subject to adjustment if any of the following deviation factors apply:

1. A spouse is the primary caretaker of a dependent minor or a disabled adult child;
2. A spouse has pre-existing court-ordered support obligations;
3. A spouse is complying with court-ordered payment of debts or other obligations (including uninsured or unreimbursed medical expenses);

4. A spouse has unusual needs;
5. A spouse's age or health;
6. A spouse has given up a career, a career opportunity or otherwise supported the career of the other spouse;
7. A spouse has received a disproportionate share of the marital estate;
8. There are unusual tax consequences;
9. Other circumstances that make application of these considerations inequitable; or
10. The parties have agreed otherwise.

The AAML guidelines also suggest a calculation for the duration of maintenance, again subject to the deviation factors. In the duration calculation, maintenance should be paid for a number of years calculated by multiplying the length of the marriage by the following durational factors:

- For marriages of 0-3 years: 30%;
- For marriages of 3-10 years: 50%;
- For marriages of 10-20 years: 75%; or
- For marriages of 20 years or more: permanent.

g. [8.18] Other Jurisdictions

There are formulas suggested in other jurisdictions, a recent compilation of which can be found at: <http://www.kelseytrask.com>.

3. [8.19] Determination of Duration

The duration of maintenance must be directly related to the period over which the need exists and the Payor has the ability to pay. *Combs v. Combs*, 622 S.W.2d 679, 680 (Ky. Ct. App. 1981). Although there is no formula in Kentucky for determining the duration of a maintenance award, one former Jefferson Family Court judge is rumored to have suggested that one (1) year of maintenance for every three (3) years of marriage might be fair. Also, the MarginSoft software and the AAML formula provide a prediction for the maintenance duration. Regardless of these "predictors", a case-by-case determination must be made based upon the length of time support will be needed and the Payor's ability to pay over that period of time.

As with setting the amount of maintenance, in setting the duration of a maintenance award, the court must consider *all* financial resources of both parties, regardless of whether they are marital or non-marital in nature. *Roberts v. Roberts*, 744 S.W.2d 433, 436 (Ky. Ct. App. 1988); *Qualls v. Qualls*, 384 S.W.2d 326, 327 (Ky. Ct. App. 1964).

Although maintenance is designed to financially rehabilitate the Recipient, the courts have recognized that there are some situations in which it is not realistic to expect the Recipient to attain the ability to become self-supporting. This is often true in a long-term marriage where the Recipient spouse has not worked outside of the home for many years, is nearing retirement age or the discrepancy in income is great. *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003), *citing Clark v. Clark*, 782 S.W.2d 56, 61 (Ky. Ct. App. 1990).

Again, Kentucky courts have been very clear in saying that there is and can be no formula for calculating either the amount or the duration of maintenance. Every determination must be made on a case-by-case basis.

III. [8.20] Modification and Termination

KRS 403.250(1) provides as follows:

> (1) Except as otherwise provided in subsection (6) of KRS 403.180, the provisions of any decree respecting maintenance may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state....
>
> (2) Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance.

A. [8.21] Application of KRS 403.250

When determining whether maintenance can be modified or terminated, it is important to consider whether the obligation arose from an agreement or a court order. If the obligation arose by agreement, the provisions of the agreement regarding modification and termination control. (Note the language of KRS 403.250(1) "Except as otherwise provided in subsection (6) of KRS 403.180, the provision of any decree respecting maintenance may be modified…"; KRS 403.180(6) says that a decree may limit or preclude modification of maintenance if the settlement agreement so provides). If the agreement is silent as to modification or termination, KRS 403.250 may apply.

Until May, 2011, another important factor in the applicability of KRS 403.250 was whether the maintenance is "lump sum" (this can be either a one-time payment, or periodic payments of a set amount and duration, or both) or whether it

is an "open-ended" obligation (this can be either an award of unlimited duration, or one which is reviewable). *Dame v. Dame*, 628 S.W.2d 625 (Ky. 1982).

In May, 2011, the Kentucky Supreme Court overturned the *Dame* decision in *Woodson v. Woodson*, 338 S.W.3d 261, 263 (Ky. 2011):

> This Court unanimously agrees that it is time for *Dame* to go. KRS 403.110, in describing the purpose of that chapter, states that it shall be "liberally construed and applied to promote its underlying purposes." One of those purposes is to "[m]itigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage." The potential harm of a trial court not being able to modify a maintenance provision can lead to the financial ruination of a party….
>
> …[A]ll decrees "respecting maintenance" are modifiable under certain circumstances.
>
> …[W]e hold today that a maintenance award in a fixed amount to be paid out over a definite period of time is subject to modification under KRS 403.250(1), thereby overruling *Dame.*
>
> In saying farewell to *Dame*, we do not belittle the compelling need for finality in all divorce cases. The burden of proof to change maintenance orders is sufficiently strict to insure relative stability and finality. It requires the showing of "changed circumstances so substantial and continuing as to make the terms unconscionable." KRS 403.250(1). However, the statute does not divest trial judges of the discretion to decide when modification outweighs the virtue of finality in seeking fairness and equity in what many times may be dire consequences and complicated options.

Additionally, even prior to the *Woodson* case, the Kentucky Supreme Court created a narrow exception to *Dame* in *Low v. Low*, 777 S.W.2d 936 (Ky. 1989) when it permitted the modification of a lump sum maintenance where the Payor's bankruptcy extinguished a promissory note owed to the Recipient. The court found that the loss of the interest-bearing promissory note had played a significant role in the court's property distribution and that the bankruptcy created a "manifest inequity" which entitled the Recipient to an increase in maintenance. *Id.* at 938. However, the court limited its decision to the specific facts before it and expressly stated that it "should not be read as a significant departure from *Dame*." *Id.*

B. [8.22] "Changed Circumstances" Under KRS 403.250

Once you have determined that the maintenance obligation may be modifiable under KRS 403.250(1), you must analyze whether there are "changed circumstances so substantial and continuing as to make the terms unconscionable."

As contemplated by KRS 403.250(1), "unconscionable" is defined as "manifestly unfair or inequitable." *Bickel v. Bickel*, 95 S.W.3d 925, 927 (Ky. Ct. App. 2002). The goal of KRS 403.250(1) is to create relative stability, and it requires the party seeking modification to present compelling evidence in order to be successful. *Id.*

While a Payor cannot voluntarily reduce his or her income so as to avoid or reduce a maintenance obligation, voluntary retirement is viewed differently by courts. *Id.* at 928. When the retirement of an obligor is found to be objectively reasonable, it is deemed a substantial and material change in circumstances which allows the modification of his or her maintenance obligation. *Id.* at 929. Courts should consider the totality of the circumstances when determining whether an obligor's retirement is objectively reasonable, including:

> the ability of both spouses to earn in the labor market, the age and health of the retiring spouse, the motives of the party for retiring, the timing of the retirement, the ability of the party to pay maintenance after retirement, the ability of the other spouse to provide for himself or herself, the reasonableness of the early retirement, the expectations of the parties and the opportunity of the dependent spouse to prepare to live on the reduced support.

Id. at 928.

When analyzing whether a changes in circumstances has occurred pursuant to KRS 403.250(1), *res judicata* does not prevent a court from considering facts which were asserted as support for a previous motion for maintenance modification so long as that motion was denied. *Wheeler v. Wheeler*, 154 S.W.3d 291, 293-94 (Ky. Ct. App. 2004). In contrast, "a previous order granting a modification of maintenance is *res judicata*, and the circumstances that justified the original modification cannot be used to support a subsequent motion to modify." *Id.* at 294 n.8.

The trial court has the discretion to order relief retroactive to the date of the motion. *Mudd v. Mudd*, 903 S.W.2d 533, 534 (Ky. Ct. App. 1995).

In *Combs v. Combs*, 787 S.W.2d 260 (Ky. 1990), the Kentucky Supreme Court considered the issue of whether the cohabitation of the party receiving maintenance constituted a change in circumstances under KRS 403.250(1) because it might constitute a new financial resource for the Recipient, making the continuation of the Payor's maintenance obligation unconscionable. The *Combs* court found that in order for cohabitation to constitute such a change in circumstances as to make the obligation unconscionable, there must be a showing of substantially changed circumstances based upon consideration of the following factors: (1) the duration of the relationship; (2) the scope and extent of the economic benefit; (3) the intent of the parties; (4) the nature of the living arrangements; (5) the nature of the financial arrangements; and (6) the likelihood of a continued relationship. *Id*. at 262. The court was clear in finding that not every instance of cohabitation would rise

to the level needed to suspend or terminate the obligation, and pointed out that it was not intended to restrict casual overnights or dating. *Id*. In *Combs*, the Payor was ordered by the court to pay maintenance, and there was no agreement by the parties which would limit the duration of the maintenance. *Id*. at 261. The Payor sought a determination under KRS 403.250(2), arguing that her cohabitation was a change of circumstances so substantial and continuing as to make continuation of the obligation unconscionable. *Id*.

C. [8.23] Modification or Termination by Agreement

Again, if the maintenance obligation arose by agreement, the provisions of the agreement regarding modification or termination control. In *Lydic v. Lydic*, 664 S.W.2d 941 (Ky. Ct. App. 1983), the agreement provided that maintenance would terminate upon Recipient's remarriage or death, and that the provisions regarding maintenance could not be modified. *Id*. at 942. Upon Recipient's cohabitation with another man, Payor sought termination, arguing that it was the equivalent of remarriage. *Id*. The court denied Payor's request, finding that cohabitation was not provided for in the agreement as a terminating event and, thus, it would not terminate the maintenance obligation. *Id*. at 943. KRS 403.180(6) provides that "...the decree may expressly preclude or limit modification of its terms if the separation agreement so provides." The courts are reluctant to change the terms of an agreement, and an agreement will not be modified on the basis that it was a "bad bargain". *Bishir v. Bishir*, 698 S.W.2d 823, 825-26 (Ky. 1985); *Peterson v. Peterson*, 583 S.W.2d 707, 712 (Ky. Ct. App. 1979).

In *Cook v. Cook*, 798 S.W.2d 955 (Ky. 1990), the parties entered into an agreement whereby the Recipient would receive maintenance until she died, remarried or began cohabitating with a non-relative adult male. *Id*. at 956. The Payor sought termination on the basis of cohabitation. *Id.* There, the court defined cohabitation as living "together as husband and wife. The mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations." *Id.* at 956. The court found that the six (6) factors enumerated in *Combs* were inapplicable because the issue before it was not modifying under KRS 403.250(1) (as in *Combs*) but, instead, was one of automatic termination under the terms of the parties' agreement. *Id.* This suggests that the factors outlined in *Combs* will apply only where modification under KRS 403.250(1) is sought and that if "cohabitation" is a terminating provision in the parties' agreement, then their intentions regarding the meaning of "cohabitation" will govern. *See also*, *Lydic v. Lydic*, 664 S.W.2d 941 (Ky. Ct. App. 1983).

In *Bennett v. Bennett*, 133 S.W.3d 487, 488 (Ky. Ct. App. 2004), the parties had entered into a settlement agreement which provided that the Recipient's maintenance would terminate upon her cohabitation. The parties' agreement did not define the term "cohabitation". The court noted that while BLACK'S LAW DICTIONARY and the language in *Combs v. Combs*, 787 S.W.2d 260 (Ky. 1990) and *Cook v. Cook*,

798 S.W.2d 955 (Ky. 1990) speak to the sharing of expenses by the cohabitating couple, other dictionaries define cohabitation as "a couple living together and not married to one another." *Bennett,* 133 S.W.3d at 490-91. The court upheld the trial court's finding that the Recipient was cohabitating. *Id.* at 491. As such, it is important to define the meaning of cohabitation if used in an agreement to limit the duration of maintenance.

D. [8.24] Termination

The Kentucky Supreme Court has held that a party whose maintenance award was terminated upon the obligee's remarriage, cannot have maintenance reinstated upon the annulment of the remarriage. *Hutton v. Hutton*, 118 S.W.3d 176, 178 (Ky. 2003). The provisions of KRS 403.250(1) do not afford courts such discretion. *Id.*

With respect to the termination of maintenance, the Kentucky Supreme Court has found that in the absence of an express statement in a written agreement or in a decree that maintenance would continue upon either party's death or the obligee's remarriage, the occurrence of either of these statutory contingencies terminated the maintenance obligation by law. *Messer v. Messer*, 134 S.W.3d 570, 573 (Ky. 2004). The holding of *Messer*, as it relates to KRS 403.250(2), applies with equal force to both an obligation arising by agreement between the parties and one arising by judicial decree.

IV. [8.25] Taxation

A. [8.26] Classification

Maintenance is deductible to the Payor for income tax purposes and included in the income of the Recipient if the following technical requirements are met: (1) the payment is in cash or its equivalent; (2) the payment is received by or on behalf of a spouse under a divorce or separation instrument; (3) the instrument does not designate the payment as not includible in gross income and not deductible; (4) spouses who are legally separated under a decree of divorce or separate maintenance cannot be members of the same household at the time the payment is made; (5) there is no liability to make any payment for any period after the death of the Recipient or to make any payment as a substitute for such payments after the death of the Recipient; and (6) the spouses must not file joint returns with each other. *See* 2011 U.S. Master Tax Guide (CCH), §§771-72, citing IRC §§ 62, 71 and 215.

The IRS defines a divorce or separation instrument as (1) a divorce or separate maintenance decree or a written instrument incident to such a decree; (2) a written separation agreement; or (3) a decree that is not a divorce decree or separate

maintenance decree but that requires a spouse to make payments for the support or maintenance of the other spouse. *Id.* at § 772, citing IRC § 71.

Where the parties have significantly different incomes prior to a maintenance award, a practitioner should consider whether shifting income via maintenance results in a gain for the parties by virtue of paying less in income taxes (the Recipient spouse may pay income taxes at a lower level than the Payor spouse).

B. [8.27] Recapture of Excess Payments (Front-Loading of Maintenance)

Caution: There is a special recapture rule through which the IRS attempts to prevent parties from treating as "maintenance" what is actually a property settlement agreement. The recapture rule requires the recapture as income of the excess amounts treated as maintenance either during the calendar year in which payments began or in the next succeeding calendar year. For sums which the Payor is required to recapture as income, the Recipient is entitled to deduct the same amount from gross income beginning in the third post-separation year. Here, the focus is on the three (3) years following the beginning of maintenance payments. If the payments from one calendar year to the next drop by more than $15,000 in any of the first three (3) years, you may have a recapture, or "front-loading" problem which will alter the tax benefits/obligations which the parties would otherwise have.

Excess payments must be recaptured in the third post-separation year. Those excess payments to be recaptured are the sum of the excess payments made in the first and second post-separation years. The formula for determining the excess payments is as follows:

Excess payments = maintenance paid in first year - ($15,000 + X)

X = (maintenance paid in 2nd year - excess payments in 2nd year) - maintenance paid in 3rd year; divided by 2

Excess payments in second year = maintenance paid in 2nd year - (maintenance paid in 3rd year + $15,000)

See 2011 U.S. MASTER TAX GUIDE (CCH), § 774, *citing* IRC § 71.

V. [8.28] Bankruptcy

Bankruptcy law crosses over into family law in numerous areas, including maintenance. For a full discussion of those issues, *see* **Chapter 9**.

9

DOMESTIC RELATIONS ISSUES IN BANKRUPTCY

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I. [9.1] § 523(a)(5) and (15) – Obligations Incident to a Divorce

A. [9.2] Background

In 2005, there were major changes to domestic relation law issues in the Bankruptcy Code[1] with the passage Senate Bill 256, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (2005 Act)[2].

As noted by numerous commentators over the past twenty years,[3] provisions of the Bankruptcy Code have been at odds with various forms of relief provided to parties ending their marriage. The primary problem the Bankruptcy Code presented to family law practitioners related to the discharge of debts owed to spouses, former spouses and children of a debtor which arose as part of a divorce decree, property settlement, other similar agreements, order of a court of record or as a result of a determination made by a governmental divorce (collectively hereinafter referred to as "Domestic Obligations")[4].

The threat of bankruptcy discharge of Domestic Obligations has been largely eliminated with the passage of the 2005 Act which sharply limits the dischargeability of such debts. However, the problems of discharge of Domestic Obligations have been replaced by significant restrictions of the ability of consumer debtors to obtain bankruptcy relief from third party debts which may limit an individual's ability to pay domestic obligations and the priority of Domestic Support Obligation ("DSO"). This section of the chapter will review the various changes made to the Bankruptcy Code by the 2005 Act which directly impact domestic relations practitioners and provide suggestions as to how to address serious economic problems in the context of the breakdown of a marriage.

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1 11 USC §§ 101 *et seq.* (2012).

2 A full copy of the 2005 Act can be found on the American Bankruptcy Institutes website at: <www.abiworld.org> or the library of Congress website at: <www.loc.gov>.

3 Vance, *Till Debt Do Us Part: Irreconcilable Differences in the Un-Happy Union of Bankruptcy and Divorce*, 45 Buff. L. Rev. 369 (1997); Bowles and Allmand, *What Divorce Court Giveth, Bankruptcy Court Taketh Away: The Dischargeability of Domestic Obligations After the Bankruptcy Reform Act of* 1994, 34 U. Louisville J. Fam. L. 521 (1985-1986); Peter C. Alexander, *Divorce and the Dischargeability of Debts: Focusing on Women as Creditors in Bankruptcy*, 43 Cath. U.L. Rev. 351 (1994); Ottilie Bello, *Bankruptcy and Divorce: The Courts send a Message to Congress*, 13 Pace L. Rev. 643 (1993); Jana B. Singer, *Divorce Obligations and Bankruptcy Discharge: Rethinking the Support/Property Distinction*, 30 Harv. J. On Legis. 43 (1993); David M. Susswein, *Divorce Related Property Division v. Alimony, Maintenance and Support in the Bankruptcy Contest: A Distinction Without a Difference?*, 22 Hofstra L. Rev. 679 (1994).

4 *See* Brigner & Bowles, *Bankruptcy and Divorce Law: Can an Unholy Alliance Make the End of an Unhappy Marriage Less Painful*? 13 Am. J. Fam. L. 148 (1999) (hereinafter *Bankruptcy and Divorce*). Please note that the overview of the Bankruptcy Code portion of this chapter is out of date in light of the 2005 Act.

B. [9.3] Discharge of Domestic Obligations Under the 2005 Act

1. [9.4] Pre-2005 Act Law

Under the Bankruptcy Code, prior to October 17, 2005 the effective date of the majority of the 2005 Act, Domestic Obligations dischargeability was governed by two provisions of the Bankruptcy Code.[5] 11 USC § 523(a)(5) governed the dischargeability of Domestic Obligations in "the nature of alimony maintenance or support" ("Support Obligations") and provided that an individual was not discharged from a debt:

> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that – (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support

11 USC § 523(a)(15) governed the dischargeability of Domestic Obligations not in the nature of Support Obligations ("Property Settlement Obligations") and provided that an individual was not discharged from a debt:

> (15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless – (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to

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[5] For a more detailed analysis of 11 USC § 523(a)(5) and (a)(15) dischargeability issues under pre-2005 Act law, *see* Bowles and Allmand, *What Divorce Court Giveth, Bankruptcy Court Taketh Away: The Dischargeability of Domestic Obligations After the Bankruptcy Reform Act of* 1994, 34 U. Louisville J. Fam. L. 521 (1985-1986); Peter C. Alexander, *Divorce and the Dischargeability of Debts: Focusing on Women as Creditors in Bankruptcy*, 43 Cath. U.L. Rev. 351 (1994); Ottilie Bello, *Bankruptcy and Divorce: The Courts send a Message to Congress*, 13 Pace L. Rev. 643 (1993); Jana B. Singer, *Divorce Obligations and Bankruptcy Discharge: Rethinking the Support/Property Distinction*, 30 Harv. J. On Legis. 43 (1993); David M. Susswein, *Divorce Related Property Division v. Alimony, Maintenance and Support in the Bankruptcy Contest: A Distinction Without a Difference?*, 22 Hofstra L. Rev. 679 (1994).

> be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;

Under the provisions of Bankruptcy Rules of Procedure ("Bankr. Rule") 4007 and 11 USC § 523(c), actions under 11 USC § 523(a)(5) to determine the dischargeability of Support Obligations could be brought in either state or federal court, without any express time limitation on such actions being filed.[6] However, actions under 11 USC § 523(a)(15) to determine the dischargeability of Property Settlement Obligations had to be: (1) brought in the bankruptcy court where the debtors bankruptcy was pending; and (2) filed no later than "60 days after *the first date set* for the meeting of creditors under § 341(a)."[7]

2. [9.5] 11 USC § 523(a)(5) Under the 2005 Act

The structure of 11 USC § 523(a)(5) was radically changed by the 2005 Act. Initially the 2005 Act added a new section, 11 USC § 101(14A), to the Bankruptcy Code which defines a new term: "Domestic Support Obligations" as follows:

> *(14A) The term 'domestic support obligation' means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is –*
>
> *(A) owed to or recoverable by –*
>
> *(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or*
>
> *(ii) a governmental unit;*
>
> *(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;*
>
> *(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of –*

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6 11 USC § 523(c); Bankr. Rule 4007 (2004). *See also*, *In re Baer*, 2012 WL 1430934 (Bankr. E.D. Ky. 2012) (abstaining from hearing dischargeability action due to state court jurisdiction).

7 11 USC § 523(c); Bankr. Rule 4007(c) (2004).

(i) a separation agreement, divorce decree, or property settlement agreement;

(ii) an order of a court of record; or

(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.[8]

This section replaces the definitional language previously found in 11 USC § 523(a)(5) addressing which debts were nondischargeable. Under the 2005 Act 11 USC § 523(a)(5) has been amended as follows:

(5) for a domestic support obligation;

~~(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that–~~

~~(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or~~

~~(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;~~

The new definition of Domestic Support Obligations ("DSO") is significantly different from the prior definition of Support Obligations in several respects although at least one court has held that the text of former 11 USC § 523(a)(5) is "comparable to and largely mirrors" Section 101(14A). *In re O'Brien*, 339 B.R. 524 (Bankr. D. Mass. 2006).

First, the definition of DSOs expands the types of debts which are made nondischargeable under 11 USC § 523(a)(5). Under old 11 USC § 523(a)(5) debts had to arise in connection with (1) separation agreement; (2) divorce decree; (3)

[8] Italics denote provisions added to the Bankruptcy Code by the 2005 Act. Strike outs denote provisions deleted from the Bankruptcy Code by the 2005 Act.

order of a court of record; or (4) determination by a governmental unit[9] made in accordance with state or territorial law in order to be nondischargeable.

Under the new definition of DSOs, debts which:

a. accrue either before, on or *after* the date an order of relief is entered in the debtor's case;

b. be established or subject to establishment before, on or *after* the date an order of relief; and

c. have arisen "by reason of applicable provisions of"

   (i) a separation agreement, divorce decree, or property settlement agreement;

   (ii) an order of a court of record; or

   (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit

are nondischargeable DSOs under 11 USC § 523(a)(5).

The broad DSO definition of Section 101(14A) encompasses many more types of obligations than the definition of Support Obligation did under the pre-2005 Act law, as it covers debts which were either: 1) established prior to the debtor's bankruptcy; 2) are in the process of being established; or 3) are established after the date of the filing of the debtor's bankruptcy. Indeed, given the "future" accrual and establishment language of the definition of DSOs it is arguable that any potential claim to a Marital Obligation which a party might have could constitute a DSO and will be nondischargeable.[10] An early decision discussing the question of what attorney fees arising from a divorce constitute DSOs. *In re O'Brien*, 339 B.R. 529 (Bankr. D. Mass. 2006) discusses this issue briefly but holds that an evidentiary hearing must be held to determine the extent the debts were DSOs.

Second, the definition of DSOs adds parents, "legal guardians" and "responsible relatives" of a child of the debtor to the list of creditors who can be owed a nondischargeable debt under 11 USC § 523(a)(5) ("Eligible Creditors"). This change makes nondischargeable certain debts in the nature of alimony, maintenance or support, which a debtor owes or could owe to an individual to whom the debtor was never married. In certain states, parties other than a debtor's spouse or former spouse (generally mothers of a debtor's child) may have claims related to the support of a child against a debtor even though they were not married to the debtor and this change directly impacts these obligations.

Third, and perhaps most importantly, the definition of DSO permits non-governmental non-Eligible Parties that have been: 1) "assigned voluntarily" debts; 2) "for the purpose of collecting the debt" (Query: collecting on whose behalf?);

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[9] 11 USC § 101(27) (2004).

[10] Under prior law it was questionable whether Domestic Support Obligations which had not arisen prior to a debtor's bankruptcy would be nondischargeable under USC § 523(a)(5).

and 3) which qualify as DSOs to file 11 USC § 523(a)(5) actions against debtors. This change is potentially harmful to the spouses, former spouses and children of debtors holding DSOs as under most state laws, alimony and child support obligations (which are DSOs) are generally *exempt* from the claims of creditors. However, if such claims can be "voluntarily assigned" to creditors of spouses, former spouses of debtors, and possibly even legal guardians or responsible relatives, the ability to exempt such claims may be lost.[11]

A possible problem in this area could arise with "hold harmless" obligations where debtors have been ordered to pay or indemnify their former spouses from liability on joint debts in a divorce decree or property settlement agreement. Although a state domestic relations court may order a party to pay these joint debts, these judges *cannot* release the other spouse or former spouse from their joint liability to the joint creditor. If the joint creditor on that obligation can convince a former spouse or spouse to voluntarily assign these hold harmless obligations for the purpose of helping her collect her DSO, it can file a nondischargeability suit for a DSO against a debtor.[12] Further, such a creditor *would not* be required to release the former spouse from liability on such joint debt even if it prevailed on the DSO adversary proceeding.

Further under the definition of DSO a parent, legal guardian or responsible relative of a child receiving child support *may voluntarily assign child support debts which qualify as DSOs to non-governmental entities*. As child support is generally exempt either statutorily or by state case law from the claims of creditors of parent, legal guardian or responsible relatives, this change in the statute could be used by parties to expropriate child support payments away from their intended beneficiaries and into the hands of creditors of parties other than the child.

There were no changes to either 11 USC § 523(c) or Bankr. Rule 4007 concerning the timing for filing 11 USC § 523(a)(5) nondischargeability actions.

3. [9.6] 11 USC § 523(a)(15) Under the 2005 Act

In contrast with the numerous complex changes to 11 USC § 523(a)(5) there were only two changes to 11 USC § 523(a)(15) made by the 2005 Act which was amended as follows:

> (15) *to a spouse, former spouse, or child of the debtor and* not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a

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[11] It is unknown as to whether the language "for the purpose of collecting the debt" is a significant limitation on third parties being able to obtain assignment of Domestic Support Obligations.

[12] *See* Section [9.21] of this chapter. However a joint creditor could also attempt to "persuade" a spouse, former spouse or parent of a debtor's child ("Joint Debtor") to file a dischargeability action under 11 USC § 523(a)(5) and a priority claim under 11 USC § 507(a)(i) in order to have both a priority and nondischargeable claim against the Debtor and then have the spouse, former spouse or parent of a debtor's child assign this claim to the joint creditors. *See* 11 USC 507(a)(1).

> separation agreement, divorce decree or other order of a court of record, *or* a determination made in accordance with State or territorial law by a governmental unit*;* ~~unless–~~
>
> ~~(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or~~
>
> ~~(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;~~

The first change, adding the language "to a spouse, former spouse or child of the debtor" clarifies an issue which sometimes arose prior to BAPCPA in bankruptcy cases as to what parties had standing to bring 11 USC § 523(a)(15) actions against the debtor. This change also shows the more limited scope of (a)(15) debts than (a)(5) DSOs It is important to note that the "child's parent, legal guardian, or responsible relative" language of 11 USC § 101(14A) *was not* added to 11 USC § 523(a)(15) and therefore a parent, legal guardian or responsible relative of a child of the debtor who is not a spouse or former spouse of the Debtor may have standing problems in seeking to bring an 11 USC § 523(a)(15) action unless the action is brought in the name of the child.

The other change made by the 2005 Act to § 523(a)(15) is the elimination of subparagraphs (A) and (B), means that *all (a)(15)* debts are nondischargeable, without a debtor having the right to raise any defenses. *See In re Adams*, 2012 WL 2467084 (Bankr. E.D. Ky. 2012). This change will eliminate most litigation over the dischargeability of Domestic Obligations which frequently occurred in bankruptcy cases. In fact the only remaining dischargeability litigation under 11 USC § 523(a)(15) will occur in chapter 13 cases as (a)(15) debts are still dischargeable under the discharge provisions of 11 USC § 1328. *See In re Ballard*, 2011 WL 2133529 (Bankr. E.D. Ky. 2011); *Howard v. Howard*, 336 S.W.2d 433 (Ky. 2011).

An equally important change made by the 2005 Act to 11 USC § 523(a)(15) practice is the removal of 11 USC § 523(a)(15) from the provisions of 11 USC § 523(c), which, in connection with Bankr. Rule 4007, had previously granted exclusive jurisdiction over 11 USC § 523(a)(15) actions to the Bankruptcy Court where the debtors case was pending and imposed strict time limits for filing 11 USC § 523(a)(15) actions. Under the 2005 Act, nondischargeability actions under 11 USC § 523(a)(15) can be brought either in state or federal courts and there is no longer any statutory time limits for bringing such action. *See In re Menges*, 337 B.R. 191 (Bankr. N.D. Ill. 2006) (discussing differences in pre- and post-2005 Act law on jurisdiction over 11 USC § 523(a)(15) claims.); *see also, In re Olson*, 2006 WL 2987938 (Bankr. E.D. Tenn. Oct. 19, 2006) (Creditor of the Debtor who was

not a spouse, former spouse or child of the Debtor, was not permitted to "Step into shoes" of non-Debtor spouse to assert 11 USC § 523(a)(15) claim).

4. [9.7] Summary of Changes to the Dischargeability of Domestic Obligations Made by the 2005 Act

When the 2005 Act amendments to the Bankruptcy Code took effect, the vast majority of issues related to the dischargeability of Domestic Obligations in bankruptcy proceedings were eliminated as the amended versions of 11 USC § 523(a)(5) and (a)(15) will make nearly all Domestic Obligations nondischargeable.[13] Instead of dischargeability of Domestic Obligations being the primary issue for family law practitioners, bankruptcy/domestic law issues will now revolve around the more indirect issues which are discussed below.

II. [9.8] Priority Claims for DSOs: 11 USC § 507(a)(1)

As noted above, the term DSO has numerous applications under the Bankruptcy Code as amended by the 2005 Act. One of the most important of those provisions is new 11 USC § 507(a)(1) which provides for first priority payment of DSOs:

> *(A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.*
>
> *(B) Subject to claims under subparagraph (A), allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition, are assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian,*

[13] The primary issues which will still be subject to dischargeability litigation is whether an obligation which arose prior to divorce or other domestic relation proceedings qualifies as nondischargeable obligations under either 11 USC §§ 523(a)(5) and (a)(15) and the potential to discharge (a)(15) debts in chapter 13 cases.

> *or responsible relative of the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.*
>
> *(C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302, the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.*

Other than superpriority claims,[14] which arise out of post-petition financing by debtors, primarily in chapter 11 and chapter 13 cases and certain trustee (*not chapter 11 debtor in possession*) claims under 11 USC §§ 503(1)(A), (2) and (6), no unsecured claim in a bankruptcy estate has priority over unpaid DSOs. This is a major change from the seventh level priority granted to Support Obligations by the pre-2005 Act Bankruptcy Code. Although this change is intended to benefit holders of DSOs, this "über-priority" afforded DSOs may prevent bankruptcy filings which would otherwise have been beneficial to the creditors holding DSOs as it severely limits the ability of bankruptcy professionals to get paid for their work in cases where there are significant outstanding DSO claims. However, three recent decisions *In re Reid*, 2006 WL 2077572 (Bankr. M.D.N.C. July 19, 2006); *In re Sanders*, 347 BR 776 (Bankr. N.D. Ala. 2006); and *In re Vinnie*, 345 B.R. 386 (Bankr. M.D. Ala. 2006) allowed attorney fees and other claims to be paid concurrently with DSO claims.

A. [9.9] Preference Defense of Domestic Support Obligations: New 11 USC § 547(c)(7)

Another change to the Bankruptcy Code made by the 2005 Act was the amendment of 11 USC § 547(c)(7) to conform with the changes made to 11 USC § 523(a)(5). This provision of the Bankruptcy Code protects payments made on DSOs, which are nondischargeable under 11 USC § 523(a)(5), from being avoided as preferences under 11 USC § 547. Prior to the 2005 Act, Support Obligations were also exempt from avoidance as a preference. Other than the more expansive definition of DSOs set forth in 11 USC § 101(14A) from nondischargeable debts under old 11 USC § 523(a)(5), this change does not materially alter current law.

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[14] *See* 11 USC § 364 (2004). In fact, new 11 USC § 507(a)(1) has priority even over 11 USC § 507(b) failed adequate protection claims as the 2005 Act amends § 507(b) to grant priority to Domestic Support Obligations over 11 USC § 507(b) claims.

B. [9.10] Domestic Relation Law and the Automatic Stay

11 USC § 362 provides for an "automatic stay" or injunction which arises upon the filing of a petition in bankruptcy and which prohibits most actions to collect, liquidate or otherwise enforce claims[15] which arise prior to the debtor filing bankruptcy. The 2005 Act greatly expends statutory exceptions from the automatic stay set forth in 11 USC § 362(b)(2) for domestic relations issues and now provides:

> *(2) under subsection (a) –*
>
> *(A) of the commencement or continuation of a civil action or proceeding –*
>
> *(i) for the establishment of paternity;*
>
> *(ii) for the establishment or modification of an order for domestic support obligations;*
>
> *(iii) concerning child custody or visitation;*
>
> *(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or*
>
> *(v) regarding domestic violence;*
>
> *(B) of the collection of a domestic support obligation from property that is not property of the estate;*
>
> *(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;*
>
> *(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;*
>
> *(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;*

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[15] 11 USC § 101(5) defines claims broadly as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

> *(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or*
>
> *(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;*

This change removes most domestic relation actions from the provisions of the automatic stay although it is still advisable (if timing permits) to seek a determination from the Bankruptcy Court that the automatic stay either does not apply or should be terminated, in order not to have your actions determined to be stay violation and either declared void and be subject to sanctions.[16]

C. [9.11] Exception to the Means Test: 11 USC § 707

One of the largest changes made to the Bankruptcy Code by the 2005 Act is the amendment of 11 USC § 707 which establishes a "means" test which imposes strict limits on debtors filing a chapter 7 case when the debtor earns more than the median annual income for a similar sized family for the applicable state. The details of this incredibly complex provision are far beyond the scope of this chapter[17] and will not be discussed further except to address two provisions of the 2005 Act amendments, which directly impact Domestic Obligations.

First, new 11 USC § 707(b)(2)(A)(iv) permits debtors to deduct all priority claims "(including priority child support and alimony claims)" in determining whether a debtor can meet the means test. Although it is unclear why the new term DSO was not referred in this provision but as DSOs are clearly "priority claims" under the Bankruptcy Code, they therefore can be deducted from a debtor's income in calculating whether a debtor passes the means test.

Second, and more importantly, 11 USC § 707(c)(3) prohibits a court from dismissing a chapter 7 case under the new provisions of 11 USC § 707 means test, if the debtor establishes, by a preponderance of the evidence, "that the filing of a case under this chapter is necessary to satisfy a claim for a Domestic Support Obligation." This means that if a debtor can show the discharge of his or her other debts is necessary to permit the payment of DSOs, the debtor can file and remain in a chapter 7 bankruptcy even if the debtor's case would otherwise be subject to dismiss under 11 USC § 707.

D. [9.12] Notice to Holders of DSOs

11 USC §§ 704 and 1106 sets forth the duties of bankruptcy trustees, and examiners in chapter 7 and 11 bankruptcy cases. With certain exceptions not

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16 *See generally Far Out Productions v. Oskar*, 247 F.3d 986 (9th Cir. 2001) (actions taken in violation of automatic stay void); *Easley v. Pettibone Michigan Corp*., 990 F.2d 905 (6th Cir. 1993) (actions voidable).

17 For an excellent discussion of the means test *see* Brown and Ahern, *2005 Bankruptcy Reform Legislation with Analysis* (2005).

related to domestic relations issues chapter 11 debtors-in-possession have the same duties as chapter 11 trustees.[18]

The 2005 Act amended both 11 USC § 704, by adding subsection (a)(10) and (5) and 11 USC § 1106 by adding subsection (a)(8) and (c). These provisions[19] require extremely specific notice to be given to holders of DSOs. The notice provisions of both 11 USC § 704 and § 1106(c) are essentially identical. The notice required is set forth in new section 11 USC § 1106(c) provides:

> *(1) In a case described in subsection (a)(8) to which subsection (a)(8) applies, the trustee shall –*
>
> *(A) (i) provide written notice to the holder of the claim described in subsection (a)(8) of such claim and of the right of such holder to use the services of the State child support enforcement agency established under sections 464 and 466 of the Social Security Act for the State in which such holder resides, for assistance in collecting child support during and after the case under this title; and*
>
> *(ii) include in the notice required by clause (i) the address and telephone number of such State child support enforcement agency;*
>
> *(B) (i) provide written notice to such State child support enforcement agency of such claim; and*
>
> *(ii) include in the notice required by clause (i) the name, address, and telephone number of such holder; and*
>
> *(C) at such time as the debtor is granted a discharge under section 1141, provide written notice to such holder and to such State child support enforcement agency of –*
>
> *(i) the granting of the discharge;*
>
> *(ii) the last recent known address of the debtor;*
>
> *(iii) the last recent known name and address of the debtor's employer; and*
>
> *(iv) the name of each creditor that holds a claim that –*
>
> *(I) is not discharged under paragraph (2), (4), or (14A) of section 523(a); or*
>
> *(II) was reaffirmed by the debtor under section 524(c).*

[18] 11 USC § 1107 (2004).

[19] 11 USC §§ 704(c) and 1106(a)(8).

> *(2)(A) The holder of a claim described in subsection (a)(8) or the State child enforcement support agency of the State in which such holder resides may request from a creditor described in paragraph (1)(C)(iv) the last known address of the debtor.*
>
> *(B) Notwithstanding any other provision of law, a creditor that makes a disclosure of a last known address of a debtor in connection with a request made under sub-paragraph (A) shall not be liable by reason of making such disclosure.*

These provisions which apply both to chapter 11 trustees and chapter 11 debtors in possession, as well as chapter 7 trustees through 11 USC § 704, make it clear that DSO creditors are entitled to clear notice of the filing of the bankruptcy case as well as several key aspects of the case.

E. [9.13] Chapter 11 Requirements to Pay DSOs

11 USC § 1112 of the Bankruptcy Code governs motions to dismiss or convert chapter 11 cases. The 2005 Act adds 11 USC § 1112(b)(4)(P) which provides that "absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate" a court *shall* convert a chapter 11 to a chapter 7 case or dismiss the chapter 11 if a debtor fails to pay a Domestic Support Obligation "that first becomes payable after the date of the filing of the petition."

This provision will help ensure payment of DSOs during the ponderous in chapter 11 cases. However, there are unresolved questions as to what impact the new version of 11 USC § 362 will have on the requirement to make such payment obligations and determining when a DSO "first becomes payable." *See generally In re Moore*, __ B.R. __ 2006 WL 3692640 (Bankr. E.D. Tenn. 2006)

F. [9.14] Chapter 11 Plan Requirements

The 2005 Act also amended 11 USC § 1129 which governs how chapter 11 plans are confirmed by Bankruptcy Courts. The 2005 Act added subsection (a)(14) to require that the debtor had to have paid all DSOs, which a "debtor is required by a judicial or administrative order, or by statute to pay" and which first became due after the date of the filing of a bankruptcy petition, in order to have a chapter 11 plan confirmed.

III. [9.15] Chapter 13 Issues

A. [9.16] Trustee Duties in Chapter 13

11 USC § 1302 governs the statutory duties of chapter 13 trustee. The 2005 Act amended this provision to require the trustee to give expended notice to creditors holding domestic support obligations similar to the notice requirements in chapter 7 and 11 cases. Section 1302(d)(1) provides:

> *(d)(1) In a case described in subsection (b)(6) to which subsection (b)(6) applies, the trustee shall –*
>
> *(A) (i)provide written notice to the holder of the claim described in subsection (b)(6) of such claim and of the right of such holder to use the services of the State child support enforcement agency established under sections 464 and 466 of the Social Security Act for the State in which such holder resides, for assistance in collecting child support during and after the case under this title; and*
>
> *(ii) include in the notice provided under clause (i) the address and telephone number of such State child support enforcement agency;*
>
> *(B) (i) provide written notice to such State child support enforcement agency of such claim; and*
>
> *(ii) include in the notice provided under clause (i) the name, address, and telephone number of such holder; and*
>
> *(C) at such time as the debtor is granted a discharge under section 1328, provide written notice to such holder and to such State child support enforcement agency of–*
>
> *(i) the granting of the discharge;*
>
> *(ii) the last recent known address of the debtor;*
>
> *(iii) the last recent known name and address of the debtor's employer; and*
>
> *(iv) the name of each creditor that holds a claim that–*
>
> *(I) is not discharged under paragraph (2) or (4) of section 523(a); or*
>
> *(II) was reaffirmed by the debtor under section 524(c).*

> *(2) (A) The holder of a claim described in subsection (b)(6) or the State child support enforcement agency of the State in which such holder resides may request from a creditor described in paragraph (1)(C)(iv) the last known address of the debtor.*
>
> *B) Notwithstanding any other provision of law, a creditor that makes a disclosure of a last known address of a debtor in connection with a request made under subparagraph (A) shall not be liable by reason of making that disclosure.*

This is essentially identical to the notice provisions required of chapter 7 trustees and chapter 11 trustees.

B. [9.17] Conversion or Dismissal of Chapter 13 Cases

The 2005 Act also amends § 1307(c)(11) of the Bankruptcy Code to provide as a ground under which a court *may* dismiss a chapter 13 case the: "failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition." This change conforms to the amendment made to the chapter 11 dismissal provisions of 11 USC § 1112.

C. [9.18] Dischargeability of 11 USC § 523(a)(15) Debts in Chapter 13 Cases

As noted above, 11 USC § 523(a)(15) provides that debts: 1) owed to a spouse, former spouse or child of the debtor; 2) not of the kind described in 11 USC § 523(a)(5); and 3) were incurred in the course of a divorce or separation, or in connection with a separation agreement, divorce decrees or other order of a court of record or a determination made in accordance with State or territorial law by a governmental unit, are nondischargeable. However, the nondischargeability provisions of 523(a)(15) do not apply to chapter 13 cases as this section is not incorporated into the discharge provisions of 11 USC § 1328 which governs discharge in chapter 13 cases.

In chapter 13, debtors will still be able to litigate both the dischargeability and the priority of marital obligations primarily by challenging whether a claim qualifies as a DSO. No reported case law post BAPCPA has arisen on the issue of a claims qualification as a DSO, but pre-petition case law concerning the difference between pre-2005 Act (a)(5) and (a)(15) claims will be highly relevant in these cases. *See generally In re O'Brien*, 339 B.R. 529 (Bankr. D. Mass. 2006).

D. [9.19] Confirmation of Chapter 13 Plan

Finally, the 2005 Act makes several changes to 11 USC §§ 1322 and 1325 which will strengthen the existing provisions in the Code relating to Domestic Obligations in chapter 13 cases.

Initially, 11 USC § 1322(a)(2) requires all priority claims under 11 USC § 507 be paid in full in deferred cash payments in order to confirm a plan unless the holder of a claim agrees to a different treatment. This includes 11 USC § 507(a)(1) DSOs.

Further 11 USC § 1322(a)(4) allows the possibility of payment of less than 100% of DSOs assigned to governmental units ("507(a)(1)(B) Claims") only if all of the debtors' projected disposable income for a 5-year period is applied to the 507(a)(1)(B) Claims.

Also under 11 USC § 1325(a)(8), the debtor must have paid prior to confirmation of the chapter 13 plan all DSOs: 1) which first become payable after the bankruptcy filing; and 2) which the debtor is required to pay by statute or judicial or administrative order, in order for his or her chapter 13 plan to be confirmed. 11 USC § 1325(b)(2) also gives special protection to DSOs in calculating disposable income for purposes of the chapter 13 plan.

Finally, it is important to note that there is a developing line of case law in chapter 13 cases which permits the payment of non-DSO claims under a chapter 13 prior to the payment in full of the DSO debts. *See In re Reid*, 2006 WL 2077572 (Bankr. M.D.N.C. July 19, 2006); *In re Sanders*, 347 B.R. 776 (Bankr. N.D. Ala. 2006); *In re Vinnie*, 345 B.R. 386 (Bankr. M.D. Ala. 2006). While these cases have not required chapter 13 debtors to pay DSOs first in their chapter 13 plans, there also appears to be no prohibition to a chapter 13 debtor confirming a plan which would have payments under the plan go first to DSO claims.

IV. [9.20] DSOs and Exemptions Under 11 USC § 522

As an additional protection for holders of DSOs, the 2005 Act amended 11 USC § 522 which governs exempt property. Under 11 USC § 522, if permitted by state law (11 USC § 522(b)(2)), a debtor may shelter or exempt certain property from the claims of creditors which arose prior to the debtor's bankruptcy filing. However, these exemptions are specifically prohibited from claims which qualify as DSOs. In fact, 11 USC § 522(c)(1) goes further and provides "notwithstanding any provision of applicable non-bankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in Section 523(a)(5)."

The final language of 11 USC § 522(c)(1), quoted above, raises the question of whether any exemption or other creditor protection law (such as ERISA anti-alienation provisions) prevents holders of DSOs from attempting to attach or obtain these otherwise protected assets. Further bankruptcy trustees could attempt to use these provisions to take and liquidate otherwise exempt assets to pay DSOs. *See generally In re Covington*, 2006 WL 2734253 (Bankr. E.D. Cal. 2006).

V. [9.21] Debt Relief Agencies: An Unintended Consequence for Domestic Relations Practitioners

Among the amendments made by the 2005 Act was the addition of §§ 526 (Restrictions on debt relief agencies); 527 (Disclosures); and 528 (Requirements for debt relief agencies) (collectively "DRA Provisions"). While these provisions were added to strengthen "professional standards" for attorneys and others who work with consumer debtors in their bankruptcy cases,[20] the definition of who and what constitute debt relief agencies is not limited to people representing consumer debtors.

11 USC § 101(12A) defines debt relief agencies as

> (12A) The *term* "debt *relief* agency" means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110, but does not include –
>
> (A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;
>
> (B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;
>
> (C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;
>
> (D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or
>
> (E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

11 USC § 101(3) defines "assisted person" as "any person whose debts consist primarily of consumer debts and the value of whose non-exempt property is less than $150,000." This means that a typical client in a divorce proceeding could be an "assisted person" if their non-exempt assets are valued at less than $150,000.

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[20] For an overview of the DRA provisions, *see In re Attorney at Law and Debt Relief Agencies*, 332 B.R. 66 (Bankr. S.D. Ga. 2005).

Please note the $150,000 is not a value net of secured debt, but apparently a gross value of an individual's assets. However, it is uncertain whether any value of an asset which could be exempted, either fully or partially, can be included in this calculation of the value of the "non-exempt property."

11 USC 101(4A) defines "bankruptcy assistance" and states:

> (4A) The term "bankruptcy assistance" means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.

Given the breadth of the definition of bankruptcy assistance which apparently includes, on its face, providing information or advice with respect to what *might* happen in a bankruptcy case, it is possible to argue that domestic relations practitioners could be considered debt relief agencies and subject to the DRA Provisions of the Bankruptcy Code if they give any advice on what may happen to a domestic obligation in a potential bankruptcy. While most of the DRA Provisions have no impact on domestic relation practitioners, under 526(c)(1), "any contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with the material requirements of [the DRA Provisions] may be avoided by the assisted person and the debt relief agency must return all fees charged the debtor and is also liable for reasonable attorney fees and actual damages." As Section 527 and 528 contain numerous technical requirements related to providing bankruptcy assistance to assisted persons, if domestic relations practitioners are deemed to be debt relief agencies, the chance of significant liability for failing to comply with the DRA Provisions is quite high.

As noted above, while it appears that the DRA Provisions were not meant to apply to domestic relation practitioners, there is a certain level of risk so each attorney must review his or her situation to determine an acceptable level of risk.

VI. [9.22] Conclusion and Suggestions

In summary, the 2005 Act has decided, as a policy matter, that most domestic obligations, including alimony, child support, and property settlements arising from dissolution of marriage, are entitled to far greater protection than previously have been afforded by the Bankruptcy Code. Now, spouses, former spouses and children of debtors will no longer have to worry about the threat of having their financial support and distributions be discharged through bankruptcy proceedings. Further, DSOs under the amendments made by the 2005 Act also enjoy a greatly enhanced priority. However, in light of other changes, particularly those relating

to the assignability of DSOs under the 2005 Act, couples who are facing both a divorce and serious financial problems must fully consider the issue of whether they wish to take certain joint bankruptcy actions in order to alleviate the financial strain on their family prior to completing their divorce or dissolution of marriage.

In many cases domestic relations courts are severely limited in their ability to enter appropriate judgments or approve settlement agreements which fully provide for the financial well being of the families of people undergoing divorce as these families are burdened with significant debt.

While domestic relations courts, are the leading authorities in determining what constitutes appropriate levels of support which families need to have in the aftermath of the dissolution of a marriage this expertise often cannot be used. As the U.S. Constitution prohibits the impairment of contracts by courts outside of bankruptcy, domestic relations courts can do *absolutely nothing* to attempt to discharge or relieve a particular parent of their liability to third party creditors, under joint or individually owed debts in domestic relations proceedings. Only Bankruptcy Courts, under the provisions of Bankruptcy Code can discharge debts, contracts and obligations to third parties.

In light of the constitutional limitations under which domestic relations courts have to operate, bankruptcy under the new 2005 Act now becomes an avenue for a more "cooperative" effort between a debtor and their former spouse in attempting to reorder their financial lives (if such relief is necessary) in order to fully provide for the needs of the family. Therefore, there are three issues that should be considered both by domestic relations practitioners and, the domestic relations judiciary in considering the problems financially strapped individuals face when entering into a divorce or dissolution proceedings.

A. [9.23] File Bankruptcy First

Perhaps, the easiest step that can be taken in this area is for parties who are considering a divorce and, who are experiencing severe financial distress to speak either individually or jointly[21] with a bankruptcy attorney to determine whether either a joint or individual bankruptcy for each spouse would be an appropriate way to discharge some of their obligations. If, after evaluation by the bankruptcy attorneys, this is the appropriate course of action, the parties can file bankruptcy, and later, conclude their divorce proceedings. With little or no debt to deal with, domestic relations courts are then able to make more realistic financial provisions for the parties in their divorce without having to worry about the burden of the parties' debt. Further, chapter 13 may be a possibility in certain situations in order to

[21] Representing parties who are planning to undergo a divorce in a "joint bankruptcy filing" before they actually divorce, presents ethical issues for bankruptcy practitioners. *See* Bowles, *Goldilocks Bankruptcy and Divorce: Are Adversarial Relationships Too Much, Too Little or Just Right?*, 21 Am. Bankr. Inst. J. 20 (2002).

the preserve the family home or, the family transportation which would otherwise be lost to foreclosing creditors.

B. [9.24] Limited Assignability of DSOs

Another issue, which both domestic relations practitioners and domestic relations courts may wish to consider in financially troubled divorce actions, is whether to judicially limit the ability of recipients of what would constitute DSOs to assign such obligations to third party creditors. As noted above, in general, such obligations cannot be involuntarily attached by creditors under state law and, in cases where spouses or former spouses of the debtor may be facing serious pressure to assign such claims (to perhaps the ultimate detriment of themselves, and the children of the debtor), provisions in domestic relations court orders could eliminate the ability of such obligations to be voluntarily assigned. This would require review of each state's applicable law, as well as applicable domestic relations practice in a state but, limiting the assignment of DSOs is an issue that should be considered in order to prevent third party assignments of otherwise unreachable assets.

C. [9.25] Judicially Ordered Bankruptcy

Finally, domestic relations practitioners may wish to consider the possibility of having a domestic relations court *require* a reluctant spouse to file bankruptcy in order to put their financial house in order. While at the present time, the author has been unable to find any reported decision where a domestic relations judge has ordered a party to file bankruptcy as a condition of either obtaining a divorce, or being awarded certain property as part of that divorce, such an action cannot be lightly dismissed. In many cases, for a variety of purely personal reasons, certain spouses will absolutely refuse to cooperate with the other spouse even, when such cooperation would lead to a great financial benefit to the family unit as a whole. State domestic relations courts, have broad equitable powers, including the ability to order people to jail for failure to pay debt, holding parties in contempt for failure to properly dispose of assets or, punishing parties for failing to secure appropriate employment. In light of the significant nature of domestic relation courts' powers, the ability to order a party to exercise their federally guaranteed privilege of filing for bankruptcy protection does not seem to be totally out of line and should be considered in appropriate cases.

Therefore, in light of the 2005 Bankruptcy Act, domestic relations practitioners can ponder the ancient adage, attributed to various cultures and numerous great speakers: "be careful what you wish for, you just may very well get it." Domestic relations practitioners have now been relieved for the threat of a discharge of domestic obligations in bankruptcy proceedings in return for the uncertain impact of the other provisions of the 2005 Act and the potential to be considered "Debt Relief Agencies." Whether this new law will be a boon, or a gift with certain "strings" attached, remains to be seen.

10

CHILD SUPPORT

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I. [10.1] Introduction

A. [10.2] Historical Background

Even before the promulgation of the Kentucky Child Support Guidelines, the law in Kentucky clearly required that both parents of a child had a duty of support, whether pursuant to an action for dissolution or an action to determine paternity. It has been a statutory requirement since 1952 that even stepparents, if receiving public assistance, may have a child support obligation.

The former KRS 403.250, which was amended by Kentucky's adoption of the Family Support Act of 1988, and Kentucky case law, provided for the general guidelines that had developed over the years. The obligation often fell to the poorest of parents, but the major deciding factor was the sound discretion of the court. *Browning v. Browning*, 551 S.W.2d 823 (Ky. Ct. App. 1977).

The guidelines take into account the standard of living of the children but disregard the parents' debt and the lack of visitation in relation to the level of support. In order to set child support in accordance with the guidelines, the court must have jurisdiction over the parties, even those choosing to enter into their own agreement regarding child support.

Because the court's discretion was so broad, the amount of support often varied from court to court and case to case. Awards were never predictable, and they were almost irrational in their diminishment of the actual duty. For example, in a 1948 case, the rationale for the award included the mother's receipt of money from a son in the armed services. *Wright v. Thomas*, 209 S.W.2d 315 (Ky. 1948). Similarly, a 1962 case rationalized that a father's new car payment and other expenses affected his ability to pay support. *Gamblin v. Gamblin*, 354 S.W.2d 504 (Ky. 1962).

Even before the enactment of the Family Support Act of 1988, in 1975, Title IV-D of the Social Security Act set up a joint federal and state enforcement program for the collection of child support and recovery of funds spent on public assistance.

B. [10.3] Kentucky Child Support Commission

In 1988, the United States Congress enacted the Family Support Act of 1988. 42 USC §§ 654, 666-667. As a result, states were required to implement presumptive child support guidelines. The purpose of the guidelines, which were required for both original and modification orders, was to make child support payments consistent and predictable.

As a result of the enactment of the Family Support Act of 1988, Kentucky enacted child support guidelines in 1990. Those guidelines, contained in KRS

403.210 *et seq*., created a rebuttable presumption that the guidelines would apply to both the establishment or modification of child support. If the guidelines were not applied, then the court was required to make written findings in support of its deviation. KRS 403.212 has established guidelines if the parties exercise split custody of children (*i.e.*, if one parent has one child and the other parent has the other child or children).

KRS 403.213 also required the establishment of a commission to periodically review the child support guidelines. The Child Support Commission consists of 13 members, including a Cabinet for Health and Family Services representative; two attorneys with at least six years of domestic relations experience, one from an urban area and one from a rural area; two Circuit Judges, one from an urban area and one from a rural area; one District Judge; two county attorneys, one from an urban area and one from a rural area; the Attorney General or his designee; a custodial parent; a non-custodial parent; a split custodial parent; and a child advocate.

The Child Support Commission is required to make recommendations to the General Assembly to ensure that the guidelines result in appropriate child support awards. In addition, the Child Support Commission is required, at least once every four years, to review the guidelines.

The most recent review of the Kentucky Child Support Guidelines by the Child Support Commission occurred in a report dated October 17, 2001, to the General Assembly. Prior to the report, the Child Support Commission reviewed the report from Policy Studies, Inc. ("PSI"), dated September 1, 2000. The Cabinet for Health and Family Services contracted with PSI to review the economic data on child-rearing expenditures and make recommendations regarding the appropriateness of the current child support guidelines. The current child support guidelines are based on economic data from 1986.

The Child Support Commission conducted public hearings, and its meetings, generally held quarterly, were also open to the public. Following the review of the PSI report, and the public hearings, the Child Support Commission recommended that the General Assembly adopt new child support guidelines. The proposed guidelines did not differ significantly from the existing guidelines, but in many cases a slight child support increase would have resulted. A bill to amend the guidelines consistent with the Child Support Commission recommendation was filed but did not pass the General Assembly.

II. [10.4] Statutory Child Support

Kentucky enacted several statutes to comply with the federal mandate handed down by the Family Support Act of 1988. KRS 403.210-.213 all address the calculation of child support using the Kentucky Child Support Guidelines. Pursu-

ant to KRS 403.211, the child support guidelines serve as a rebuttable presumption of the child support award in any given case. Only after making specific findings on the record are the courts allowed to deviate from the child support guidelines.

A. [10.5] Calculations Pursuant to the Guidelines

A few simple factors are needed to calculate child support using the guidelines: the gross income of each parent; the number of minor children; whether either parent is financially supporting prior born minor children; and whether either parent is paying court-ordered maintenance. Once these factors are determined, the calculations are made on the "child support chart" using the Kentucky Child Support Guidelines. This chart is found in KRS 403.212. The child support calculation worksheet can be found in the Appendix of this chapter at Section [10.32], *infra*.

1. [10.6] Income

The income of the parents is the factor that receives the most attention in the child support calculations. The child support guidelines use *gross* income in calculating support. Although the statute contains numerous definitions and explanations regarding income, the term is still the subject most often questioned by litigants and interpreted by courts. For example, some of the most common inquiries include: Is overtime counted as income? What if a parent is paid in cash? What if a parent owns his/her own business? What if a parent quits her job as a doctor to work at McDonald's? The questions and scenarios are literally endless.

The legislature attempted to simplify matters by providing a detailed definition of gross income:

> (b) "Gross income" includes income from any source, except as excluded in this subsection, and includes but is not limited to income from salaries, wages, retirement and pension funds, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, Social Security benefits, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, Supplemental Security Income (SSI), gifts, prizes, and alimony or maintenance received. Specifically excluded are benefits received from means-tested public assistance programs, including but not limited to public assistance as defined under Title IV-A of the Federal Social Security Act, and food stamps.

KRS 403.212(2)(b).

Determining income is usually an easy matter if the parties involved are full-time employees, working for an arms-length employer. The Kentucky Court of Appeals has interpreted the statute as creating a presumption that future years'

income will be similar to the most recent year's income. *Keplinger v. Keplinger*, 839 S.W.2d 566, 569 (Ky. Ct. App. 1992). If one parent wants the court to use an income other than what the other parent earned in the most recent year, that parent bears the burden of proving the change in income sufficient to overcome the burden. *Id*. Therefore, the historical earning data from each parent – pay stubs, W-2s, tax returns – will provide enough information for counsel, or the court, to prepare child support calculations under the guidelines. In fact, the statute requires that the income of the parents "shall be verified by documentation of both current and past income," and that tax returns and pay stubs are suitable. KRS 403.212(f).

There are, of course, many sources of income, and, for the most part, all sources of income will be counted when calculating child support. In fact, the Kentucky Court of Appeals has stated that in determining child support, "the emphasis should be on *including, not excluding*, income...." *Clary v. Clary*, 54 S.W.3d 568, 573 (Ky. Ct. App. 2001) (emphasis added).

The statute specifically spells out some sources of income that will be included in the calculation of child support under the guidelines. Bonuses and commissions, for example, are counted as income for the purpose of calculating child support. Even if the bonus is given only at one time per year, it will be included in gross income when determining the monthly or weekly child support obligation. Maintenance is also income for purposes of child support. If one parent is paying maintenance to the other, then the maintenance is deducted from the payor's income, and added to the payee's income for the child support calculations. The receipt of maintenance will almost always reduce the amount of child support received by the payee parent.

a. [10.7] Non-Recurring Income: Capital Gains, Gifts, Prizes, Student Loans

The statute also specifically includes nonrecurring income, such as capital gains, gifts, prizes, and severance pay as "gross income" for the purpose of calculating child support. KRS 403.212(2)(b). The Kentucky Court of Appeals specifically addressed this issue in *Clary v. Clary*, 54 S.W.3d 568 (Ky. Ct. App. 2001). In *Clary*, the father had sold his farm and had realized a capital gain of $620,000.00. The mother argued that the entire lump sum should be included in the father's income for purposes of calculating his child support obligation. The father argued that only capital gains received on a recurring or regular basis should be included in the child support calculations. *Id.* at 571.

The court started with the statutory definition of income, which includes items that are typically singular, non-recurring events, such as gifts and prizes. The court also looked at other jurisdictions, which had generally included non-recurring income in child support calculations. *Id.* at 571-72. In the case before it, the court pointed out that the father received the entire sum and had immediate access and control over it. The court agreed with the other jurisdictions that the

capital gain should be included in the father's income for child support purposes. *Id.* at 574. In response to the father's argument that the inclusion would be unfair, the court stated that the trial court retained discretion to deviate from the guidelines by making written findings, and that the father could move for a modification of the support the following year. *Id.*

The Kentucky Court of Appeals has also provided guidance on some miscellaneous forms of potential income. In *Stewart v. Burton*, 108 S.W.3d 647 (Ky. Ct. App. 2003), the court discussed the income of a dental student for child support. The student was not working full time; instead, his father helped to support him by giving him about $700.00 per month, and the student took out student loans to help cover his remaining living expenses. The child's mother argued that the money the student received from his father, and the money received from student loans, should be counted as income for child support purposes. The trial court agreed with both arguments. *Id.* at 648.

In *Stewart*, the Court of Appeals first examined the issue of the gifts. "Gifts" are specifically included in the statutory definition of gross income. The student argued that the legislature only meant to include income-producing gifts in the statutory definition. *Id.* The court correctly pointed out that the legislature could easily have specified "income producing gifts," had it intended such a restricted interpretation. Therefore, the court rejected the argument that a gift must produce income to be counted as income for child support purposes. *Id.* However, whether a gift was, in fact, the type that should count as income for child support was ultimately within the trial court's discretion. Specifically, the court stated that the trial court "may determine that a gift should not be included in income if it is inconsequential, nonrecurring or unlikely to provide sufficient funds to pay the increased child support." *Id.* at 648-49. The type of gifts received by the student in this case – regular, recurring gifts every month used to pay his monthly expenses – were exactly the type of gifts that should be counted in the calculation of child support. *Id.* at 649.

As for "income" derived from student loans, the court disagreed with the trial court's decision that it should be included in calculating the student's child support obligation. *Id.* at 649. Although student loans are not included in the statutory definition of gross income, the statute does not set forth an exhaustive list of income sources that can be included in child support calculations. The Court of Appeals reviewed decisions from several other jurisdictions who had looked at the issue, and all of those jurisdictions had found that student loans did not meet the statutory definition of income because of the requirement that the loans be repaid. *Id.* at 649. The court concluded that the student loans should not be included as income because they must be repaid and "there was no showing that these loans were allocated for anything other than [the student's] education." *Id.* at 649.

The court's conclusion in *Stewart* regarding student loans begs the following questions: (1) What if the student's father had "loaned" him the money for his living expenses each month instead of giving it to him? Would the requirement that

the money be repaid be enough to exclude it as income for child support purposes? and (2) What if the student took out student loans to cover his living expenses, as many students do? Would the fact that the loans were allocated for living expense as opposed to educational expenses be sufficient to count the loans as income?

b. [10.8] Expense Reimbursements

Expense reimbursements received by a parent from an employer can also be counted as income "if they are significant and reduce personal living expenses such as company or business car, free housing, reimbursed meals, or club dues." KRS 403.212(2)(c). In *Pegler v. Pegler*, 895 S.W.2d 580 (Ky. Ct. App. 1995), the Kentucky Court of Appeals addressed the issue of free housing furnished to a member of the military. The wife argued that since the statute specifically includes expense reimbursements and free housing as income, the value of the husband's free military housing must be factored into his income. *Id.* at 582. The trial court had declined to include the value of the husband's housing, which was on the military base, and the Court of Appeals agreed. The court stated that the trial court has "some" discretion in determining whether expense reimbursements are significant. *Id.* With regard to the military housing, the court pointed out that in some situations housing provided by the military might be "space on a ship, or a tent in the field." *Id.* The court found that the trial court had not abused its discretion by choosing not to include the value of the soldier's housing in his income for child support purposes. *Id.*

c. [10.9] Social Security Disability

Social Security income is another source of income that can cause confusion in trying to determine child support. Income from Social Security is expressly delineated in the statute as income to be counted for child support calculations. KRS 403.212(2)(b). The Kentucky Supreme Court rejected the argument that, since federal law prohibits the attachment of Social Security benefits, such benefits cannot be counted as income for child support purposes. *Commonwealth v. Morris*, 984 S.W.2d 840 (Ky. 1998). Therefore, if either parent receives Social Security payments, those payments are counted toward that parent's income for child support purposes.

The more complicated question arises when the child receives Social Security payments. A child can receive payments directly as a result of a parent's disability, or as a result of the child's own disability. When the child receives the payments, how does that affect the amount of child support the child receives?

In *Barker v. Hill*, 949 S.W.2d 896 (Ky. Ct. App. 1997), the child at issue was disabled and received supplemental security income ("SSI") as a result. The trial court set the father's child support obligation at zero because the child's SSI payments were in excess of the father's child support obligation under the guidelines. *Id.* at 896. On appeal, the mother argued that it was inappropriate for

the child's independent income to offset the father's child support. The court did not address the mother's argument. The court rejected the trial court's opinion on a technical issue – the trial court had failed to issue written findings which are required for a deviation of the child support guidelines. *Id.* at 898.

The child support guidelines create a rebuttable presumption. Therefore, the father's child support was the amount provided by the guidelines. However, the court acknowledged that the trial court had the ability to deviate from the guidelines if it did so in writing, and one of the statutory criteria allowing for a deviation is the independent financial resources of the child. *Id.* at 897. While the court's opinion leaves the issue open for a trial court to deviate based on the SSI income for a child's disability, the court did advise that "there is nothing inherently unjust or inappropriate about making a father support his child, if he is able to do so, before looking to a government welfare program that is intended to supplement the resources of the needy." *Id.* at 898.

In a slightly different scenario, the case of *Miller v. Miller*, 929 S.W.2d 202 (Ky. Ct. App. 1996), and KRS 403.211(14), address the issue of payments to the child as a result of a parent's disability. A payment to a child as a result of a parent's disability is credited against the child support obligation of the disabled parent. *Id.* at 205; KRS 403.211(14). If the child's Social Security payments are equal to or exceed the child support obligation, the disabled parent has no direct-pay obligation. Any surplus payment above the child support obligation is considered a gratuity, except that the overpayment can be applied toward an arrearage accrued *after* the disability. *Id.* The amount of the child's payment is not added to the income of either parent for the purposes of calculating the child support obligation. KRS 403.211(14).

2. [10.10] Imputed Income

If the court determines that a parent is voluntarily unemployed or underemployed, the court can base child support on the parent's "potential income." KRS 403.212(2)(d). The Kentucky Court of Appeals first interpreted this statute to require a showing that the parent's underemployment or unemployment was purposefully done with the intention of interfering with child support. *McKinney v. McKinney*, 813 S.W.2d 828 (Ky. Ct. App. 1991). However, that burden was especially difficult to meet. The requirement of intent would preclude the courts from ever imputing income to a parent who had stayed at home with the children before the divorce, or from using potential income for a parent who had been laid off, but had failed to even look for another job in over a year. As a result, the legislature added language to the statute providing that a finding of voluntarily underemployment or unemployment was not contingent on a finding "that the parent intended to avoid or reduce the child support obligation." KRS 403.212(2)(d). Today, Kentucky courts routinely use potential, or imputed, income to determine a child support obligation.

The statute gives the courts some guidance in determining potential income, stating that it shall be "based upon employment potential and probable earnings level based on the [parent's] recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community." KRS 403.212(2)(d). The court is to determine potential income for any parent who is voluntarily unemployed or underemployed, unless the parent is physically or mentally incapacitated or is caring for a child, belonging to both of the parents, age three or younger. *Id.*

Determining if a parent is voluntarily unemployed or underemployed, and what the parent's potential income is, is a matter left to judicial discretion. The fact that a parent earns less than he or she is capable of earning does not necessarily dispose of the issue. The court must consider the totality of the circumstances in deciding whether it is appropriate to use potential income in setting a child support award. *Polley v. Allen*, 132 S.W.3d 223, 227 (Ky. Ct. App. 2004).

In the case of *Gossett v. Gossett*, 32 S.W.3d 109 (Ky. Ct. App. 2000), the Kentucky Court of Appeals addressed the issue of whether it was appropriate to impute income to a parent already working a full time job. In *Gossett*, the father had worked a full time job, often with overtime, and a second job part-time, when his child support was originally calculated. *Id.* at 110. Subsequently, he voluntarily quit his part-time job, and cut back on his overtime at his full time job. Then, he moved to reduce his child support. *Id.* The trial court found, as a matter of law, that the father was not required to maintain more than one full time job, and reduced his child support to the number based on the earnings from his full time job. *Id.* at 111.

The Court of Appeals disagreed that *as a matter of law*, income from more than one full time job could not be imputed to a parent. Instead, the court stated that the issue of whether a parent is underemployed is an issue of fact, and must be evaluated under the circumstances of each case. *Id.* at 111-12. The court stated that it is "generally not appropriate to impute additional income to a parent already working a full 40 hour work week." *Id.* at 112. However, the court stated that it might be appropriate when there is a history of a parent having more than one job, and that the trial court should consider several factors, including "the previous history of employment, the occupational qualifications, the extent to which the parent may be under-employed in the primary job, the health of the individual, the needs of the family, the rigors of the primary job, and the second job...." *Id.*

When income is imputed by the trial court, there must be sufficient evidence establishing the income. In another case, the trial court went too far in imputing income. In *Schoenbachler v. Minyard*, 110 S.W.3d 776 (Ky. 2003), the mother claimed that her monthly income was $1,740.00 per month which was an amount substantiated by her income tax returns. However, after a hearing, the trial court found that the mother's "lifestyle and property exceeded that which could be obtained" from her claimed income. *Id.* at 778. The trial court inferred that she had additional income from gifts, gambling, and ticket scalping. *Id.* at 785.

As a result, the trial court imputed additional monthly income to the mother in an amount equal to that of the father's ($3,333.33). *Id.* at 778.

The Kentucky Supreme Court found that there was insufficient evidence to support the trial court's imputation of additional income to the mother. *Id.* at 785. The court stated that the burden was on the father to prove the additional income, and he failed to do so. At the same time, the court acknowledged that such income would be close to impossible to prove, but, if a party were able to do so, the income could be included: "Certainly, these types of undocumented income, while *not susceptible to documentation*, are nevertheless income which, if proven, a trial court should consider when determining a party's gross income." *Id.* (emphasis added).

Likewise, the Kentucky Supreme Court found that the trial court erred in imputing an income "well in excess" of the mother's potential in *Gripshover v. Gripshover*, 246 S.W.3d 468 (Ky. 2008). The trial court imputed income in excess of what the mother had earned when she was younger and in better health. The court stated that the trial court did not adequately consider prevailing job opportunities in the geographical area and the mother's limited qualifications. The case was remanded and the trial court instructed to "redetermine" the mother's income. *Id*. at 469.

3. [10.11] Self-Employed Parents

The child support statute specifically addresses scenarios of those parents who are self-employed. The statute defines income from such pursuits broadly and is a clear invitation to the trial court to scrutinize the incomes of such individuals carefully. For those who are self-employed or own a business, "gross income" means "gross receipts minus ordinary and necessary expenses required for self-employment or business operation." KRS 403.212(2)(c). The statute goes on to require that the income and expenses should be scrutinized to determine the income available to the child, and that expenses "inappropriate for determining gross income for the purposes of calculating child support" should be excluded. *Id.*

KRS 403.212(2)(c) should be used to carefully examine any income from self employment. For example, one detail of the statute is that "straight-line depreciation...shall be the only allowable method of calculating depreciation expense in determining gross income." *Id*. In *Gripshover*, the trial court was reversed because it adjusted the father's self-employment income using the *section 179* depreciation deduction instead of the straight-line deduction. 246 S.W.3d at 469.

The *Schoenbachler* decision, discussed above, places the burden on the opposing party to prove undocumented income, including income the other party is trying to hide from the court, and, probably, the IRS. For example, a small business owner might have tax returns showing that his personal income was $20,000 in a year. But, at the same time, have a $1,500.00 mortgage payment. How could he pay $18,000.00 to the mortgage company when he only made $20,000

before taxes? Obviously, the income tax returns are not an accurate reflection of the business owner's income. However, if he is trying to hide the income from the IRS, it will be difficult for the opposing party to document. Even though the statute provides for scrutiny of income for those who are self-employed, it is difficult (perhaps even impossible) to scrutinize what is not there. That is one of the difficulties in determining gross income for child support purposes when one of the parents is self-employed.

4. [10.12] Credits to Income

In calculating child support, a parent's income can be reduced for two reasons: paying maintenance or supporting a prior born minor child. As explained above, maintenance is a source of income, and is included in the income of the recipient parent. Likewise, the parent paying maintenance is entitled to an income deduction in the amount of maintenance actually paid to a prior spouse or the other parent. KRS 403.212(2)(g)(1). Therefore, the payor's income could be reduced for payment of maintenance to the former spouse, a person not even a party to the proceedings.

The other income deduction is for supporting *prior-born* minor children. The statute is specific that the deduction only applies for support of children born *before* the child or children at issue. The deduction is for the amount of the child support ordered to be paid, if the parent is actually paying it. KRS 403.212(2)(g)(2). If the prior born children reside with the parent, and, therefore, there is no order for that parent to pay child support, the deduction is made based on an "imputed child support obligation" in the amount of child support that parent would have to pay if child support was ordered for those children. KRS 403.212(2)(g)(3).

For both the maintenance and child support deductions that qualify under the statute, those amounts are subtracted from the parent's gross income, arriving at the number to use as that parent's income for calculating child support.

B. [10.13] Deviations from the Guidelines

The child support guidelines, and calculation of child support based upon the chart, create only a rebuttable presumption of what a parent's child support obligation should be. KRS 403.211(2). Trial courts retain the discretion to deviate from the guidelines – *i.e.*, to set a child support amount different from that which the child support chart dictates – if the trial court finds that the application of the guidelines would be "unjust or inappropriate." *Id.* If the trial court deviates from the guidelines, the court must make a specific finding, on the record or in writing, as to the reason for the deviation. *Id.*

The statute sets forth specific criteria upon which a trial court can base a deviation:

(a) A child's extraordinary medical or dental needs;

(b) A child's extraordinary education, job training, or special needs;

(c) Either parent's own extraordinary needs, such as medical expenses;

(d) The independent financial resources, if any, of the child or children;

(e) Combined monthly adjusted parental gross income in excess of the Kentucky child support guidelines;

(f) The parents of the child, having demonstrated knowledge of the amount of child support established by the Kentucky child support guidelines, have agreed to child support different from the guideline amount. However, no such agreement shall be the basis of any deviation if public assistance is being paid on behalf of a child under the provisions of Part D of Title IV of the Federal Social Security Act; and

(g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.

KRS 403.211(3).

The trial court can set child support in whatever amount it wants, if the court makes a finding sufficient to support the deviation pursuant to KRS 403.211(3). The specific factors in the statute, along with the catchall provision in subsection (3)(g), give trial courts broad discretion, again, so long as the decision is appropriately supported by specific findings. Other than deviation by agreement of the parties, the two factors most commonly relied on to deviate from the guidelines are income in excess of the guidelines and a shared parenting schedule.

1. [10.14] Income in Excess of the Guidelines

The Kentucky child support chart stops at a combined parental income of $180,000.00. Therefore, if the parents earn more than $15,000.00 per month, combined, a deviation is appropriate pursuant to KRS 403.211(3)(e). The preeminent Kentucky case on child support "above the guidelines" is *Downing v. Downing*. 45 S.W.3d 449 (Ky. Ct. App. 2001).

In *Downing,* the mother petitioned the court for a post-decree increase in child support, based on the increased income of the father. The decision does not reveal how much the father was earning at the time of the divorce. Six years later, when the mother filed the motion, the father was earning $57,000.00 per month. *Id.* at 452. The mother earned $1,500.00 per month. The trial court increased the father's child support to $3,475.00 per month. *Id.* In determining that amount, the trial court used a mathematical calculation, using the child support chart through $15,000.00 per month – the highest income provided by the guidelines – and mul-

tiplying the excess income by 4%. *Id.* The trial court heard very little evidence about the needs of the children or the lifestyle the children would have enjoyed had the parents stayed married. *Id.*

On appeal, the father argued that it was an abuse of discretion for the trial court to arbitrarily calculate using a mathematical formula. The Kentucky Court of Appeals agreed. *Id.* at 456. The court rejected the trial court's use of a projection of the child support guidelines, stating that a mathematical calculation cannot be used as a substitute for judicial discretion. *Id.* However, the court did not rule out the use of the calculation as a "useful tool" so long as it was not given presumptive weight. *Id.* A mathematical increase in the child support above the guidelines is not tied directly to the child's reasonable needs and would benefit the custodial parent more than the children. *Id.* The court was concerned that the excess transfer of funds would "serve no purpose but to provide extravagance and an unwarranted transfer of wealth." *Id.* at 457.

Despite the fact that the court took issue with the mathematical extrapolation of the guidelines, the court stated that it was appropriate for the trial court to deviate from the child support guidelines, since the combined monthly income was in excess of $15,000.00. *Id.* at 454. The court rejected the second part of the father's argument that the highest amount of child support allowed is the amount for a combined income of $15,000.00, even if the parents earn more than that. *Id.* at 456.

The Court of Appeals took issue with the fact that the trial court had very little evidence regarding the children's specific needs: "At a minimum, any decision to set child support above the guidelines must be based primarily on the child's needs, as set out in specific findings." *Id.* In determining the reasonable needs of the children, the court elaborated that the "inquiry does not concern the lifestyle which the parents *could* afford to provide the child, but rather it is the standard of living which satisfies the child's reasonable and realistic needs under the circumstances." *Id.* at 457. In remanding the case, the court declined to say that the amount of child support ordered by the trial court was unreasonable. *Id*. at 456. However, because the amount was set arbitrarily, the case was remanded for a determination of child support based on the children's reasonable needs. *Id.* at 457.

The Court of Appeals reiterated the need for specific evidence regarding the child's needs in *Bell v. Cartwright*, 277 S.W.3d 631 (Ky. Ct. App. 2009). In that matter, the father was a professional football player, earning in excess of one million dollars per year. The trial court set the child support obligation at $4,000 per month, stating that the child had a "right to share in some degree in his parent's standard of living." *Id*. at 632. At the same time, the trial court acknowledged that there was no evidence offered regarding the actual cost of many of the child's expenses as claimed by the mother. That was a fatal error. The Court of Appeals stated that the trial court's decision was "in direct contravention of our holding in *Downing*." *Id*. at 633. The decision was vacated and remanded.

Downing resolved the question of whether child support above the highest number on the chart was appropriate. *Downing* rejected the trial court's attempt at a mathematical calculation above the chart and prohibited trial courts from relying solely on mathematical calculations. Instead, the trial court must use its discretion after considering specific evidence regarding the children's needs and actual expenses.

The Kentucky Child Support Guidelines were enacted in 1990 and since that time, the percentage of parents who earn monthly income in excess of $15,000.00 has certainly increased greatly. The Kentucky Legislature could revise the current guidelines, or enact new ones, so that the chart exceeds $15,000.00 per month. Until then, parents in this highest income level will not have any clear guidance as to how much their child support obligation will be. If the parents are unable to come to an agreement, resolution of the issue will be left to the trial court's discretion.

2. [10.15] Shared Parenting Time

The Kentucky Court of Appeals has stated, "It must be recognized that the [child support] guidelines were intended to apply to a traditional post-dissolution familial model where one parent (usually the mother) was the primary custodial parent and earned substantially less income than the noncustodial parent (usually the father)." *Dudgeon v. Dudgeon*, 318 S.W.3d 106, 111 (Ky. Ct. App. 2010). When the parenting schedule does not conform to such an arrangement – a custodial and non-custodial residence – the question becomes how should child support be calculated. There are many children who currently share time between their parents' respective residences on an equal or almost equal basis.

A shared parenting schedule is not delineated in the statute as a reason to deviate from the child support guidelines. However, the Kentucky Court of Appeals has held that the trial court may consider the period of time the children reside with each parent in determining child support, and can deviate from the guidelines as a result. *McGregor v. McGregor*, 334 S.W.3d 113, 118 (Ky. Ct. App. 2011); *Dudgeon v. Dudgeon*, 318 S.W.3d 106, 111 (Ky. Ct. App. 2010); *Plattner v. Plattner*, 228 S.W.3d 577, 579 (Ky. Ct. App. 2007); *Downey v. Rogers*, 847 S.W.2d 63, 64 (Ky. Ct. App. 1993). The idea that, as a matter of law, no child support should change hands if the children reside equally with both parents has been flatly rejected. *Downey*, 847 S.W.3d at 64. However, no child support may be the appropriate result if the children spend about equal time in each home, and the parents earn nearly the same income. *Plattner*, 228 S.W.3d at 579.

In cases where the children spend equal time in each home, the matter is left to the trial court, which has the discretion to deviate from the child support guidelines. *McGregor*, 334 S.W.3d at 118. In doing so, the court should keep in mind that some expenses, such as food, are substantially reduced when the parent

does not have the child; other expenses, such as housing, continue even when the child is not there. *Downey*, 847 S.W.3d at 64.

As stated above, several cases have concluded that no child support order may be appropriate when the children spend equal time in each home, and the parties earn nearly equal incomes. The tougher question is how the trial court should exercise its discretion in shared parenting time scenarios when one parent earns significantly more income than the other. There is little appellate authority speaking to that issue.

In *Downey v. Rogers*, the trial court calculated child support pursuant to the guidelines, without deviation, despite the fact that the children spent equal time with each parent. 847 S.W.3d at 64. On appeal, the decision was affirmed, "particularly in light of the evidence showing appellant's greater ability to pay, and the fact that all expenses are not shared equally by the parties." *Id.* at 65. In *Brown v. Brown*, 952 S.W.2d 707, 708 (Ky. Ct. App. 1997), the trial court found that the children resided with their mother 40% of the time. In calculating child support, the trial court figured the mother's child support obligation pursuant to the Kentucky guidelines and then reduced that amount by 40%. *Id.* On appeal, the mother argued that the father owed her support for the time the children were with her and that his obligation should be offset against hers. *Id.* The Kentucky Court of Appeals disagreed, finding no abuse of discretion. In affirming the trial court's decision not to order counterbalancing support, the court stated, "As a result of his designation of the primary custodian, [the father] has an ongoing obligation to maintain a residence on a permanent basis – regardless of the amount of time they may spend with their mother." *Id.*

The Kentucky Child Support Commission has held hearings on the issue of whether the guidelines should be amended to address the calculation of support in shared parenting scenarios.

3. [10.16] Kentucky Child Support Commission's Recommendations on Shared Parenting Time

During the hearings conducted by the Child Support Commission on the proposal to modify the guidelines, many guest speakers were concerned about the inequity of the application of the guidelines when each parent exercises significant parenting time with the child. The Child Support Commission recommended the adoption of a new shared parenting formula for the same reasons that Congress set forth as the basis for requiring states to adopt the guidelines: predictability, consistency, and fairness. The bill to adopt the shared parenting formula was submitted to both houses of the Kentucky Legislature, but it did not pass.

The following example sets forth the formula. This formula *may* be used when both parties have at least 30% of the overnights and *shall* be used when both parties have at least 40% of the overnights. Provided, however, the court first determines that the application of the formula will not result in the receiving party

having insufficient funds to maintain the household, and the parties have an actual shifting of expenses as a result of the parenting schedule.

Wife's monthly income:	$3,000.00 (63.4% of total income)
Husband's monthly income:	$1,736.00 (36.6% of total income)
Kentucky Child Support Guideline base support for two children:	$964.00
Multiplier	x 1.5
Base Monthly Support:	$1,446.00 (guideline x multiplier)
Wife's share of base monthly support:	$917.00 ($1,446.00 x 0.634)
Husband's share of base monthly support:	$529.00 ($1,446.00 x 0.366)
Wife's parenting time:	52%
Husband's parenting time:	48%
Wife retains 52% of her obligation:	$917.00 x .52 = $477.00
Husband retains 48% of his obligation:	$529.00 x .48 = $254.00
Wife's adjusted obligation:	$917.00 - $477.00 = $440.00
Husband's adjusted obligation:	$529.00 - $254.00 = $275.00
(Wife's obligation) $440.00 - (Husband's obligation) $275.00	**$165.00** (Wife owes Husband this Amount)

It is also possible to utilize the cross-multiplier method, in which the court multiples **his obligation by her percentage of time and her obligation by his percentage of time, then take the difference between the two:**

Wife's obligation:	$917.00
Husband's obligation:	$529.00
Wife retains 52% of Husband's obligation:	$529.00 x .52 = $275.00
Husband retains 48% of Wife's obligation:	$917.00 x .48 = $440.00
(Wife's obligation) $440.00 - (Husband's obligation) $275.00 =	$165.00 (Wife owes Husband this Amount)

C. [10.17] Other Shared Parenting Expenses: Health Insurance, Medical Expenses, and Child Care

In addition to the base child support obligation calculated pursuant to the child support guidelines, there are other expenses that the parents are statutorily obligated to share. The cost of health care coverage for the children that is "reasonable and available" shall be allocated between the parents in proportion to their incomes. KRS 403.211(7). If the father makes 70% of the income, he will pay 70% of the health insurance premium, in addition to the base child support. Similarly, the out-of-pocket health care expenses are allocated between the parents, based on income. KRS 403.211(9) sets forth a very broad definition of "extraordinary medical expenses" to be shared by the parents, including counseling, orthodontics, and prescription medications. These expenses are to be shared, based on income, after the parent who is receiving the child support pays the first $100.00 per child per calendar year. KRS 403.211(9).

The parties must also share the cost of "reasonable and necessary child care costs incurred due to employment, job search, or education leading to employment" in addition to the child support set according to the guidelines. KRS 403.211(6). This expense is also shared in proportion to income.

The income percentages are calculated at the time of the original calculation of support, whether by agreement or court order. Those percentages are usually made part of the order and remain the same until the order is modified. Unless the parties agree otherwise, the income percentages are not recalculated on a periodic basis.

D. [10.18] Child Support Orders

1. [10.19] Temporary Child Support

In a divorce, legal separation, or child support action, either party may move the court for temporary child support. KRS 403.160(2)(a). The moving party must file an affidavit with the motion, including information necessary to calculate child support pursuant to the guidelines in KRS 403.212(2)(g). *Id.* The statute requires that the court order an amount of temporary child support within 14 days of filing the motion, and that the order shall be retroactive to the date of the filing of the motion, unless otherwise ordered by the court. *Id.*

A court can also set temporary child support without written or oral notice to the other party. KRS 403.1602(b). These child support orders are typically entered before the other party has been served. The moving party must file an affidavit with the necessary information for calculating support. At that time, the court can issue a temporary child support order to become effective seven days after service on the other party, unless the party requests a hearing during that seven day period. *Id.*

2. [10.20] Permanent Child Support

A final child support order is a permanent order that continues until a subsequent order modifies or terminates the support, or until the child becomes emancipated. KRS 403.213(1) & (3). In Kentucky, emancipation by age occurs when a child is 18 years old, unless the child is still a high school student. If the child is still in high school, child support continues until the child graduates or upon completion of the school year in which the child turns 19. KRS 403.213(3). After emancipation by age, child support automatically terminates unless the child is "wholly dependent because of permanent physical or mental disability." KRS 405.020(1) & (2).

3. [10.21] Wage Assignment Order

Pursuant to KRS 403.215, all child support orders must include a wage assignment order, unless good cause is shown. Under a wage assignment order, child support is deducted directly from the payor's wages. The child support is paid to the state child support agency which directly distributes it to the payee. Kentucky courts require a specific form (AOC-152) for a wage assignment order. Effective June 1, 2012 all Income Withholding Orders requiring an employer to withhold payments, including those issues by court and private attorneys, must direct payments to the State Disbursement Unit. This form, along with many others produced by the Administrative Office of the Courts, can be found online at: <courts.ky.gov/resources/legalforms/LegalForms/152.pdf>. Note that not all forms AOC publishes are available on this website, nor are all forms available for attorney use.

E. [10.22] Modification of Support

KRS 403.213 provides that a child support order can be increased or decreased "only upon a showing of a material change in circumstances that is substantial and continuing." KRS 403.213(1). *Goldsmith v. Bennett-Goldsmith*, 227 S.W.3d 459 (Ky. 2007); *Bell v. Cartwright and CHFS*, 277 S.W.3d 631 (Ky. 2009). The statute also sets up, after a one year period, a rebuttable presumption that a 15% change in the amount of support due is sufficient to prove a material change in circumstances and a rebuttable presumption that a change of less than 15% is not a material change in circumstances. KRS 403.213(2). Prior to the one year period, the percentage is 25%.

A party wishing to recalculate child support must file a motion with the court alleging facts which show a substantial and continuing material change in circumstances. In order to meet the rebuttable presumption, child support must be recalculated, using updated income information for the parents. If the child support goes up or down by 15% or more, then, as a result of the presumption, the trial court will typically modify the support obligation.

If the child support obligation is modified, the modification can only be prospective to child support payments accruing subsequent to the motion. A court cannot modify payments ordered before the motion is filed, regardless of the circumstances. *Price v. Price*, 912 S.W.2d 44 (Ky. 1995). The statue does allow the modification to be retroactive to the filing of the motion. Generally, courts order the child support changed as of the date the motion is filed.

The 15% presumption set forth in the statute is not applicable to modifications as a result in changes in child care and health insurance costs. *Olson v. Olson*, 108 S.W.3d 650 (Ky. Ct. App. 2003). If the child care or health insurance costs decrease or increase, then child support may be increased or decreased, even if the change is less than 15%. Similarly, the child support amount may be changed retroactively from the date the motion was filed back to the date the costs changed. *Id.* at 651-52. The allocation of these costs are "in the nature of a prepayment or reimbursement of the actual costs, and if the expense is not incurred the other party is entitled to be repaid the amount they had provided." *Id.* at 652.

A concise discussion of the requirements of and pitfalls of modification motions is outlined in *Bennett v. Bennett*, 2011 Ky. App. LEXIS 106 and confirms the precise procedure of KRS 403.213. See also *Jones v. Jones*, 329 S.W.3d 331 (Ky. App. 2010).

III. [10.23] Other Statutes Providing Support for Children

There are a myriad of other Kentucky statutes that provide for child support, whether codifications of common law, requirements for support, obligations for handicapped children (KRS 405.020(2)), provisions for support collection, or dependency issues in the workers' compensation statute. There is even a statute requiring the Kentucky Lottery Commission and the Cabinet for Families & Children to develop a program to enhance child support collection. KRS 405.463.

A. [10.24] Public Assistance and Medical Assistance

Even before the enactment of the Family Support Act of 1988, Title IV-D of the Social Security Act set up a federal and state enforcement program in 1975 for the collection of child support and recovery of funds spent on public assistance. Child support, medical support, maintenance and medical insurance support orders are all covered by this statute which sets up procedures for collection, including obligations of employers.

Public assistance is available for those who have a standard of need in an amount not less than the poverty income level as determined annually by the United States Department of Health and Human Services. KRS 205.2001. However, *In re Beltz*, 263 B.R. 525 (Bankr. W.D. Ky. 2001), states that under Kentucky law, for a child to be classified as "needy," a two-part test must be met. First, a child

must be deprived of parental support. Second, the child must be provided "a level of subsistence that is compatible with decency and health."

Medical assistance must also be provided for those children who require assistance. Pursuant to KRS 205.594, children who require medical assistance may not be denied enrollment by health insurers on the parent's plan due to the child being born out of wedlock or for not residing with the insured parent. Similarly, if a court order requires a parent to carry health insurance for a child and the parent is considered eligible for a health insurance plan, Kentucky employers are required to permit the parent to enroll the child under a family coverage health plan. KRS 205.594 and KRS 205.595. Every effort is made within the Kentucky statutes to facilitate the provision of health care coverage and medical attention that children frequently require.

The Kentucky Revised Statutes also address the process for child support recovery. When a dependent child must receive public assistance due to a parent's or parents' failure to pay child support, this creates a debt owed to the state by the parent or parents of the child. KRS 205.715. Once a parent accepts public assistance on behalf of a child, the parent is deemed to have assigned the Cabinet for Families & Children the right to any child support owed equal to the amount paid in assistance by the Cabinet. KRS 205.720(1). The Cabinet must then attempt to locate a non-custodial parent to enforce the child support obligation and to recover any assistance given. KRS 205.730.

B. [10.25] Workers' Compensation

In the area of workers' compensation, there is a statute contained within the dependency section which provides the definition of dependency in relation to child support orders, regardless of whether the children are living with the worker or are supported by the worker and/or by court orders.

If a deceased employee has a child under the age of 16 who depends upon the employee for support, or if the deceased is legally required by the court to provide support, the KRS allows for a presumption of dependency. However, the burden of proof for the receipt of workers' compensation requires that a dependent live in the household or to have a specific relationship by blood or marriage and be actually dependent. KRS 342.075(3). Should an individual be entitled to workers' compensation upon his or her death, this burden of proof must be settled before the dependent child can recover on behalf of the deceased.

C. [10.26] Parent and Child

While both parents are liable for the nurture and care of their children, the father is primarily liable for children under eighteen years of age or nineteen if a child is still in high school. Both the mother and the father are responsible for the support of any children eighteen or older who are dependent because of a physical or mental disability. KRS 405.020.

KRS Chapters 205 and 405 establish the administrative process of collection of child support by the Cabinet for Families & Children. These statutes provide the methods of collection, including establishing paternity and obtaining employer and labor union information. Remedies enacted for failure to pay child support include wage withholding, attaching lottery winnings, and vehicle attachment. These orders of support take priority over any other debts of the parents. The orders of other states for support must be honored pursuant to KRS Chapter 407. *See* Section [10.27], *infra*.

D. [10.27] Interstate Support Enforcement

Kentucky's Interstate Support Enforcement statutes are found in KRS Chapter 407 which incorporates the Uniform Interstate Family Support Act and its nine (9) articles. This Act is one of the remedies available for collection of support owed under support orders. And while the actual statute is very technical in nature, the case law surrounding this Act has been instrumental in aiding child support collections. For example, *Stewart v. Raikes*, 627 S.W.2d 586 (Ky. 1982), clarified that it was not necessary for child support to be reduced to a lump sum for collection purposes.

In order to enforce a child support order on a parent who is a non-resident of Kentucky, a court may choose to exercise personal jurisdiction by serving the individual within Kentucky, through consent of the individual, or if the individiual still has connections with the state, through providing support to a child in Kentucky.

This Act also allows for the direct enforcement of a support order issued by the court of another state. For example, an order to withhold income which is issued in another state may be enforced by an individual's new employer in Kentucky without having to file a similar petition or order in a Kentucky court. KRS 407.5501. An employer must recognize that wage withholding as if it were an order issued by a court of Kentucky and must distribute any funds that have been withheld to the payment of ordered child support. KRS 407.5502.

An order issued by the court of another state, such as a child support order or wage withholding order, may also be registered and recognized in a Kentucky court so that it may be enforced. KRS 407.5601. Once this order is registered, it must still be executed under the law of the issuing state in regards to the nature, amount and duration of current support payments. KRS 407.5604(1).

Should an individual enter and reside in Kentucky while failing to meet child support obligations issued in another state, the Governor of this state may surrender that individual to the state where support is due. Additionally, the Governor of Kentucky may make a similar demand on the governor of another state so that an individual owing support in Kentucky may be returned to face criminal charges. KRS 407.5801.

E. [10.28] Paternity Cases

Pursuant to the Kentucky Revised Statutes, the obligation to provide child support is assigned to fathers by marriage and those fathers whose parentage is eventually established through paternity testing. Under KRS 406.011, the presumption of paternity obligates the father of a child born out of wedlock to provide the educational and financial support of the child in addition to the reasonable expenses surrounding the mother's pregnancy and confinement. Those children born during a marriage or within ten months after the conclusions of a marriage are automatically presumed to be the children of the husband and wife. *Id.*

Once paternity is established, a mother may request for a father to provide support for the out-of-wedlock child at issue. This occurs when a motion is made by a party. After a motion is made, a temporary order of child support may be issued if a father voluntarily acknowledges paternity or if the court finds other indications of paternity through clear and convincing evidence. Any request for support must be the subject of the usual child support motion including an affidavit as required by KRS 403.160 and KRS 403.212, and the requirements of KRS 403.212 and KRS 406.025. Generally, these orders are retroactive to the date of the motion's filing.

F. [10.29] Terminating Parental Rights

While KRS Chapter 625 is a statute which addresses the process for the termination of parental rights, the statute also dictates that the payment of support by a putative father is one of the criteria necessary for him to be made a party to any involuntary termination action. Additionally, a putative father may be made a party to an involuntary termination action if he is voluntarily identified by the child's mother through an affidavit, if he has acknowledged the child as his own at least 60 days after the child is born or if he has begun a court proceeding asserting a parental right to the child. KRS 625.065.

Simultaneously, the failure to support a child is one of the criteria considered for the termination of parental rights, if such a determination may be found by clear and convincing evidence. Such evidence may be found if a parent continuously fails to provide a child with necessities, such as food, clothing, shelter or medical care that is "reasonably necessary" to the standard care of a child. KRS 625.090.

G. [10.30] Domestic Violence

Kentucky has adopted statutes which allow for prosecution in circumstances of domestic violence and abuse. The legislative intent behind these statutes is to effectively assist victims of domestic violence and to broaden the powers of law enforcement in domestic violence issues so that the law can be used to aid those in violent situations. KRS 403.715. Children who are removed from the home due to issues of domestic violence and abuse are still able to receive child support from a parent. Should a Kentucky court find, from a preponderance of

the evidence, that acts of domestic violence have occurred, the court may award temporary child support to an individual caring for a child removed from the home. KRS 403.750(1)(g). Additionally, if a court determines that temporary support is necessary in a case surrounding domestic violence, the court may also enter an order stipulating how the support should be paid and collected. Any award of child support will be subject to the amounts established in the Kentucky Child Support Guidelines under KRS 403.212.

IV. [10.31] Appendix

A. [10.32] Child Support Worksheet

COMMONWEALTH OF KENTUCKY

WORKSHEET FOR MONTHLY CHILD SUPPORT OBLIGATION

INSTRUCTIONS FOR USE

1. Enter each parent's gross monthly income [KRS 403.212(2)(a) through (d)].

2. Enter the amount actually paid for court ordered maintenance for prior spouse(s) plus the amount of maintenance ordered in the current proceeding [KRS 403.212(2)(g)(1)].

3. Enter the amount of child support that is:

   a. paid pursuant to a court/administrative order for prior-born children [KRS 403.212(2)(g)(2)];

   b. paid, but not pursuant to a court/administrative order, for prior-born children for whom the parent is legally responsible [KRS 403.212(2)(g)(3)]; and

   c. imputed for prior-born children residing with the parent [KRS 403.212(2)(g)(3)].

4. Subtract any amounts on lines 2 and 3 from the amounts on line 1. If the result is less than 0, enter 0.

5. Add the amounts on line 4 in columns A and B to obtain the combined monthly adjusted parental gross income.

6. Divide each of the amounts on line 4 by the total amount on line 5. Enter the percentages. [NOTE: If the noncustodial parent (NCP) has 100% of the combined monthly adjusted parental gross income, use the CS-71.1 to calculate the child support obligation. KRS 403.211(7)(b) provides a reduction in gross income for the entire amount of health insurance premiums incurred for the child(ren) when a parent has 100% of the combined monthly adjusted parental gross income.]

7. Determine the base support obligation by referring to the Guidelines Table (on the back of this worksheet) using the combined monthly adjusted parental gross income as entered on line 5C and the number of children for whom the parents share a joint legal responsibility [KRS 403.212(7)].

8. Enter the monthly payment for child care costs [KRS 403.211(6)].

9. Enter the monthly payment for the child(ren)'s health insurance premium [KRS 403.211(7)(a)].

10. Add lines 7, 8 and 9. This is the total monthly child support obligation.

11. Multiply line 10 by 6A and 6B for the monthly obligation of each parent. These amounts include each parent's share of child care costs and health insurance premium costs if these costs were included on lines 8 or 9.

12. If the NCP pays either of the amounts listed on lines 8 or 9 to the provider, enter that amount on line 12. If the NCP pays both of these amounts, add these amounts together and enter the total on line 12. [NOTE: If the NCP is paying 100 percent of either or both of these costs, then the NCP subtracts this amount from his/her monthly obligation, which reduces the amount he/she pays to the custodial parent (CP). Subtracting 100 percent includes the NCP's percentage of these expenses and also compensates the NCP for paying the CP's percentage of these costs].

13. Subtract line 12 from line 11 and enter the amount. This is the amount the NCP pays to the CP. To calculate a weekly amount, multiply line 13 by 12 and divide by 52.

CASE NAME: _____ FILE NUMBER: _____

COUNTY: _____

COMMONWEALTH OF KENTUCKY WORKSHEET FOR MONTHLY CHILD SUPPORT OBLIGATION			
	A. Custodial Parent (CP)	**B. Noncustodial Parent (NCP)**	**C. Both Parents**
1. Monthly gross income	**$**	**$**	
2. Deduction for maintenance payments	$	**$**	
3. Deduction for other child support for prior-born children	$	**$**	
4. Adjusted monthly income	$	**$**	
5. Combined monthly adjusted parental gross income			**$**
6. Percentage of combined monthly adjusted parental gross income	**%**	**%**	
7. Base monthly support			**$**
8. Child care costs			**$**

9. Child(ren)'s health insurance premium			$
10. Total child support obligation			$
11. Each parent's monthly child support obligation	$	$	
12. Subtract child care costs or health insurance premiums paid by NCP to the provider		$	
13. Amount the NCP pays to the CP		$	

11

CHILD CUSTODY

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I. [11.1] Introduction

Often the most difficult, emotional and legally complex aspects of domestic relations law are those involving child custody. Frequently, a researcher can find no case directly on point for a particular situation. Further, all orders with regard to custody and timesharing, whether agreed to or determined by a court after litigation, are subject to review and revision until the child reaches majority. *See* KRS 403.340 and KRS 403.320(3).

In Kentucky, contested custody issues are to be given priority by the courts. KRS 403.310(1). Unfortunately, even if expedited, contested cases can take months or years to resolve. The guiding light in all court decisions involving custody and timesharing is "the best interests of the child." Although KRS 403.270(2) does not define the term "best interests of the child," it does provide some guidelines for the court. The factors set forth to determine "best interests" include: (a) the wishes of the parents or any de facto custodian, (b) the wishes of the child as to his custodian, (c) the child's interactions with the immediate family and significant others who affect the child's best interests, (d) the child's adjustment to his or her school, home and community, and (e) the mental and physical health of all individuals involved in the child's life. These factors were supported in the case of *Polley v. Allen*, 146 S.W.3d 923 (Ky. 2004). The court may also consider any evidence of domestic violence but is excluded from considering conduct of a proposed custodian that does not affect his or her relationship to the child. KRS 403.270(f); KRS 403.270(3); and *Moore v. Moore*, 577 S.W.2d 613 (Ky. 1979). Courts have expounded on the "best interests" rule in cases like *Davis v. Davis*, 619 S.W.2d 727 (Ky. Ct. App. 1981), and *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003).

Issues of custody and timesharing are generally resolved within an action for dissolution or legal separation filed with the circuit or family court. Similarly, if the parents are not married, an action to determine custody, timesharing and support may be filed with the circuit or family court. KRS 403.140(1)(d). Petitions must be verified and should include the residences of the children during the past five years and any pending arrangements between the parties as to custody, timesharing and support of the children. *See* Appendix A at Section [11.21], *infra* for a sample Petition for Custody, Timesharing and Support.

In divorce actions in which there are minor children who are the issue of the marriage, no testimony other than on temporary motions shall be taken or heard before 60 days after the respondent is properly before the court. KRS 403.044. The court may impose costs or expenses incurred by any person whose presence the court deems necessary to determine the best interests of the child. KRS 403.310(2). This would include but not be limited to the cost of any individuals appointed by the court, such as mental health professionals or a guardian *ad litem*. The court, without a jury, shall determine questions of law and fact relating to custody, and the public may be excluded from the courtroom if their presence is deemed to be

detrimental to the child's best interests. KRS 403.310(3). The court may also seal the court records to protect a child's welfare. KRS 403.310(4). All orders of the court with regard to custody and timesharing are subject to appellate review. KRS 403.130; CR 73. However, the appellate court will not entertain motions for relief from interlocutory orders such as temporary custody or timesharing.

II. [11.2] Jurisdiction and the UCCJEA

A. [11.3] General Jurisdictional Issues and Initiating a Petition

The Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") sets out the jurisdictional authority as between foreign and domestic courts to exercise jurisdiction for child custody proceedings. The UCCJEA was recently updated effective June 13, 2004, and governs the jurisdictional framework for custody matters in the Commonwealth of Kentucky. The complete text of the UCCJEA is provided in the statutory appendix to this Handbook.

The UCCJEA threshold must be met before a court may entertain a change of custody. *See Quisenberry v. Quisenberry*, 785 S.W.2d 485 (Ky. 1990). Parties questioning the existence or exercise of jurisdiction under the UCCJEA are given priority and handled expeditiously. KRS 403.810. *See* Appendix B at Section [11.22], *infra* for a sample Motion to Dismiss for Lack of Jurisdiction. Article 2 of the UCCJEA describes the jurisdictional guidelines.

Initiating a petition requires the following information to be submitted under oath to the court: verified information as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and addresses of the persons with whom the child lived during that period. KRS 403.838(1). The pleading or affidavit must also state whether the party: (a) has participated in any other custody proceedings concerning the child; (b) knows of any proceeding that could affect the current proceedings; and (c) knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights to legal custody. If the answers to (a),(b), or (c) are affirmative, then the pleading must identify any existing cases and interested parties and give detailed information regarding those persons and/or cases.

KRS 403.840 governs the appearance of the parties and the child(ren) in a child custody proceeding. In Kentucky, the court may order a party who has physical custody or control of a child to appear with that child. KRS 403.840(1). If the party resides out of state, the court may order notice be given to inform that party that failure to appear may result in an adverse decision. KRS 403.840(2). This statute also gives the court broad jurisdiction to "enter any order necessary to ensure the safety of the child and of any person ordered to appear under this section." KRS 403.840(3). Finally, the court may require another party to pay

the reasonable and necessary travel expenses of the out-of-state party and child. KRS 403.840(4).

B. [11.4] Jurisdiction to Make an Initial Child Custody Determination and Subsequent Modifications

Kentucky courts have jurisdiction to make an initial child custody determination only if one of four factors is applicable. KRS 403.822(1). These factors are the only way that Kentucky courts may make a child custody determination. KRS 403.822(2). Notably, physical presence and personal jurisdiction over a child or a party are neither required nor sufficient for a Kentucky court to make a child custody determination. KRS 403.822(3).

First, if Kentucky is the "home state" of the child or was the home state in the most recent six months, and the child is now absent from the state but a parent continues to live in the state, then Kentucky has jurisdiction to make an initial determination of child custody. KRS 403.822(1)(a). The "home state" is where the child lived with the parent or person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. KRS 403.800(7).

Second, if another state's court does not have jurisdiction, or a court in another state has declined to exercise jurisdiction because Kentucky is the more appropriate forum, and either the child and at least one parent or person acting as a parent has a significant connection with Kentucky other than mere physical presence; and substantial evidence is available here regarding the children's care, protection, training, and personal relationships, then Kentucky has jurisdiction to make an initial determination of child custody. KRS 403.822(1)(b).

Third, Kentucky has jurisdiction to make a custody determination when all courts that have jurisdiction for the reasons set forth above have declined to exercise jurisdiction because a Kentucky court is the more appropriate forum. KRS 403.822(1)(c).

Finally, Kentucky has jurisdiction when no court of another state has jurisdiction for the above reasons. KRS 403.822(1)(d).

Kentucky courts have exclusive, continuing jurisdiction over an initial or modified child custody determination until: (a) the court determines that neither the child nor one parent nor a person acting as a parent has significant connection with the state, and substantial evidence is no longer available in this state regarding the child's care, protection, training, and personal relationships; or (b) the court determines that the child, the child's parents, and any other person acting as a parent no longer reside in the state. KRS 403.824. Notably, a Kentucky court that no longer has exclusive, continuing jurisdiction per KRS 403.824, may modify a child custody determination only if it has jurisdiction to make an initial determination under KRS 403.822.

Kentucky courts have jurisdiction to modify a child custody determination made by another state only if the Kentucky court has jurisdiction to make the initial determination under KRS 403.822(1)(a) and (b); and (1) the other state's court no longer has exclusive, continuing jurisdiction and Kentucky would be the more convenient forum; or (2) the courts decided that the child, the parents, and any other person acting as a parent no longer reside in the other state. KRS 403.826(1) and (2).

C. [11.5] Temporary Emergency Jurisdiction

Temporary emergency jurisdiction for Kentucky courts trumps all other jurisdictional requirements. Per KRS 403.828, a court has temporary emergency jurisdiction if the child is present and abandoned or it is necessary to protect the child, sibling, or parent who is at risk of mistreatment or abuse. KRS 403.828(1). If there is no previous custody determination and no proceedings have been commenced in other states that could exercise jurisdiction, then the determination made under this section is in effect until the other state makes that determination. If no other determinations are made or commenced, then the determination under this section may be final and thus Kentucky becomes the home state of the child. KRS 403.822(3).

In contrast, if other states have jurisdiction or pending proceedings, the temporary emergency jurisdiction order issued by Kentucky must specify the time period that the court considers adequate to allow the party to obtain an order in the other state. The Kentucky order remains in effect until the other state's order is obtained or the period expires. KRS 402.822(3).

If Kentucky has been asked to make a temporary emergency order and learns that a proceeding has commenced or a determination has been made in another state, Kentucky shall communicate with the other court immediately. If the other state has a statute similar to Kentucky's, the courts must immediately communicate to resolve the emergency, protect the safety of the parties and the child, and establish the duration of the temporary order. KRS 403.822(4).

D. [11.6] Notice

All persons entitled to notice under Kentucky law shall be given notice before a child custody determination is made. KRS 403.830(1). Those persons include any parent whose parental rights have not been previously terminated, and any person having physical custody of the child. *Id.* This statute will not govern enforcement of a custody determination made without notice. KRS 403.830(2). The Kentucky rules of joinder and intervention govern the custody proceedings as between residents of Kentucky. KRS 403.830(3).

E. [11.7] Simultaneous Jurisdiction and Declining Jurisdiction

Except for emergency jurisdiction, Kentucky shall not exercise jurisdiction simultaneously with a court of another state, unless the other state terminates or stays the matter because Kentucky is the more convenient forum. KRS 403.832(1). Before a Kentucky court can begin a custody proceeding, it must determine if another state has commenced a proceeding, and if so, the Kentucky court shall stay the proceeding and communicate with the other state court. Kentucky shall dismiss the proceeding if the other state determines that Kentucky is not the most appropriate forum. KRS 403.832(2).

In a custody modification proceeding, if Kentucky determines that a simultaneous proceeding has been commenced to enforce the determination in another state, the court may stay the modification proceeding pending the entry of an order from the other state; enjoin the parties from continuing with the enforcement proceeding; or proceed with the modification however the court deems appropriate. KRS 403.832(3)(a) and (b).

A Kentucky court with jurisdiction to make child custody determinations may decline to exercise jurisdiction if it determines that it is an inconvenient forum and that another court in another state is more appropriate. KRS 403.834(1). Whether Kentucky is an inconvenient forum may be raised by motion of a party, the court, or another court. *Id.* Before making a determination that it is an inconvenient forum, Kentucky courts must determine that another state is appropriate by considering the following factors: (a) if domestic violence has occurred and which state could best protect if domestic violence continued; (b) how long the child has resided outside Kentucky; (c) the distance between the Kentucky court and the out-of-state court under consideration; (d) the relative financial circumstances of the parties; (e) agreements between parties as to jurisdiction; (f) the nature and location of evidence required to resolve the pending litigation, including testimony of the child; (g) the ability of both courts to decide the issue expeditiously and the procedures necessary to present evidence; and (h) the familiarity of the court of each state with the facts and issues. KRS 403.834(2).

If the Kentucky court determines that it is an inconvenient forum, and the out-of-state court is more appropriate, it shall stay the proceedings conditioned upon commencement of custody proceedings in another state. KRS 403.834(3). The court may also attach any additional conditions at its discretion. *Id.* Notably, a Kentucky court may decline to exercise jurisdiction under this statute if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the actions. KRS 403.834(4).

Kentucky courts may also decline jurisdiction because a party seeking jurisdiction has engaged in unjustifiable conduct, unless: (a) all parents and parties have acquiesced to jurisdiction; (b) a Kentucky court determines that Kentucky is the more appropriate forum; or (c) no out-of-state court would have jurisdiction. KRS 403.836(1). If a Kentucky court declines jurisdiction because of conduct, it

may still fashion a remedy to ensure the safety of the child, stop the unjustifiable conduct, and assess reasonable expenses against the jurisdiction-seeking party. KRS 403.836(2) and (3).

F. [11.8] Venue

In Kentucky practice, circuit court is the proper court for child custody or timesharing matters. KRS 23A.010. Family court would be the appropriate forum for child custody or timesharing matters for those counties in which they are available. Ky. Const. §112(6); KRS 23A.100.

G. [11.9] Enforcement of Child Custody Determinations

Article 3 of the UCCJEA governs the enforcement of child custody determinations (and orders made under the Hague Convention of the Civil Aspects of International Child Abduction) as between foreign and domestic courts. KRS 403.842 *et seq*.

Kentucky courts are required to recognize and enforce child custody determinations of other states if the other state exercised jurisdiction conforming to the Kentucky UCCJEA or if the facts would meet the standards of the Kentucky UCCJEA. KRS 403.846. Kentucky may use any remedy available under state law to enforce child custody determinations, including Article 3. *Id.*

Kentucky courts without jurisdiction to modify a custody determination may still issue a temporary order enforcing timesharing schedules or timesharing provisions that are not specific. KRS 403.834(1). When ruling on non-specific timesharing provisions, the Kentucky court must give a time period for the petitioner to obtain an order from the court with jurisdiction. KRS 403.848(2).

Out-of-state custody determinations may be registered in Kentucky, with or without a simultaneous request for enforcement. KRS 403.850(1). The party seeking registration must send to the Kentucky court correspondence requesting registration; two copies (one certified) of the determination sought to be registered, accompanied by a verified statement that the order has not been modified; and the names and addresses of the parties awarded custody or timesharing in the original determination. KRS 403.850(1)(a)-(c). When the registering court receives the above information, it shall file the determination as a foreign judgment and serve notice to the named persons with an opportunity to contest the registration request. KRS 403.850(2).

Parties contesting the registration have a right to request a hearing within 20 days of service, and failure to contest shall preclude further contest of the confirmed registration. KRS 403.850(3). If a hearing is held, the court shall confirm the registered order unless the contesting party establishes that: (a) the issuing court did not have jurisdiction under Article 2; (b) the determination has been vacated, stayed or modified by a court with jurisdiction; or (c) notice was not

properly given for the registration. KRS 403.850(4). If a hearing is not requested within the 20-day period, the registration is confirmed and all parties are notified of such. KRS 403.850(5). Finally, confirmation of an order precludes further contest. KRS 403.850(6). *See* Appendix C at Section [11.23], *infra* for a sample Registration of Foreign Judgments.

A Kentucky court may recognize, enforce, and grant any relief available under state law to enforce a registered foreign determination, but may not modify it except in accordance with Article 2. KRS 403.852. The Kentucky court may expedite the enforcement of an out-of-state custody determination. KRS 403.856. The court may grant a warrant determining physical custody of a child if the child is likely to suffer serious physical harm or be removed from the state. KRS 403.862. The court may award costs, fees, and expenses to the prevailing party. KRS 403.864.

Finally, Kentucky courts are to give full faith and credit to an order issued by another state and consistent with the UCCJEA, which enforces a custody determination by a court of another state, unless the order has been stayed, vacated, or modified. KRS 403.866. A party may move for an expedited appeal from a final Article 3 order. Notably, the enforcing court shall not stay the enforcement order during the pending appeal. KRS 403.868. A county attorney or other appropriate official, acting on behalf of the court, and not a party, may take any lawful action to locate a child, obtain the return of a child, or enforce a custody determination if there is: (a) an existing determination; (b) a court requesting it in a pending custody proceeding; (c) a reasonable belief that a criminal statute was violated; or (d) a reasonable belief that the child has been wrongfully removed or retained. KRS 403.870.

III. [11.10] Custody

A. [11.11] Standing

In any child custody contest between a natural parent or parents and a non-parent, the natural parent or parents have a recognized constitutional and preferred fundamental right to raise their own children. *See Moore v. Asente*, 110 S.W.3d 336, 358 (Ky. 2003).

The U.S. Supreme Court has addressed this issue in the context of grandparent timesharing rights. *Troxel v. Granville*, 530 U.S. 57 (2000). The *Troxel case* overturned a Washington State statute that permitted anyone to petition the court for timesharing with a child; timesharing would be granted if the court decided that it was in the best interest of the child. The *Troxel* decision held in part that the Fourteenth Amendment Due Process Clause provides heightened protection for a parent's fundamental rights regarding the care, custody and control of their children, and that several factors, including the fitness of the parent, were part of

that scrutiny. *Id.* The *Troxel* decision overturned the state statute because it was too broad; the Supreme Court stopped short of analyzing whether harm or potential harm to the child would be a factor to consider in granting timesharing.

In light of the above constitutional stance on custody and timesharing rights of non-parents, the Kentucky Legislature has provided for a "de facto" parent to have standing in a custody case. KRS 403.270(1). This statute defines a "de facto custodian" as one who has been shown by clear and convincing evidence to have been the primary care-giver for, and financial supporter of, a child who has resided with the person for a period of six months or more if the child is under three years old or for twelve months if the child is three or older. The Court of Appeals has clarified that in order to be a de facto custodian, the petitioner must be "the" primary care-giver and "the" primary financial supporter of the child, not a person who has cared for or provided for a child alongside a parent. *Consalvi v. Cawood*, 63 S.W.3d 195 (Ky. Ct. App. 2001). A person cannot obtain de facto status until a court makes the determination by clear and convincing evidence. KRS 403.270(b). *See* Appendix E at Section [11.25], *infra* for a sample Third-Party Petition for Standing. According to KRS 403.270, de facto custodians have the same standing in custody matters as each of the child's parents.

A non-parent who does not meet the statutory requirements of a de facto custodian may still seek custody involuntarily or against the wishes of the parent, but this generally requires proving that the parent is unfit or the parent waived the superior right to custody. *Vinson v. Sorrell*, 136 S.W.3d 465 (Ky. 2004); *Diaz v. Morales*, 51 S.W.3d 451 (Ky. Ct. App. 2001). The Kentucky Supreme Court has made clear that "there can be a waiver of some part of custody rights demonstrating an intent to co-parent a child with a nonparent." *Mullins v. Pickelseimer*, 317 S.W.3d 569, 578 (Ky. 2010). In *Mullins*, the parties were an estranged lesbian couple who together made a decision to conceive a child by artificial insemination of one of the parties. Though only one party was the biological parent of the child, the court determined that she had waived her superior right to custody by co-parenting the child with her partner. The court noted that the parties had reached some agreements with respect to custody of the child prior to the end of the relationship. Although those agreements were ultimately legally unenforceable, they were considered as evidence of the voluntary, informed waiver of the biological parent's superior right.

The same rule regarding co-parenting and waiver may apply to a wife who knowingly did not inform her husband of the possibility that children born during their marriage were not his biological children. *See Boone v. Ballinger*, 228 S.W.3d 1 (Ky. Ct. App. 2007).

B. [11.12] Temporary Custody

Any party to a custody proceeding may move for temporary custody, supported by affidavit(s) per KRS 403.350, and if there is no objection, temporary custody may be awarded solely on the basis of the affidavit(s). KRS 403.280(1). If

there is an objection to the motion, the court will make a determination about temporary custody after a hearing according to standards set forth in KRS 403.270(2). These temporary orders are vacated if the underlying action is dismissed. KRS 403.280(3). If a court determines that a person is a de facto custodian, under KRS 403.270, that person shall be joined in the action. KRS 403.280(4).

The affidavit required for temporary custody shall set forth the facts supporting an award of temporary custody and give notice to the other parties. KRS 403.350. The court shall join the de facto custodian if a determination of said status is made. *Id.* The court shall deny the motion for temporary custody unless it finds that adequate cause for a hearing is established by the affidavits. *Id.* If the court finds adequate cause, it shall set a date for a hearing on an order to show cause why the requested order should not be granted. *Id. See* Appendix D at Section [11.24], *infra* for a sample Petition for Temporary Custody.

C. [11.13] Joint Custody Versus Sole Custody

The standards for permanent custody are determined by the "best interest of the child" standard under KRS 403.270(2). Courts are to consider the following factors: (a) the wishes of the child's parents and de facto custodian, if any; (b) the wishes of the child as to his custodian; (c) the interaction and interrelationship of the child with his parents, siblings, and any other person who may significantly affect the child's best interests; (d) the child's adjustment to home, school, and community; (e) the mental and physical health of all individuals involved; (f) information, records, and evidence of domestic violence; (g) the extent to which the child has been cared for, nurtured, and supported by any de facto custodian; (h) the intent of the parents in placing the child with a de facto custodian; and (i) the circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian. KRS 403.270(2).

When making a determination of custody, the court is not to consider the conduct of proposed custodians that does not affect the relationship with the child. However, if domestic violence or abuse is alleged, the court determines the extent to which the domestic violence and abuse has affected the child and the child's relationship with both parents. KRS 403.270(3). Also, abandonment of the marital residence by a custodial party is not considered when the party was physically harmed or seriously threatened with physical harm by his or her spouse, and the harm or threat of harm is related to the abandonment. KRS 403.270(4). The focus of a decision should always be on the best interests of the child and not the suitability of the person(s) seeking custody. *Davis v. Davis*, 619 S.W.2d 727 (Ky. Ct. App. 1981).

In *Polley v. Allen*, 132 S.W.2d 244 (Ky. Ct. App. 2004), the Kentucky Court of Appeals held that evidence was sufficient to support granting sole custody to the mother. The evidence included medical and psychiatric expert recommendations; failure by the father to recognize the medical and emotional needs of the

children; the children's exposure to the father's cigarette smoke and exposure to animal hair; excessive use of the computer for the son was permitted; failure to pay adequate attention to his daughter during visits; and the children were unhappy during visits with their father.

Joint custody acknowledges that both parents share in making decisions in major areas of the child's upbringing, even though one parent may have primary physical possession of the child. *Chalupa v. Chalupa*, 830 S.W.2d 391, 393 (Ky. Ct. App. 1992); *Hazel v. Wells*, 918 S.W.2d 742 (Ky. Ct. App. 1996). Sole custody gives the custodian sole decision-making powers, but may function in a way similar to a joint custody time-sharing arrangement between parents.

The court may grant joint custody to the child's parents, or to the child's parents and a de facto custodian, if it is in the best interests of the child. KRS 403.270(5). Joint custody, in practice, may be the starting point, or the slightly favored presumption. However, courts recognize that divorcing parents may not be able to interact with one another in a way that fosters the best interests of the child. *Squires v. Squires*, 854 S.W.2d 765, 770 (Ky. 1993). Joint custody must be accorded the same dignity as sole custody and is therefore subject to the custody modification statutes. *Fenwick v. Fenwick,* 114 S.W.3d 767, 778 (Ky. 2003); *Scheer v. Zeigler*, 21 S.W.3d 807 (Ky. Ct. App. 2000). Courts may have the ability to modify joint custody when the parties are unable to cooperate. *Id.*

Although not part of the dissolution statute, but relevant as the default starting point before a dissolution permits the court to intercede in family affairs, the "parent and child" statute states that "the father and mother shall have joint custody, nurture, and education of their children who are under the age of eighteen (18)." KRS 405.020(1). This statute also imposes the standards of KRS 403.270 on de facto custodians. KRS 405.020(3) and (4).

1. [11.14] Custody Evaluations

Frequently, the court will appoint mental health professionals to become involved in custody or timesharing cases. "The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel upon request. Counsel may examine as a witness any professional personnel consulted by the court." KRS 403.290(2); *see also*, FCRPP 6(1). This role requires the mental health professional to evaluate the child's developmental, emotional, and economic needs in light of the parents' comparative ability to meet those needs. The mental health professional is charged with the responsibility of making reports and recommendations to the court with regard to various parenting options which will further the child's best interests. The mental health professional should be given specific instructions by the court prior to initiating the evaluation. The scope of the custody evaluation is properly set out in the court's order. *See* Appendix F at Section [11.26], *infra* for a sample Order Appointing a Psychological Expert.

Often, court orders direct the mental health professional to request a psychological evaluation of the parents to determine their parenting skills and personality defects. Pursuant to KRS 403.290(2), the court may order psychological testing of the parents, child, and/or significant others to assist in making a custody decision. The trial court may also consider the testimony of experts retained by the parties. *Poe v. Poe*, 711 S.W.2d 849 (Ky. Ct. App. 1986). Often, child custody evaluators go beyond their expertise by offering opinions on ultimate issues which are reserved for the court's determination.

Notably, in *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986), the court ordered that the child and all four prospective parents be evaluated by psychologists. The Kentucky Supreme Court found that the Court of Appeals relied on the reports and depositions of these experts to reverse a lower court custody decision without considering the other factors set forth in KRS 403.270. *Id.* at 445. Because of this, the court held that relying solely on these reports wrongfully excluded facts and other factors that the trier of fact rightfully must consider. "[C]ustody decisions should be based on all statutory factors and not just on psychological evaluations. It is an improper delegation of the statutory duty of the court to rely solely on the recommendations of psychologists." *Id.*

When reviewing custody evaluations, it is important to determine what resource information was received or excluded as a basis for the report. The evaluator can increase the reliability and relevance of interviews by using a standard set of questions and recognized psychological tests.

The purpose of the psychological testing is to provide the court with reliable, objective psychological data of the parties and others who were interviewed. The psychological expert's testimony must also meet legal standards of admissibility. *See* KRE 702; specifically *Newkirk v. Commonwealth*, 937 S.W.2d 690 (Ky. 1996); *U.S. v. Sullivan*, 246 F. Supp. 2d 696 (E.D. Ky. 2003).

Further, any opinions must be reliable within the scope of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993). The *Daubert* court held that the word "scientific" implies "a grounding in the methods and procedures of science," and that the word "knowledge" implies "more than subjective belief or unsupported speculation." Thus, in any case in which a party seeks to admit scientific or expert testimony, the judge must first ascertain whether the testimony would assist the trier of fact in assessing the disputed issue, as well as whether the testimony has a scientific connection to a disputed issue. If the answer is affirmative, the judge must inquire whether the reasoning or methodology underlying the testimony is scientifically valid, and whether that reasoning or methodology can be properly applied to the facts in issue. In this sense, the *Daubert* ruling suggests that the judge is responsible for ensuring that expert testimony is based on methods and procedures that are both reliable and relevant to the underlying legal issue. *See Hodge v. Commonwealth*, 17 S.W.3d 824 (Ky. 2000); *Staggs v. Commonwealth*, 877 S.W.2d 604 (Ky. 1993); KRE 703.

In addition to the initial evaluation, the court may order a mental health professional to provide continuing supervision of the custodial terms if the child's physical or emotional development would be endangered or impaired. *See* KRS 403.330.

2. [11.15] Role of the Guardian *ad litem*

In some jurisdictions, the court will appoint a guardian *ad litem* ("GAL") for a minor child when there is a conflict between the parents over custody or other issues relating to the child. The GAL is vested with the power and charged with the duty of protecting the child's interest in the litigation. Traditionally, a GAL, usually an attorney, stands in the minor's place and pursues a strategy designed to achieve what is in the best interests of the child. *See Black v. Wiedeman*, 254 S.W.2d 344, 346 (Ky. Ct. App. 1953).

The GAL is subject to all rules of the court and shall receive all pleadings, notices, discovery, correspondence relating to the child, orders, and notices of appeal. *See* Appendix G at Section [11.27], *infra* for a sample Appointment of Guardian *ad litem*. It is the responsibility of the GAL to conduct an independent investigation by obtaining records and conducting interviews with the parents, child, significant others, siblings, teachers, medical providers, counselors, therapists and/or other caretakers to determine what is in the best interests of the child. If the parties to the action are represented by counsel, the GAL should respect the attorney-client relationship and obtain consent of the parties' lawyers before conducting interviews. It is necessary for the GAL to communicate with the child as appropriate, considering the child's age and maturity, and to report the child's concerns and relevant wishes to the court. The GAL should keep the child generally informed about the status of the litigation and how that litigation may affect the child. The GAL should strive to protect confidential communications with the child.

Under the Kentucky Rules of Professional Conduct, "A lawyer shall provide competent representation to a client." SCR 3.130(1.1). The same Supreme Court Rules that pertain to representing an adult client also apply when representing a minor. *See* SCR 3.130(1.3, 4, 6, 7). In addition, the American Academy of Matrimonial Lawyers has adopted guidelines for GALs which are helpful in defining the GAL's role. *See* American Academy of Matrimonial Lawyers, Representing Children: Standards for Attorneys and Guardian Ad Litems in Custody and Timesharing Proceedings, (Martin Guggenheim ed., 1995), which can be viewed at <http://www.aaml.org>.

For more information on guardians *ad litem*, as well as additional sample forms, *see* **Chapter 14**.

3. [11.16] Parenting Coordination

Although there is no specific statutory authority for the appointment of a parenting coordinator, the practice is specifically authorized in FCRPP 6(1) and

trial courts are appointing coordinators, both *sua sponte* and at the request of one or both parties. A number of appellate decisions acknowledge the existence of a parenting coordinator, but there is little authority that is instructive with respect to the specific role of the coordinator. The Court of Appeals notes in an unpublished decision that parenting coordination is:

> a type of counseling service for parents who are unable to communicate or reach agreements regarding the day-to-day custody arrangements of their children. A parenting coordinator is assigned to help the parties work together to accomplish this task. In instances where the parties are unable to agree, the parenting coordinator will make a decision that is in compliance with the family court's orders. If either party should disagree with the parenting coordinator's determination, they may turn to the family court for a final decision.

Telek v. Bucher, 2008-CA-002149-ME (Ky. Ct. App. 2010).

In *Telek*, one party argued that the Order to parenting coordination amounted to "binding arbitration" and an improper delegation of the judicial function, but the Court of Appeals disagreed, finding that the parenting coordinator "merely assists the court." *Id*.

IV. [11.17] Modification of Custody

Joint custody is based upon the simple presumption that the parties will be able to communicate to resolve issues involving the children. "A joint custody award envisions shared decision making and extensive parental involvement in the child's upbringing, and in general serves the child's best interest." *Drury v. Drury*, 32 S.W.3d 521, 524 (Ky. Ct. App. 2000); *Squires v. Squires*, 854 S.W.2d 765, 769 (Ky. 1993). If communication becomes impossible for some reason, it may be appropriate to ask to modify joint custody to sole custody for one parent. Similarly, if a parent is unhappy with the other's behavior as sole custodian, it could be appropriate to request a modification to joint custody.

Any modification of custody is governed by KRS 403.340. This is true whether the current custody arrangement is sole custody or joint custody. *See Scheer*, 21 S.W.3d at 814.

If a change in custody is sought *less than two years* after an entry of custody decree, then a party must submit at least two affidavits demonstrating that "the child's present environment may endanger seriously his physical, mental, moral or emotional health" or "the custodian appointed under the prior decree has placed the child with a de facto custodian." KRS 403.340(2)(a)-(b). Pursuant to KRS 403.350, a party seeking a change in custody must still submit an affidavit

(or affidavits if filing within two years of the original decree) with his motion setting forth facts supporting the requested change. KRS 403.350. These facts must establish adequate cause for a hearing. *West v. West*, 664 S.W.2d 948, 949 (Ky. Ct. App. 1984); *see also, Quisenberry v. Quisenberry*, 785 S.W.2d 485 (Ky. 1990); *Betzer v. Betzer*, 749 S.W.2d 694 (Ky. Ct. App. 1988); and *Gladish v. Gladish*, 741 S.W.2d 658 (Ky. Ct. App. 1987).

With respect to requests for modification *more than two (2) years* after the original decree or the last custody order (emphasis added), KRS 403.340(3) states:

> If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the court shall not modify a prior custody decree unless *after hearing* it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a *change has occurred in the circumstances of the child or his custodian*, and that the *modification is necessary to serve the best interests of the child*.

KRS 403.340(3) (emphasis added).

This section then continues:

> When determining *if a change has occurred and whether a modification of custody is in the best interests of the child*, the court shall consider the following:
>
> (a) Whether the custodian agrees to the modification;
>
> (b) Whether the child has been integrated into the family of the petitioner with consent of the custodian;
>
> (c) *The factors set forth in KRS 403.270(2) to determine the best interests of the child*;
>
> (d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;
>
> (e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and
>
> (f) Whether the custodian has placed the child with a defacto custodian.

KRS 403.340(3)(a)-(f) (emphasis added).

After the submission of the initial motion for modification, the court should set a hearing at which time the parties can present evidence relating to the above factors.

It is important to note that the *Scheer* court stated, "Our holding today in no way alters or destroys the ability of courts to modify joint custody in situa-

tions where the parties are unable to cooperate," relying on its interpretations of KRS 403.340(2)(c) [now KRS 403.340(3)(d)] and KRS 403.340(3) [now KRS 403.340(4)] as its authority for this proposition. *Scheer*, 21 S.W.3d at 814. Apparently, the intent of the court is that if the inability to cooperate is linked with endangerment of the child's physical, mental, moral or emotional health, then joint custody may be successfully modified on that basis. More support for this position is found in the Kentucky Supreme Court decision of *Squires v. Squires*, 854 S.W.2d 765 (Ky. 1993). In that case, (although it was an initial custody decision rather than a modification case) the Kentucky Supreme Court defined cooperation as "rational participation" in decisions affecting the child's upbringing. *Id.* at 769. The court went on to state that the trial court could "assist" the parties with its contempt power or the power to modify custody in the event of a bad faith refusal to cooperate. *Id.* *Briggs v. Clemons*, 3 S.W.3d 760 (Ky. Ct. App. 1999), is an extreme example of the application of that principal. In *Briggs*, the mother and father were awarded joint custody with an equal division of time with the child. After an inability to cooperate, the mother filed a motion seeking to move with the child from Kentucky to Georgia. The trial court entered an order granting this motion and the Kentucky Court of Appeals affirmed. *Id.* at 761.

A. [11.18] Relocation

A relocation that is planned for or takes place prior to the entry of a decree is addressed as part of the general determination of custody under KRS 403.270. *See Frances v. Frances*, 266 S.W.3d 754 (Ky. 2008). If one parent desires to relocate with the children after the entry of the decree, the burden is on that parent to bring the issue before the court in the form of a motion to modify timesharing. Although the burden is technically on the parent who desires the relocation, that does not prohibit the parent opposing relocation from bringing a motion to disallow same. *See Pennington v. Marcum*, 266 S.W.3d 759, 770 (Ky. 2008).

Effective January 1, 2013, the statewide Family Court Rules provide that:

> Before a joint custodian seeks to relocate, written notice shall be filed with the court and notice shall be served on the non-relocating joint custodian. Either party may file a motion for change of custody or time-sharing within 20 days of service of the notice if the custodians are not in agreement; or, the parties shall file an agreed order if the time sharing arrangement is modified by agreement.
>
> Before a sole custodian seeks to relocate, written notice shall be filed with the court and notice shall be served on the non-custodial parent. If the court ordered visitation is affected by the relocation, the non-custodial parent may file a motion contesting the change in visitation within 20 days of service of the notice. FCRPP 7(2)(a)-(b)

The Rule shifts the burden to the parent opposing the move only if the relocating parent has sole custody. If the parties share joint custody, the burden to have the relocation approved remains on the relocating joint custodian, but the other joint custodian is permitted to file the initiating motion if he/she so desires.

In our modern, mobile society, it is possible for parents to maintain a joint custody relationship even if they do not live in close geographic proximity to one another. "[T]he essence of joint custody is shared decision-making…. [T]he joint custody itself will remain unaffected by [the] relocation because [the other parent] will still be able to continue sharing substantial time with [the] children through personal contact and other means…." *Fenwick v. Fenwick*, 114 S.W.3d 767, 789 (Ky. 2003). Therefore, "clearly a parent opposed to relocation but not seeking a change in joint custody, does not need to make a motion for a change of custody, but rather a motion for modification of timesharing." *Pennington v. Marcum*, 266 S.W.3d 759, 768 (Ky. 2008). When considering whether or not to modify the timesharing arrangement so as to allow one parent to move, the standard applied is "whenever modification would serve the best interest of the child." KRS 403.320(3). KRS 403.320 also specifically dictates that a court "shall not restrict a parent's visitation rights" unless allowing visitation would seriously endanger the child. The ultimate decision about the modification/relocation lies squarely within the discretion of the trial court.

V. [11.19] Timesharing

KRS 403.320 provides that a parent who is not granted custody is entitled to "reasonable timesharing rights," unless the court determines at the conclusion of a hearing that timesharing would endanger the child's physical, mental, moral or emotional health. If the parties cannot reach an agreement, the court will order a time-sharing schedule which takes into consideration the age of the child, the parties' work schedule, the child's activities, distance between the parties and any special concerns of the child.

Ideally, a parental timesharing arrangement "should be crafted to allow both parents as much involvement in their children's lives as is possible under the circumstances." *Drury*, 32 S.W.3d at 524. If there is no agreement between the parties, "the trial court has considerable discretion to determine the living arrangements which will best serve the interests of the children." *Id.* at 525. In addition, "joint custody does not necessarily require an *equal* division of residential custody [timesharing] of the children." *Id.*

If there are findings of domestic violence, the court may deny timesharing or specifically determine timesharing arrangements which would protect the child and the custodial parent from physical, mental or emotional dangers. KRS 403.320(2).

With respect to exchanging the children between timesharing periods, the court should consider the physical distance between the parties' residences, the age of the children, and any safety issues, including domestic violence. Courts may dictate a particular place or places for the exchanges, order that the parties share transportation responsibilities, and even allocate the expense of transportation. *See* FCRPP 7(2)(b).

Holidays should be specified so that there is no confusion as to the times for the beginning and conclusion of holiday periods. Although most plans tend to alternate holidays, the parties can instead design the plan to fit their traditional family schedules.

Some jurisdictions make use of "timesharing guidelines" or standard "shared parenting plans." These plans are acceptable so long as they are not applied in such a way that conflicts with the statutory requirement that the trial court make findings regarding timesharing based upon the facts in each case. *Drury v. Drury*, 32 S.W.3d 521 (Ky. Ct. App. 2000). These guidelines have suggested schedules based upon the ages of the children and generally include a very specific division of holidays, school breaks, and other special events.

See Appendices I and J at Sections [11.29] and [11.30], *infra* for Bullitt County timesharing schedules and Fayette County timesharing guidelines.

VI. [11.20] Appendix of Forms

A. [11.21] Petition for Custody, Timesharing and Support

NO._____ **[CIRCUIT/FAMILY] COURT**
DIVISION_____

_____ **PETITIONER**

VS. **PETITION FOR CUSTODY AND CHILD SUPPORT**

_____ **RESPONDENT**

In Re: The Custody and Support of (names of children)

Petitioner for [his/her] cause of action herein states under oath as follows:

1. The parties hereto are husband and wife having been lawfully married on _____ in _____ where said marriage is so registered.
2. The Petitioner is age _____; [his/her] occupation is _____. She presently resides at _____, Kentucky and has resided in this state for 180 days preceding the filing of this petition.
3. The Respondent is age ___; his occupation is _____. [He/She] presently resides at _____, Kentucky and has resided in this state for 180 days preceding the filing of this petition.
4. The parties hereto are separated, having separated on _____ and having remained separated since that time.
5. _____ children were born as a result of this marriage, of whom ___ are still minors; namely,_____ born _____and _____ born _____ both of whom presently reside at _____ with _____. In accordance with KRS 403.480, the petitioner gives the following additional information concerning the minor children:

    a) The places where said children have lived during the past five (5) years and the names and present address of the persons with whom said children lived during that period are:

DATE PERSON ADDRESS

_____
_____
_____
_____

b) The Petitioner has not participated as a party, witness or in any other capacity in any other litigation concerning the custody of said children in this or in any other state.

c) The Petitioner has no information of any custody proceeding concerning said children pending in a Court of this or any other state.

d) The Petitioner does not know of any person not a party to this proceeding who has physical custody of either child or claims to have custody or timesharing rights with respect to either child.

6. No arrangements have been made between the parties regarding custody, timesharing, support of the minor children, and maintenance of the spouse.

   or [List said arrangements]

7. (if applicable) A Domestic Violence Protective Order was issued by _____ Court on _____, 20__ and the provisions of this Order are as follows: _____.

8. _____ is the fit and proper person to have custody of said minor children and awarding custody to said party would be in the best interest of the children.

9. _____ is in need of and is entitled to child support from _____. _____ is an able-bodied person capable of gainful employment, and possessing the financial resources to pay child support to _____.

10. _____ has the greater financial resources and should be required to pay the cost of this action and part or all of _____'s attorney's fee.

WHEREFORE, THE PETITIONER RESPECTFULLY REQUESTS:

1. That [he/she] be awarded custody of the parties' minor child(ren).
2. That _____ be required to pay to _____ as child support the sum of $_____ per week.
3. That _____ be required to pay the court costs of this action and part or all of _____'s attorney fee.

4. All other relief both legal and equitable to which _____ may be entitled.

Petitioner, _____, states that [he/she] has read the foregoing petition for custody and child support and the statements contained therein are true to the best of her belief.

_____
Petitioner

STATE OF KENTUCKY)
)SS:
COUNTY OF _____)

SUBSCRIBED AND SWORN TO before me by _____on this the _____ day of _____, 20__.

_____
NOTARY OF PUBLIC, STATE AT LARGE, KY

My commission expires:_____

A copy hereof was served with all the moving papers.

B. [11.22] Motion to Dismiss for Lack of Jurisdiction

NO._____ **[CIRCUIT/FAMILY] COURT**
DIVISION_____

_____ **PETITIONER**

VS. **NOTICE - MOTION - ORDER**

_____ **RESPONDENT**

MOTION

Comes the [Petitioner/Respondent[, _____, by counsel, and moves the court to determine that this Court is an inconvenient forum, and that (other court) is a more appropriate forum pursuant to KRS 403.834.

Should the court make the above determination, [Petitioner/Respondent] further moves that the court stay the pending proceedings conditioned upon commencement of custody proceedings in another state.

_____

CERTIFICATE OF SERVICE

It is hereby certified that a copy hereof was, on the (date), mailed to (name), (address).

_____

NO. _____ **[CIRCUIT/FAMILY] COURT DIVISION_____**

_____ **PETITIONER**

VS.

_____ **RESPONDENT**

MEMORANDUM

Come the (party), (name), and in support of motion pursuant to KRS 403.834 to determine that the _____ court is an inconvenient forum and to stay pending proceedings in _____ [Circuit/Family] Court Division _____, state as follows:

(List factors as applicable to KRS 403.834(2), and apply factors to the law.)

Respectfully submitted,

_____

C. [11.23] Registration of Foreign Judgments

NO. _____ **[CIRCUIT/FAMILY] COURT DIVISION_____**

_____ **PETITIONER**

VS. VERIFIED PETITION TO REGISTER FOREIGN DECREE

_____ **RESPONDENT**

*** *** ***

Comes the Petitioner, by counsel, and hereby requests registration of the attached "(title of order)" of (date) from (county), (state) pursuant to KRS 403.850.

1. Said order has not been modified.
2. The Petitioner, (name), resides at (address).
3. The Respondent, (name), resides (address).

WHEREFORE, Petitioner moves the Court to

1. Register the attached (title) of (county), (state).

Respectfully submitted,

_____

Petitioner, (name), states that she has read the foregoing petition and the statements contained therein are true to the best of her knowledge and belief.

_____
(Name) Petitioner

COMMONWEALTH OF KENTUCKY
COUNTY OF _____

SUBSCRIBED AND SWORN TO before me by _____ on this the ____ day of _____, 200__.

_____
NOTARY PUBLIC, STATE AT LARGE, KY

CERTIFICATE

This is to certify that a true copy of the above was served by mailing the same to (name), (address).

_____

D. [11.24] Petition for Temporary Custody

NO._____ **[CIRCUIT/FAMILY] COURT DIVISION_____**

_____ **PETITIONER**

VS. **NOTICE - MOTION - ORDER**

_____ **RESPONDENT**

* * * * * *

NOTICE

PLEASE TAKE NOTICE that the undersigned, on the_____ day of _____, 20__, at _____.m., in the Courtroom of the above Court, will make the Motion and tender the Order set out below.

MOTION

Comes the [Petitioner/Respondent], by counsel, and supported by his affidavit, and moves this Court to enter the following Order.

_____
Attorney for [Petitioner/Respondent]

CERTIFICATE

It is hereby certified that a copy hereof was, on the ____ day of _____, mailed to the person and address listed above.

_____

NO._____ **[CIRCUIT/FAMILY] COURT DIVISION_____**

_____ **PETITIONER**

VS. **ORDER**

_____ **RESPONDENT**

* * * * *

Motion having been made, and this Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that the [Respondent/Petitioner] shall be restrained from removing the parties' minor child, _____, from the _____ [Metropolitan] area without written agreement of the parties or further order of the court.

IT IS FURTHER ORDERED AND ADJUDGED that the [Petitioner/Respondent], _____, shall have the temporary custody of the minor child _____ until further order of this court.

_____
JUDGE

_____
DATE

Tendered by:

_____
Counsel for [Petitioner/Respondent]

E. [11.25] Third Party Petition for Standing

NO._____ **[CIRCUIT/FAMILY] COURT DIVISION_____**

_____ **INTERVENING PETITIONER(S)**

VS.

_____ **PETITIONER**

VS. **INTERVENING PETITION FOR TIMESHARING**

_____ **RESPONDENT**

Intervening Petitioners for their cause of action herein states under oath as follows:

1. The Intervening Petitioner, is the [state relationship] of the child which is the center of this action and resides in Louisville, Jefferson County, Kentucky.
2. The Petitioner and Respondent are former husband and wife and the natural parents of _____, born _____.
3. All parties have been residents of the Commonwealth of Kentucky for 180 days next preceding the filing of this petition.
4. Said child has resided with and been cared for by the Intervening Petitioner(s) for the past _____ years. Said child has resided continuously in _____, Kentucky since her birth. The Intervening Petitioner(s) have not participated as a party, witness or in any other capacity in any other litigation concerning said child pending in this or any other state with the exception of the custody dispute currently pending. The Intervening Petitioner(s) do not know of any person not a party to this proceeding who has physical custody of said child or claims to have custody or timesharing rights with respect to said child other than the paternal grandmother.
5. Intervening Petitioner(s) contend that granting them timesharing would be in the best interest of the minor child.

WHEREFORE, THE INTERVENING PETITIONER(S) DEMAND:

1. A hearing before this court to determine timesharing;

2. That the Petitioner and Respondent not be allowed to take the child out of _____ County during the pendency of this action;
3. That during the pendency of this action this court grant the Intervening Petitioner(s) a temporary timesharing schedule to include every other weekend and one evening each week;
4. All other relief to which the Intervening Petitioner(s) may appear entitled.

_____

_____

COMMONWEALTH OF KENTUCKY)
) SS:
COUNTY OF _____)

Subscribed, sworn to, and acknowledged before me, a Notary Public in and for the aforesaid Commonwealth and County, by _____ this____ day of _____, 20___.

_____
NOTARY PUBLIC, KENTUCKY STATE AT LARGE

My commission expires: _____

THIS DOCUMENT TENDERED BY:

_____
Attorney for Intervening Petitioner(s)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above was mailed postage pre-paid to _____on this the ___day of _____, 200__.

_____

F. [11.26] Order Appointing Psychological Expert

NO._____ **[CIRCUIT/FAMILY] COURT DIVISION_____**

_____ **PETITIONER**

VS. **ORDER**

_____ **RESPONDENT**

* * * * * * * *

Motion having been made and this Court being sufficiently advised,

IT IS HEREBY ORDERED_____ shall be appointed to evaluate the parties and the parties' minor children, and make recommendations to this Court.

Petitioner and Respondent shall equally divide the cost of said evaluation and report until further notice of this Court. Each party reserves the right to request a different allocation of the cost involved at a later date.

_____
JUDGE, _____ [CIRCUIT/FAMILY] COURT

DATE:_____

TENDERED BY:

_____
Attorney for [Petitioner/Respondent]

G. [11.27] Appointment of Guardian *ad litem*

NO._____ **[CIRCUIT/FAMILY] COURT DIVISION_____**

_____ **PETITIONER**

VS. **ORDER**

_____ **RESPONDENT**

* * * * * * * *

Motion having been made and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED _____ shall be appointed Guardian *ad litem* for the parties' minor children, _____. The parties shall bear the cost of this representation equally. This Court reserves the right to reallocate these costs at a later date. Said Guardian *ad litem* shall have access to all medical, psychological, and educational records involving said children and shall make periodic reports to this Court based on information provided by the parties, their counsel, and said children.

_____
JUDGE, _____
[CIRCUIT/FAMILY] COURT, Division____

DATE:_____

TENDERED BY:

_____
Attorney for [Petitioner/Respondent]

H. [11.28] Motion for Change of Custody

NO._____ **[CIRCUIT/FAMILY] COURT**
DIVISION_____

_____ **PETITIONER**

VS. **NOTICE-MOTION-ORDER**

_____ **RESPONDENT**

* * * * * * * *

Please take Notice the undersigned will, on **_____, 200__,** at the hour of **_____.m.,** in the courtroom of the above Court, make the following Motion and tender the attached Order.

MOTION

Comes the [Petitioner/Respondent], _____, by counsel, and moves this Court to enter the attached Order scheduling a hearing on [Petitioner's/Respondent's] motion to change the custody of the parties' minor children, _____and to revise the time-share schedule and specific holiday schedule. In support of said motion, [Petitioner/Respondent] attaches [his/her] Affidavit.

_____
Attorney for [Petitioner/Respondent]

CERTIFICATE OF SERVICE

The undersigned hereby certifies a true and correct copy of the foregoing Notice-Motion-Order was mailed this ____ day of _____, 200__, to:

_____

NO._____ **[CIRCUIT/FAMILY] COURT DIVISION_____**

_____ **PETITIONER**

VS. **ORDER**

_____ **RESPONDENT**

* * * * * * * *

Motion having been made and this Court being sufficiently advised,

IT IS HEREBY ORDERED a hearing in the above-referenced matter is scheduled for the _____ day of _____, 200__, at _____.m. on [Petitioner's/Respondent's] motion to change the custody of the parties minor children and to revise the time-share schedule.

_____
JUDGE, _____
[CIRCUIT/FAMILY] COURT, DIVISION ___

DATE:_____

TENDERED BY:

_____
Attorney for [Petitioner/Respondent]

I. [11.29] Timesharing Schedules: Bullitt County

NO. (Form 9A) **BULLITT CIRCUIT COURT DIVISION_____**

_____ **PETITIONER**

VS. **ORDER**

_____ **RESPONDENT**

* * * * * * * * *

In all cases, unless the parties shall otherwise agree in writing, wherein the parties have a minor child or children over two (2) years of age, regardless of whether custody is joint or sole, timesharing is required with the following schedule, which shall apply until further order of the court, unless there is good cause shown. This is a minimal schedule. The parties are encouraged to grant more liberal timesharing. The DRC may modify or enlarge timesharing upon proper motion and hearing, but the schedule herein set is deemed to be in effect and is to be followed absent any other order.

1. The parents shall alternate possession of the minor children during the following holidays: New Years Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day, Christmas Eve from 10:00 a.m. until 10:00 a.m. Christmas Day and Christmas Day after 10:00 a.m.
   A. The Petitioner shall have the following holidays:
      1) Even Years: New Years, July 4th, Thanksgiving Day, and Christmas Day.
      2) Odd Years: Memorial Day, Labor Day, and Christmas Eve.
   B. The Respondent shall have the following holidays:
      1) Even Years: Memorial Day, Labor Day and Christmas Eve.
      2) Odd Years: New Years, July 4th, Thanksgiving Day, and Christmas Day.
   C. Birthdays
      1) Possession of a child for his or her birthday shall alternate with Petitioner having even numbered years and with Respondent having odd numbered years, regardless of other timesharing scheduled.
      2) The father shall have the children on Father's day, regardless of any other timesharing schedules,

3) The mother shall have the children on Mother's day, regardless of any other timesharing schedules.

D. School Break Periods

During the Christmas and Easter school holidays, possession of the minor children shall be divided.

1) The Petitioner shall have the children

a. Even years: Christmas Day at 10:00 a.m. to first day of school, last day of school beginning Easter Break until 12:00 noon on Wednesday.

b. Odd years: last day of school before break through 10:00 a.m. Christmas Day, Wednesday at 12:00 noon through resumption of school ending the Easter break.

2) The Respondent shall have the children

a. Odd years: Christmas Day at 10:00 a.m. to first day of school, last day of school beginning Easter Break until 12:00 noon on Wednesday

b. Even years: last day of school before break through 10:00 a.m. Christmas Day, Wednesday at 12:00 noon through resumption of school ending the Easter break.

3) This timesharing shall apply regardless of weekend alternation. Alternation of weekend timesharing shall resume following the end of holiday timesharing.

2. Petitioner shall be responsible to see that the child or children are delivered to timesharing and Respondent shall see that the child or children are returned from timesharing. Weekend timesharing begins at 6:00 p.m. on Friday until 6:00 p.m. on Sunday. Holiday timesharing begins at 8:00 a.m. until 8:00 p.m. on the holiday unless the holiday follows a weekend timesharing in which case the weekend timesharing will continue through the holiday until 8:00 p.m.

_____
JUDGE

DATE:_____

TENDERED BY:

_____
Attorney for [Petitioner/Respondent]

J. [11.30] Timesharing Guidelines: Fayette County

Revised 1/2007

FAYETTE FAMILY COURT
TIMESHARING / PARENTING GUIDELINES
Each Parent Shall:

I. BEHAVIOR

A. Realize that these Guidelines require both parents to put the child(ren)'s needs ahead of their own, to actually utilize the timeshare granted, and to be responsible for getting the child(ren)'s homework and other activities done during that parent's time with the child(ren).
B. Understand that there may be circumstances from time to time with regard to work schedules and/or activities of the child(ren) which require flexibility and cooperation, and that changes in the scheduling may be required.
C. Not send written or verbal messages to each other through the child(ren).
D. Keep the other parent advised as to current residential address, business address, email address, telephone numbers for home, work, mobile, fax and pager for the purpose of notification unless otherwise ordered by the Court.
E. Not schedule activities for the child(ren) when the child(ren) are to be with the other parent, without first consulting with the other parent.
F. Cooperate to ensure that the child(ren) have appropriate clothing and other personal items at both parents' residence.

II. TRAVEL

A. Be responsible to pick up the child(ren) from the other parent's residence, school or daycare when assuming physical custody of the child(ren) unless otherwise ordered by the Court.
B. Not unreasonably object to assistance in transportation by responsible third parties.
C. Not turn over the child(ren) to an intoxicated individual.
D. Ensure that every child is secured in an appropriate child restraint system when transporting the child(ren).
E. Be prompt when picking up or dropping off the child(ren). However, each parent is entitled to a 15-minute grace period. After this grace period, the parents shall continue with their daily activities, and the timesharing is forfeited for that day.

III. SCHOOL / HEALTH

A. Have the right and responsibility to obtain schedule and activity information regarding the child(ren)'s school, daycare, healthcare or any other organized activity from any third party.
B. Have the opportunity to complete and view the school information for the child(ren), including emergency contact information, and persons allowed to pick up the child(ren) from school. Both parents shall be listed on all information with the school.
C. Keep the other parent advised as to the child(ren)'s serious illness or any other major development, whether medical, educational or otherwise.

IV. RELOCATION

A. Provide the other parent 60 days' written notice of any intended relocation that would impact the current timesharing of the non-relocating party, in order to facilitate a review of current timesharing arrangements by the court.

V. MISCELLANEOUS

A. Realize that these Guidelines are not suited to every set of circumstances and that they should only be used as a starting point for discussion between parties.
B. Realize that parents are encouraged to draft mutually suitable specific timesharing arrangements and to make continued agreed adjustments as needed.
C. Realize that these Guidelines can only be enforced if Court ordered.
D. Realize that these Guidelines assume that both parents reside in Fayette or an adjacent county. These Guidelines will not address all of the appropriate terms for timesharing of parents who do not live within a reasonable proximity of one another.
E. Realize that these Guidelines will apply **only** in cases where both parents have been actively involved in the child(ren)'s lives for a significant amount of time. The Guidelines would not be appropriate for cases in which the parents have been separated for so long that one parent is a stranger to the child(ren).
F. Realize that timesharing in accordance with these Guidelines, or timesharing of less than these Guidelines, shall not be the basis for a motion to reduce child support or deviate from the child support Guidelines.

Revised 1/2007

TIMESHARING SCHEDULE FOR PARENTS OF CHILDREN TWO YEARS OLD OR OLDER

1. **WEEKENDS / SCHOOL WEEK:** Unless otherwise agreed, Parent A shall have the child(ren) on alternate WEEKENDS from 6:00 p.m., or if appropriate, from the time school or daycare ends on Friday until Sunday evening at 6:00 p.m., or if appropriate, until school resumes on Monday, depending on the parties' circumstances. If there are additional days off from school creating a three or four-day weekend, those additional days shall also be included as part of that weekend. In addition, the child(ren) shall be with Parent A each Tuesday or Thursday from the time school ends until 7:30 p.m., or until school resumes the following day, if appropriate. Parent B shall have the child(ren) all other times. This schedule shall not change throughout the year.

2. **SPRING BREAK**: The parents shall alternate timesharing for Spring Break each year from the time school ends until 6:00 p.m. on the Sunday evening before school resumes. Parent A shall have timesharing with the child(ren) in even numbered years and Parent B shall have timesharing with the child(ren) in odd numbered years.

3. **MOTHER'S DAY & FATHER'S DAY:** The child(ren) shall spend this time with the appropriate parent from 9:00 a.m. Sunday until school resumes, or 9:00 a.m. Monday if appropriate. These days shall supersede all other schedules.

4. **SUMMER BREAK:** Summer timesharing shall be divided equally in alternating one-week periods beginning on the Friday before the first full week that school is not in session. The parent that is scheduled for timesharing on that Friday evening shall have the first summer period. Exchanges shall occur each Friday at 6:00 p.m.

   Each parent may have one of the other parent's weekends each summer for the exclusive purpose of extending a week into nine days in order to enjoy a vacation with the child(ren). Written notice of the dates of this nine-day time shall be given by each parent to the other parent prior to May 1 of each year.

   If the child(ren) spend substantially more time in the home of one parent during the school year, the child(ren) should return to that parent's home approximately one week before school resumes to prepare for the upcoming school year. The parents may have to adjust the schedule to accomplish this and to still divide the summer timesharing equally.

5. **THANKSGIVING BREAK:** The parents shall alternate timesharing for Thanksgiving Break each year from the time school ends until 6:00 p.m. on the Sunday evening before school resumes, or Monday morning after the break, if appropriate. Parent A shall have timesharing with the child(ren) in odd numbered years and Parent B shall have timesharing with the child(ren) in even numbered years.

6. **DECEMBER BREAK:** In even-numbered years, Parent A shall have timesharing with the child(ren) from the time school ends in December until December 25th at 5:00 p.m., and Parent B shall have timesharing with the child(ren) from December 25th at 5:00 p.m. until school resumes. In odd-numbered years, Parent B shall have timesharing with the child(ren) from the time school ends in December until December 25th at 5:00 p.m., and Parent A shall have timesharing with the child(ren) from December 25th at 5:00 p.m. until school resumes.

7. **BIRTHDAYS:** No adjustments to the schedule shall be given for birthdays of the child(ren) or of either parent.

8. **OTHER HOLIDAYS:** No adjustments to the schedule shall be given for any other holidays, including but not limited to July 4th, Memorial Day, Halloween/Trick or Treat evening, or Labor Day.

9. **EFFECT OF PARAGRAPHS 2-6 ON PARAGRAPH 1:** Timesharing pursuant to these Guidelines may result in one parent spending several weekends in a row with the child(ren).

TIMESHARING SCHEDULE FOR PARENTS OF CHILDREN UNDER TWO YEARS OF AGE

Children Less Than Two Years Old shall spend at least two 24-hour periods each week with Parent A. This time shall be as follows:

1. Each week, Tuesday from 6:00 p.m. to Wednesday at 6:00 p.m., and

2. For the first week, from Friday at 6:00 p.m. until Saturday at 6:00 p.m.; and the following week, from Thursday at 6:00 p.m. until Friday at 6:00 p.m.

The fact that a child is nursing is not necessarily a reason to deviate from this Guideline. The purpose of this provision is to encourage significant time with both parents and any deviation from this Guideline shall be consistent with this purpose.

12

DEPENDENCY, NEGLECT & ABUSE, TERMINATION OF PARENTAL RIGHTS & ADOPTION

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I. [12.1] Dependency, Neglect, and Abuse

A. [12.2] Fundamental Rights

In KRS 620.010, the Kentucky legislature recognized that children have certain fundamental rights that must be protected and preserved, including but not limited to, the following:

- Adequate food, clothing and shelter;
- Right to be free from physical, sexual or emotional injury or exploitation;
- Right to develop physically, mentally, and emotionally to their potential;
- Right to educational instruction; and
- Right to a secure and stable family.

Kentucky law specifically defines *physical injury*, *emotional injury*, and *sexual exploitation*. *Physical injury* is substantial physical pain or any impairment of physical condition. KRS 600.020(46). *Emotional injury* means an injury to the mental or psychological capacity or emotional stability of a child as evidenced by a substantial and observable impairment in the child's ability to function within a normal range of performance and behavior, with due regard to his or her age, development, culture, and environment as testified to by a qualified mental health professional. KRS 600.020(24). *Sexual exploitation* includes, but is not limited to, a situation in which a parent, guardian, or other person having custodial control or supervision of a child or responsibility for his or her welfare allows the child to engage in an act which constitutes prostitution or obscene or pornographic photographing, filming or depicting of a child. KRS 600.020(55).

B. [12.3] Duty to Report

To effectuate the legislative purpose of protecting children's fundamental rights as set forth in KRS 620.010, Kentucky law provides that any person who knows or has reasonable cause to believe that a child is *dependent*, *neglected,* or *abused* shall immediately make an oral or written report to a local law enforcement agency or the Kentucky State Police; the Cabinet for Health and Family Services ("Cabinet") or its designated agency; the Commonwealth's attorney, or the county attorney. KRS 620.030(1). *Dependent* means any child, other than an abused or neglected child, who is under improper care, custody, control, or guardianship that is not due to an intentional act of a parent, guardian, or person exercising custodial control or supervision of the child. KRS 600.020(19). A child cannot be both dependent and abused or dependent and neglected. An *abused or neglected* child is one whose health or welfare is harmed or threatened with harm when his parent, guardian, or other person exercising custodial control or supervision of the child:

- Inflicts or allows to be inflicted upon the child physical or emotional injury;
- Creates or allows to be created a risk of physical or emotional injury by other than accidental means;
- Engages in a pattern of conduct that renders the parent incapable of caring for the child due to alcohol or other drug abuse;
- Continuously or repeatedly fails or refuses to provide care and protection for the child;
- Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;
- Abandons or exploits the child;
- Does not provide the child with adequate care, supervision, food, clothing, shelter, and educational or medical care; or
- Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining in foster care for 15 of the most recent 22 months.

KRS 600.020(1).

C. [12.4] Duty of Cabinet for Health and Family Services to Investigate Report

The Cabinet is mandated under Kentucky law to respond to any report of dependency, neglect, or abuse allegedly committed by a parent, guardian, or person exercising custodial control or supervision. KRS 620.030(1). A *parent* means the biological or adoptive mother or father of a child. KRS 600.020(41). A *person exercising custodial control or supervision* is a person or agency that has assumed the role and responsibility of parent or guardian for the child, but does not necessarily have legal custody. KRS 600.020(42).

If the Cabinet receives a report of suspected dependency, neglect, or abuse allegedly committed by a person *other than* a parent, guardian, or person exercising custodial control or supervision, then the Cabinet shall refer the matter to the Commonwealth's attorney or the county attorney and the local law enforcement agency or the Kentucky State Police. KRS 620.030(1). However, the Cabinet shall participate in an investigation of non-custodial abuse or neglect if requested to do so by local law enforcement or the Kentucky State Police. KRS 620.040(3).

If a report alleges abuse or neglect by a parent, guardian, or person exercising custodial control or supervision, then the Cabinet shall immediately make an initial determination as to the risk of harm and immediate safety of the child. KRS 620.040(1)(b). Based upon the level of risk determined, the Cabinet shall investigate the allegation or accept the report for an assessment of family needs. *Id.*

If appropriate, the Cabinet may provide or make referral to any community-based services necessary to reduce the risk to the child and provide family support, unless the report alleges sexual abuse. *Id.* A report of sexual abuse shall be considered high risk and shall not be referred to any community agency. *Id.*

When reports of abuse or neglect are concerned, the Cabinet shall, within 72 hours, excluding weekends and holidays, make a written report to the Commonwealth's attorney or county attorney and the local law enforcement agency or Kentucky State Police concerning the action that has been taken in the investigation. KRS 620.040(1)(c). The Cabinet need not notify the local law enforcement agency or Kentucky State Police or county attorney or Commonwealth's attorney of reports alleging dependency and the action taken. KRS 620.040(2)(c). The obligation to make a report to law enforcement within 72 hours applies only to abuse and neglect allegations.

D. [12.5] Jurisdiction

For those counties without a family court division of circuit court, the juvenile session of the district court shall have exclusive jurisdiction of proceedings concerning any child either living or found within the county who has not reached the age of 18. KRS 610.010(1) and KRS 23A.100(3). These statutory provisions effectively prohibit the transfer of a dependency, neglect, or abuse action to a dissolution of marriage proceeding in circuit court. However, for matters of child custody and visitation in cases that come before the district court under KRS Chapter 620, which pertains to the treatment of dependent, neglected, and abused children, district courts have concurrent jurisdiction with circuit courts. KRS 620.027. For those Kentucky counties with a family court division of circuit court, the family court division shall have jurisdiction of dependency, neglect, and abuse proceedings, as well as all matters of child custody, visitation, and dissolution of marriage. KRS 23A.100(1) and (2).

The Family Court Rules of Procedure and Practice ("FCRPP"), which took effect January 1, 2011, set out additional requirements for all dependency, neglect and abuse cases. Specifically with regard to jurisdiction, FCRPP Rule 25 states that cases shall not be transferred from one county to another prior to adjudication except on a specific finding of improper venue or *forum non-conveniens*. FCRPP 25.

E. [12.6] Emergency Custody Order

The court for the county where the child is found may order an *ex parte* emergency custody order under the limited set of circumstances wherein there are reasonable grounds to believe that the parent or other person exercising custodial control or supervision is unable or unwilling to protect the child and one or more of the following conditions exist:

- The child is in danger of imminent death or *serious physical injury*, defined in KRS 600.020(53) as that which creates a

substantial risk of death or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily member or organ, or the child is being sexually abused;

- The parent has repeatedly inflicted or allowed to be inflicted by other than accidental means physical or emotional injury; or
- The child is in immediate danger due to the parent's failure or refusal to provide for the safety or needs of the child. KRS 620.060(1).

An emergency custody order shall be effective for no longer than 72 hours, exclusive of weekends and holidays, unless there is a temporary removal hearing with oral or other notice to the county attorney and the parent or other person exercising custodial control or supervision of the child, to determine if the child should be held for a longer period. KRS 620.060(3). Any person authorized to serve process shall serve the parent or other person exercising custodial control or supervision with a copy of the emergency custody order. KRS 620.060(4). If such a person cannot be found, then the sheriff shall make a good faith effort to notify the nearest relative, neighbor, or other person familiar with the child. *Id.* Within 72 hours of the taking of a child into custody without the consent of his or her parent or other person exercising custodial control or supervision, a petition shall be filed pursuant to KRS 620.070.

If the court finds there are not reasonable grounds to believe the child is dependent, neglected, or abused, or if no action is taken within 72 hours, then the emergency custody order shall be dissolved automatically and the Cabinet or its designee shall return the child to the parent or other person exercising custodial control or supervision of the child. KRS 620.090(3). A request for a continuance of the hearing by the parent or other person exercising custodial control or supervision of the child shall constitute action precluding automatic dissolution of the emergency custody order. *Id.*

F. [12.7] Petition

Any interested person may file a dependency, neglect, or abuse action by filing a petition. KRS 620.070(1). After a petition has been filed, the clerk of the court shall issue, and the sheriff or authorized agent shall serve, a copy of the petition and summons to the parent or other person exercising custodial control or supervision. KRS 620.070(2). The summons shall include an explanation of the importance of the petition and of the rights of the parent or other person exercising custodial control or supervision, and it shall also emphasize the importance of immediately contacting the court about legal representation and to be advised of the date, time, and place when the parent or other person exercising custodial control or supervision is to appear. KRS 620.070(3). The summons shall also include

written notice that the case may be reviewed by a local citizen foster care review board and the report of the board review shall become part of the court record. *Id.*

FCRPP Rules 18 and 20 pertain to specific requirements for the filing and service of these petitions and summons. Specifically, Rule 18 addresses the service requirements and states that the petitions, summons and emergency custody order may be served by any person authorized to serve process except the state child protective agency itself. FCRPP 18(1). In addition to the required copies of the petition, service requires the parent be provided with a statement of rights and a blank affidavit of indigency utilizing the proper AOC forms. FCRPP 18(2). Rule 20 states that there shall be separate petitions filed for each sibling with individual case numbers for each child. All children within a sibling group shall be assigned to the same judge. FCRPP 20(1).

G. [12.8] Temporary Removal Hearing

Unless waived by the child and his or her parent or other person exercising custodial control or supervision, for those cases initiated by the filing of an emergency custody order, a temporary removal hearing shall be held within 72 hours, excluding weekends and holidays, of the time when an emergency custody order is issued or a child is taken into custody without the consent of his or her parent or other person exercising custodial control or supervision. KRS 620.080(1)(a). However, in those dependency, neglect, and abuse actions commenced by the filing of a petition, rather than an emergency custody order, the initial hearing shall take place within 10 days of the date of filing. KRS 620.080(1)(b). Notice of this hearing shall be provided by the clerk to the parents or other person exercising custodial control or supervision, the county attorney, the state child protective service agency and any guardian *ad litem* or attorney of record. FCRPP 21.

At a temporary removal/initial hearing, the court determines whether there are reasonable grounds to believe that the child would be dependent, neglected, or abused if returned to or left in the custody of the parent or other person exercising custodial control or supervision, even though it is not proved conclusively who has perpetrated the dependency, neglect, or abuse. KRS 620.080(2). The court may allow hearsay evidence for good cause shown. *Id.* The Commonwealth bears the burden of proof by a preponderance of the evidence and, if the Commonwealth should fail to meet the burden of proof, the child must be released to or retained in the custody of his or her parent or other person exercising custodial control or supervision. *Id.* However, the Cabinet may file a dependency petition and request that a temporary removal hearing be held within 72 hours to protect the child, if the Cabinet believes the child will be dependent, neglected, or abused if in the custody of his or her parent or other person exercising custodial control or supervision. 922 KAR 1:230 § 3.

H. [12.9] Temporary Custody Order

If the court finds, following the temporary removal hearing, that there are reasonable grounds to believe that the child is dependent, neglected, or abused, then the court shall issue an order for temporary removal and shall grant temporary custody to the Cabinet or other appropriate person or agency. KRS 620.090(1). Preference shall be given to available and qualified relatives of the child, considering the wishes of the parent or other person exercising custodial control or supervision, if known. *Id*. The court shall state the specific reasons for removal and show that alternative, less restrictive placements and services have been considered. *Id.*

The court may recommend a placement for the child. KRS 620.090(1). However, the Cabinet is responsible for making the placement. KRS 620.090(2). In placing a child under a temporary custody order, the Cabinet or its designee shall use the least restrictive appropriate placement available. *Id.* Also, under 922 KAR 1:140 § 3(a)(2), the placement must be the best available for the child that is in the closest proximity to the child's home.

The child shall remain in temporary custody with the Cabinet for a period of time not to exceed 45 days from the date of removal from his or her home. KRS 620.090(5). The court shall conduct the adjudicatory hearing and make a final disposition of the action within 45 days of the removal. *Id.* However, the court may extend this time period after making written findings establishing the need for the extension and after finding that the extension is in the child's best interest. *Id.*

I. [12.10] Alternatives to Removal

Whenever the court is petitioned to remove or continue the removal of a child from the custody of his or her parent or other person exercising custodial control or supervision, the court must first consider whether the child may be reasonably protected against the alleged dependency, neglect, or abuse by alternatives less restrictive than removal. KRS 620.130(1). Such alternatives may include, but are not be limited to, the provision of medical, educational, psychiatric, psychological, social work, counseling, day care, or homemaking services with monitoring whenever necessary by the Cabinet or other agency. *Id.* When the court specifically finds that such alternatives are adequate to protect the child against the alleged dependency, neglect, or abuse, the court shall not order the removal or continued removal of the child. *Id.*

If, however, the court orders the removal or continues the removal of the child, then services provided to the parent and the child shall be designed to promote the protection of the child and the return of the child safely to the child's home as soon as possible. The Cabinet shall develop a treatment plan for each child designed to meet the needs of the child. KRS 620.130(2). All out of home case plans, visitation agreements, or prevention and safety plans developed by

the child protective agency shall be filed in the court records and provided to all parties. FCRPP 29.

J. [12.11] Appointment of Counsel

If the court finds, as a result of the temporary removal hearing, that further proceedings are required, then the court shall advise the child and his parent or other person exercising custodial control or supervision of their right to appointment of separate counsel. KRS 620.100(1). The court shall appoint counsel for the child, to be paid for by the Finance and Administration Cabinet, subject to the fee limits set forth in KRS 620.100(1)(a). The court shall also appoint separate counsel for the parent who exercises custodial control or supervision if the parent is unable to afford counsel pursuant to KRS Chapter 31. KRS 620.100(1)(b) and pursuant to the disclosures made in the AOC-DNA-11, Financial Statement, Affidavit of Indigence, Request for Counsel and Order. The court may also, in the interest of justice, appoint separate counsel for a non-parent who exercises custodial control or supervision of the child, if the person is unable to afford counsel under KRS Chapter 31. KRS 620.100(1)(c). Counsel fees for both a parent and a non-parent are to be paid by the Finance and Administration Cabinet, subject to the limits set forth in KRS 620.100(1)(b) and (1)(c).

FCRPP Rule 26 governs the requirement for entry of appearance for non-court-appointed counsel and states that the attorney shall file a written entry of appearance. Further, no attorney shall be permitted to withdraw from representation except upon written motion to withdraw granted by the court. FCRPP 26.

K. [12.12] Adjudicatory Hearing

If the court determines that further proceedings are required, then the court shall advise the child and his or her parent or other person exercising custodial control or supervision that they have a right not to incriminate themselves and a right to a full adjudicatory hearing during which they may confront and cross-examine all adverse witnesses, present evidence on their own behalf, and appeal. KRS 620.100(2). The adjudication shall take place without a jury. KRS 610.070(1). Furthermore, the general public is excluded, and only immediate family members or guardians of the parties shall be admitted into the courtroom. KRS 610.070(3).

The adjudication shall determine the truth or falsity of the allegations in the petition. KRS 620.100(3). The petitioner shall have the burden of proof by a preponderance of the evidence, and the Kentucky Rules of Evidence apply. *Id.* For cases in which, criminal charges arise out of the same transaction or occurrence against an adult alleged to have perpetrated child abuse or neglect, the charges shall be tried separately from the adjudicatory hearing described herein. KRS 620.120.

The court in making determination with regard to a child in a dependency neglect or abuse action may consider the findings of fact and court orders from any other court proceeding in any other court file involving the child or the child's

parents or person exercising custodial control or supervision if the court is aware of such proceedings. To the extent that the court relies on such, the court shall include a copy of that material in the record. FCRPP 17.

L. [12.13] Visitation

Following an order of removal, the Cabinet shall establish terms and conditions of visitation with the child after consulting with his or her parent or other person exercising custodial control or supervision. KRS 620.150. If the parent or other person exercising custodial control or supervision is dissatisfied with the visitation schedule, then they may petition the court for review of the schedule. *Id.* After review, the court may alter the schedule if it finds that the schedule has been arbitrary or unreasonable. *Id.* All visitation agreements shall be filed in the record. FCRPP 29.

M. [12.14] Dispositional Alternatives

At disposition, the court decides who will have custody and control of the child and what steps are needed to resolve the problems that led to the Cabinet's intervention. The focus is no longer whether the child was abused, neglected, or dependent, but what will happen next to the child. The Dispositional Hearing is to be held no more than forty-five (45) days after the removal from the home. However, the court may extend such time after making findings establishing the need for such extension is in the best interest of the child. KRS 620.090(5).

In determining the disposition of dependency, neglect, and abuse cases, the court shall consider the best interest of the child and will not be limited to the following dispositional alternatives: informal adjustment of the case; protective orders; removal of the child to the custody of another person or a facility; or commitment of the child to the custody of the Cabinet for placement for an indefinite period not to exceed the child's eighteenth birthday. An order of temporary custody to the Cabinet is not a permissible dispositional alternative. KRS 620.140(2).

Informal adjustment means an agreement reached among the parties which is approved by the court. KRS 600.020(31). Protective orders may include actions such as requiring the parent or any other person to abstain from any conduct abusing, neglecting, or making the child dependent. Protective orders may also place the child in his or her home under supervision of the Cabinet or its designee with appropriate services. KRS 620.140(1)(b). All prevention and safety plans established by the Cabinet shall be filed in the record. FCRPP 29. If the child is removed to the custody of a relative, another adult, or a child-caring facility, then the court must take into consideration the wishes of the parent or other person exercising custodial control or supervision. KRS 620.140(1)(c). Before any child removed from his or her home is committed to the Cabinet, the court must first determine that reasonable efforts have been made to prevent or eliminate the need for removal and that continuation in the home would be contrary to the welfare of

the child. *Id. Reasonable efforts* means the exercise of ordinary due diligence and care to use all preventive and reunification services available that are necessary to enable the child to live safely at home. KRS 620.020(10).

N. [12.15] Case Permanency Plans

For every child committed to the custody of the Cabinet, it must file a case permanency plan for the child with the court no later than 30 days after the effective date of the commitment order. KRS 620.230(1). The *case permanency plan* is a document that identifies decisions made by the Cabinet, for both the biological family and the child, concerning action that needs to be taken to assure that the child in foster care expeditiously obtains a permanent home. KRS 620.020(1). However, most jurisdictions require these case plans to be established and presented at disposition as a part of the Disposition Report and any objections or changes to these recommendations are considered at the Disposition Hearing. All disposition reports must be filed in the record three days prior to the hearing. FCRPP 28. It shall include, but not be limited to, the following:

- Reasons why the child is in the custody of the Cabinet;
- Actions taken and contemplated actions regarding the child during the next six months and the entire time the child is in the custody of the Cabinet;
- Contemplated placements for the child;
- If the child is outside the home, reasons why the child cannot adequately be protected in the home, efforts the Cabinet is making to return the child home, and steps the Cabinet will take to minimize the harm to the child;
- Description of the type of home or facility in which the child is placed and an explanation as to why the placement is appropriate;
- If the placement is outside the child's county of residence, documentation that no closer placement is appropriate or available;
- A description of the services for the child and his or her family that are to be provided to facilitate the child's return home or to another permanent placement;
- A list of objectives and tasks, along with timeframes for completion, for which the parents have agreed to be responsible, including a schedule for regular visits;
- If the child is to remain at home, a description of the potential harm to the child and measures being taken to prevent or minimize the harm; and

- If the child is to remain at home, reasons why the child cannot be placed in foster care or why foster care is not needed.

KRS 620.230(2).

O. [12.16] Permanency Review Hearings

If a child has been placed in the custody of the Cabinet, then the court shall conduct a permanency hearing no later than 12 months after the date the child is considered to have entered foster care, and every 12 months thereafter as long as the child continues to be in the custody of the Cabinet, to determine the future status of the child. KRS 610.125(1). A child is considered to have entered foster care on the earlier of the date of the first judicial finding that the child was abused or neglected or the date that is 60 days after the date the child was removed from home. *Id.*

In addition to the annual permanency reviews addressed above the court shall conduct a permanency progress review no later than six months after a child is placed in foster care, in the homes of a non-custodial parent, or other persons or agency, when that child is sixteen years of age or younger at the time of the filing of a dependency, neglect or abuse petition. FCRPP 30.

At the permanency hearing, generally speaking, the court will assess the performance of the parent and the Cabinet, as well as the child's relationships. The court will determine the parent's progress in achieving case plan goals and the Cabinet's ability to provide those services promised.

The court will also review the permanency goal for the child. If parental rights to the child have not been terminated, then the court must address whether the child should be returned to his or her parent. KRS 610.125(1)(a). If parental rights have been terminated, then the court must address whether the child should be placed for adoption or with a permanent custodian, as well as whether the Cabinet has documented a compelling reason that it is in the best interest of the child to be placed in another planned permanent living arrangement. KRS 610.125(1)(b), (c), and (d). The court must give notice of the permanency hearing to the parent, foster parents, pre-adoptive parents, or relatives providing care to the child, all of whom have the right to be present and present evidence relevant to the determination of the permanency plan for the child. KRS 610.125(3) and (5).

The Adoption and Safe Families Act of 1997 ("AFSA") was the first substantive change in federal law since the Child Welfare Act of 1980 and was adopted by Kentucky. In addition to shortening the permanency hearing guidelines from every eighteen (18) months to every twelve (12) months, among other things, AFSA calls for both reasonable efforts towards reunification and concurrent efforts to place a child for adoption or permanent guardianship. AFSA shifts the focus to the child's best interest and requires permanency for every child. Further, AFSA allows the Cabinet to be relieved of its duty to offer reunification

services to parents in certain circumstances. If the Cabinet determines that reasonable efforts, as defined in KRS 620.020(10), to reunify the child with his or her parent will not be made, then the Cabinet must file a case permanency plan or case progress report with the court that documents the reasons for not making reasonable efforts. The court must hold a permanency hearing within 30 days of the filing of the Cabinet's plan or report to the court. KRS 610.125(2).

The Cabinet is absolved of its duty to make reasonable efforts to reunify the child with his or her parent when the parent has:

- Subjected the child to aggravated circumstances, as defined by KRS 600.020(2);
- Been convicted in a criminal proceeding of having caused or contributed to the death of another child of the parent;
- Has committed a felony assault that resulted in serious bodily injury to the child or another child of the parent;
- Had their parental rights to another child involuntarily terminated;
- Engaged in a pattern of conduct due to alcohol or other drug abuse for not less than 90 days that has made the parent incapable of caring for the child and the parent has refused available treatment;
- Mental illness or mental retardation that places the child at substantial risk of physical or emotional injury; or
- Other circumstances exist that make reasonable efforts to preserve or reunify the family inconsistent with the best interests of the child.

KRS 610.127.

As used in KRS 610.127, *aggravated circumstances* exist when one or more of the following conditions are present: the parent has had no contact with the child for 90 days or more; the parent is incarcerated and will be unavailable to care for the child for a least one year, and no appropriate relative placement is available; the parent has sexually abused the child and has refused treatment; the child has been removed from the parent's home due to abuse two or more times in the past two years; or the parent has caused the child serious physical injury. KRS 600.020(2).

For an attorney representing a parent on a criminal charge stemming from the incident that led to Cabinet intervention, it is critical to consider any plea that could result in a finding of aggravated circumstances under KRS 610.127. Such a finding negates the Cabinet's duty to make reasonable efforts to reunify the child with his or her parent.

P. [12.17] Case Progress Reports

The Cabinet shall file a case progress report for each child at least every six months. KRS 620.240. A *case progress report* is a written record of goals that have been achieved in the case of a child. KRS 620.020(2). The case report shall include but is not limited to the following:

- Length of time the child has been in foster care;
- Number, location, and date for each placement of the child;
- Description of the services provided by the Cabinet to the parents and the results achieved;
- Description of the efforts and the progress of the parents;
- Barriers, familial and institutional, to returning the child home;
- Evaluation of the child's current placement;
- Recommendations for necessary services to return the child home, release the child from the Cabinet's custody, or facilitate another placement;
- Timetable for the child's return home or other permanent placement; and
- If return home is not recommended, a specific recommendation for a permanent placement.

KRS 620.240.

Case progress reports address the goals and progress in regard to the case plan in the initial action prior to permanency being established through return to parent, permanent relative custody, or adoption. Any new allegation or request for removal after a child has achieved permanency shall be filed as a new action and not as a review in the prior action. FCRPP 31.

II. [12.18] Representing Parents in Dependency, Neglect, and Abuse Proceedings

A. [12.19] Initial Steps

When representing a parent in a dependency, neglect, or abuse proceeding, you should consider taking several steps at the outset of your legal representation: immediately contacting the Cabinet; contacting the police or law enforcement if a report was made concerning the incident; interviewing any potential witnesses

to the incident and other relevant people; and reviewing the Cabinet's case file.[1] Early involvement can help prevent removal and influence the process to the greatest extent.[2]

Generally, the Cabinet case file is the most important record that you need to review.[3] You should take whatever steps are legally necessary to gain access to it as quickly as possible. You should also determine whether any records or casenotes from the worker have not been placed in the file and move to obtain those as well.[4] In some cases, other documents not in the case file will also be critical, such as medical or school records that the caseworker has not yet obtained. In seeking these documents, you must evaluate whether to use informal or formal discovery.[5] Of course, if you decide upon formal discovery, then you must determine the most appropriate technique, such as interrogatories, subpoenas, or depositions.[6] Any time before the adjudicatory hearing, you should also be prepared to file any and all appropriate pre-hearing motions, including motions for discovery, psychological or medical assessments, protective orders, change of placement, or modification of visitation.[7]

B. [12.20] Adjudicatory Hearing

First and foremost, you must determine whether the Cabinet has a legal basis for intervening and whether it is in your client's best interest to contest the intervention.[8] Although you must contest if the parent chooses, you must also advise the parent as to whether it is advisable.[9] If the parent is likely to lose, then it may be in the parent's best interest to negotiate the court's finding that the child was abused or neglected and consider accepting services from the Cabinet through a negotiated settlement.[10]

In Kentucky procedures vary. Some counties set adjudication hearings as the next court appearance after the initial/temporary removal hearing. In many of the larger counties where the dockets can be extremely lengthy, the court will set a pretrial hearing after the temporary removal hearing. At that pretrial your client will have the opportunity to either stipulate to the allegations or request a full adjudication hearing. Often that hearing will be set for a separate date and time and not on the regular larger court docket.

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1 Rauber & Granik, *Representing Parents in Child Welfare Cases: A Basic Introduction for Attorneys*, American Bar Association Center on Children and the Law, National Child Welfare Resource Center on Legal and Judicial Issues, Washington, D.C., 2000.

2 *Id*.

3 *Id*.

4 *Id*.

5 *Id*.

6 *Id*.

7 *Id*.

8 *Id*.

9 *Id*.

10 *Id*.

The record at adjudication is critical to the remainder of the process and should specify the precise nature of the allegations so that disposition and casework can focus on the specific problems that led to the Cabinet's intervention.[11] A parent can sometimes refuse to cooperate with the Cabinet on an issue not legally established at adjudication.[12] Moreover, a clear record may nullify subsequent factual disputes or further evidence against the parent that might otherwise be admissible.[13]

C. [12.21] Disposition

Again, procedure can vary from county to county across Kentucky. In some counties the adjudication and disposition hearings can be (and often are) held together, with disposition immediately following adjudication. In many of the larger counties, disposition is done at a later date. Although holding the disposition hearing at a later date may delay the ultimate disposition, you should consider requesting that the disposition hearing be held on a separate date. This allows you to prepare separately for each hearing because different questions are at issue in each.

In the early stages of the proceedings the Cabinet will have a family team meeting in which the Cabinet meets with the family, custodians and other relevant parties to establish the case plan and goals for the child and parents. These meetings very often, especially when the child is placed in the temporary custody of the Cabinet, occur prior to the adjudication of the case. If possible, it can be extremely beneficial for both the parent and the attorney to participate in these meetings. Despite having occurred early in the case prior to adjudication, many of the recommendations included in the dispositional report will be discussed during these meetings.

Be mindful that the caseworker's report is usually the agency's primary piece of evidence at disposition and often heavily influences the court's decision. In Kentucky all Cabinet reports and case plans must be filed in the record a minimum of three days prior to the dispositional hearing. FCRPP 28 and 29. In essence, the case plan sets forth the Cabinet's proposal for services. Therefore, you need it in advance so that you can prepare a response and, if necessary, negotiate or contest certain issues. By participating in the family team meeting and by obtaining a copy of the report in advance, you can help ensure that the plan developed by the Cabinet and the parent addresses the specific problems that caused the Cabinet to intervene.[14]

In reviewing the case plan and preparing for the disposition hearing, consider the logic and plausibility of the plan for your client.[15] Make sure the tasks

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11 *Id*.

12 *Id*.

13 *Id*.

14 *Id*.

15 Sandt, *Succeeding on Appeal: Five Principles for Parents' Attorneys in the ASFA Age,* ABA Child Law Practice, 20(7),2001.

and goals set forth for your client are realistic and not designed to result in failure. You may even need witnesses to testify on your client's behalf if the plan is not workable and what alternatives services should be considered.

Like the adjudication record, the disposition record should be clear and set a framework for subsequent review. To ensure that you accomplish this, be sure that the plan addresses all crucial issues raised at adjudication and specifies:

- What the parent is to do;
- What the Cabinet is to do;
- What services are to be provided; and
- What the schedule will be for services.[16]

Perhaps the most important advice you can give the parent you represent is to adhere to the visitation schedule.[17] If your client has a legitimate reason to miss a visit, he or she should promptly notify everyone and promptly reschedule. Maintaining regular visits, especially when the parent behaves appropriately during the visits, can help sway a judge against terminating parental rights.

D. [12.22] Permanency Review Hearings

You must always be mindful that the permanency review hearing is not just another hearing. It is meant to resolve the issue of where the child's permanent home will be.[18] If the court decides at the permanency hearing, for example, that the child should be placed for adoption, then the Cabinet will be required to file an action for termination of parental rights. Therefore, you will want to be as prepared as possible for each permanency review hearing conducted.

In representing your client at permanency review hearings, you should call service providers to determine whether any of them view your client in a positive light or see progress.[19] If so, then you will want to present this information to the court.

Before each review hearing, you should determine how the case has progressed since the last hearing by reading the Cabinet's updated records and obtaining the latest copy of the case plan, as well as the Cabinet's report to be presented at the hearing. Additionally, as with the adjudicatory and disposition hearings, you should confer with your client prior to the hearing and arrange for necessary witnesses and evidence.

At the hearing, you will want to concentrate on creating a record that places the parent in the best light possible. Do so by emphasizing any gaps in services provided to the parent and focusing on establishing a workable plan for your client.

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16 Rauber & Granik, 2000.

17 *Id*.

18 *Id*.

19 *Id*.

Of course, if your client has completed portions of the case plan pertaining to the health, safety, and well-being of the child, then focus on that and consider arguing for the child's return home.[20]

The court must give notice of the hearing to the parent, foster parents, pre-adoptive parents, or relatives providing care to the child, and all have the right to be present and present evidence relevant to the determination of the permanency plan for the child. KRS 610.125(3) and (5). Therefore, you should let your client know that these individuals will have the chance to be present and present their opinions to the court. Furthermore, you will want to speak with these individuals before the hearing. Because they are not parties, there is no ethical problem for you to contact them. If their testimony is helpful to your client, then you may even want to help them get to the hearing.

III. [12.23] Termination of Parental Rights

A. [12.24] Introduction

Kentucky recognizes two types of termination of parental rights actions: voluntary and involuntary. For those counties without a family court division of circuit court, the circuit court has jurisdiction of both types of termination proceedings. KRS 625.020 and KRS 23A.100(1). For those Kentucky counties with a family court division of circuit court, the family court division has jurisdiction of all termination of parental rights actions. KRS 23A.100(1).

The FCRPP governs all venue and petition requirements for both voluntary and involuntary terminations. When filed in the same county, termination proceedings shall be assigned to the same court division as heard the dependency, neglect or abuse action. Otherwise venue shall be determined pursuant to KRS 625.050(4). FCRPP 32(1). A separate petition shall be filed for each child and individual case numbers assigned pursuant to KRS Chapter 625 and all siblings shall be heard by the same judge. FCRPP 32(2)(a). Every petition in a termination of parental rights action shall also include the case number of any underlying juvenile case, specifically dependency, neglect or abuse cases and shall include the name of any guardian *ad litem* previously appointed in those actions. FCRPP 32(2)(b).

B. [12.25] Voluntary Termination of Parental Rights

1. [12.26] Introduction

A voluntary termination action is filed in the county where the petitioner or child resides or in the county where juvenile court actions concerning the child,

[20] *Id.*

if any, have already begun. KRS 625.040(2). If the parent chooses not to attend the proceedings, then the action can be filed by a parent or counsel for the parent but only with an appearance-waiver and consent-to-adopt form. KRS 625.040(1). The necessary contents of the form are set forth in KRS 625.041(3). However, no voluntary termination action can be filed until at least three days after the child was born. KRS 625.040(3). The petition must include the following:

- Name and place of residence of each petitioner;
- Name, sex, date of birth, and place of residence of the child;
- Name and relationship of each petitioner to the child;
- Concise statement of the factual basis for the termination of parental rights;
- Name and address of the person or of the Cabinet or authorized agency to whom parental rights are sought to be transferred; and
- Statement that the person or the Cabinet or authorized agency to whom parental rights are to be transferred is willing to receive the custody of the child and has applied for the written permission of the Cabinet Secretary for the child's placement. KRS 625.040(2).

2. [12.27] Right to Counsel

A parent who wants to terminate voluntarily his or her parental rights may ask the court to appoint an attorney to represent him or her either before or upon the filing of the petition. KRS 625.0405(1). If the court determines that the requesting parent is indigent under KRS Chapter 31, then the court must appoint an attorney within 48 hours of the request. *Id.* The attorney for the parent shall be paid a fee not to exceed $500, to be paid by the proposed adoptive parent(s) or adoption agency, except that the attorney fee will be paid by the Finance and Administration Cabinet if termination is not granted or custody of the child is placed with the Cabinet. *Id.* Additionally, once a petition is filed, the court must appoint a guardian *ad litem* ("GAL") to represent the best interests of the child. KRS 625.041(1). Like the parent's attorney, the GAL shall be paid a fee not to exceed five hundred dollars ($500), to be paid either by the petitioner or, if the Cabinet receives custody of the child, then by the Finance and Administration Cabinet. KRS 625.041(2). For more detailed information on the role of guardians *ad litem*, *see* **Chapter 14** of this Handbook.

3. [12.28] Hearing and Final Order

Once the petition is filed, the court shall set a final hearing date within three days. KRS 625.042(1). The hearing must take place not more than 30 days after the petition is filed. *Id.*

At the hearing, the court must determine whether each petitioner is fully aware of the consequences of the proceeding. KRS 625.041(6). The best interests of the child will be the court's primary consideration in making a determination on whether to grant the petitioner's request. KRS 625.041(5).

If the court finds that parental rights are to be voluntarily terminated in accordance with the statute, then it shall make an order terminating all parental rights and obligations of the parent and releasing the child from all legal obligations to the parent. KRS 625.043(1). Furthermore, the court shall vest all care and custody of the child in the person, agency, or cabinet of state government the court believes is best qualified to receive custody. *Id.*

Any order resulting from the voluntary termination of parental rights shall contain only the name of the child, with no reference to the names of the parents whose rights have been terminated. KRS 625.045(1). During the voluntary termination proceedings, the court record shall not be available for inspection by anyone other than the parties, their attorneys, and representatives of the Cabinet, unless the court expressly permits otherwise by order. KRS 625.045(2). Upon entry of the final order voluntarily terminating parental rights, the court record shall be sealed by the court clerk and shall not be open for inspection by any person other than representatives of the Cabinet without a written order of the court. *Id.*

C. [12.29] Involuntary Termination of Parental Rights

1. [12.30] Parties and Filing of Petition

A petition for involuntary termination of parental rights shall be entitled, "In the best interest of…, a child." KRS 625.050(1). In addition to the child, the following must also be parties in an action for involuntary termination of parental rights: the petitioner; the Cabinet, if not the petitioner; and the biological parents, if known and if their rights have not been previously terminated. KRS 625.060(1). Additionally, the putative father shall be made a party, unless he has been exempted under KRS 625.065(1). A putative father is exempted from the action if one of the following conditions exists:

- He is known and voluntarily identified by the mother by affidavit;
- Before the entry of a final order in a termination proceeding, he has asserted paternity within 60 days after the birth of the child;
- He has put his name on the birth certificate of the child;
- He has contributed financially to the support of the child by paying the medical bills associated with the child's birth or financially contributing to the child's support; or

- He has married the mother of the child or has lived openly with the child or the person designated on the birth certificate as the biological mother. *Id.*

The petitioner may file the action in the county where either parent resides or may be found, where the child involved resides or is present, or where juvenile court actions, if any, concerning the child have begun. KRS 625.050(2). The petition must be brought by one of the following: the Cabinet; any child-placing agency licensed by the Cabinet; a county attorney; a Commonwealth's attorney; or a parent. KRS 625.050(3). However, no involuntary termination action can be filed until at least five days after the child is born. KRS 625.050(5). The petition must include:

- Name and mailing address of each petitioner;
- Name, sex, date of birth, and place of residence of the child;
- Name and address of the living parents of the child;
- Name, date of death, and cause of death, if known, of any deceased parent;
- Name and address of the putative father, if known by the petitioner, of the child if not the same person as the legal father;
- Name and address of the person, cabinet, or agency having custody of the child;
- Name and identity of the person, cabinet, or authorized agency to whom custody is sought to be transferred;
- Statement that the person, cabinet or agency to whom custody is to be given has facilities available and is willing to receive the custody of the child;
- All pertinent information concerning termination or disclaimers of parenthood or voluntary consent to termination;
- Information as to the legal status of the child and the court so adjudicating; and
- A concise statement of the factual basis for the termination of parental rights.

KRS 625.050(4).

Immediately upon the filing of the petition, the petitioner shall obtain a pretrial date. In the event that the parents are not yet served prior to the pretrial date, the pretrial date shall be used as a case status review to expedite the proceeding. FCRPP 34(1).

2. [12.31] Right to Counsel

Pursuant to KRS 625.080(1), the court shall conduct a private hearing. A guardian *ad litem* shall be appointed to represent the best interests of the child. KRS 625.080(2). The GAL is entitled to a fee not to $500, to be paid by the Finance and Administration Cabinet when the Cabinet is the proposed custodian. *Id.* Otherwise, the court may order the fee to be paid by the proposed adoptive parent(s), child-placing agency, or the petitioner. *Id.* Upon motion of any party, the child may be permitted to be present during the proceeding and to testify if the court finds that it is in the child's best interests to do so. *Id.* Alternatively, the court has the discretion to interview the child in private, but must make a record of the interview. *Id.*

The parents have the right to counsel, and if they are found to be indigent under KRS Chapter 31, then an attorney will be provided to each of them. KRS 625.080(3). The attorney shall be paid a fee not to exceed $500, to be paid by the Finance and Administration Cabinet. *Id.*

3. [12.32] Visitation

If the parent is currently authorized to visit with the child, the court may continue to permit the parent to visit pending the final hearing, unless it finds that visitation would not be in the best interest of the child. KRS 625.080(4). The hearing is to be held within 60 days of a motion for a hearing date by any party or the guardian *ad litem*. *Id.*

4. [12.33] Grounds for Involuntary Termination

To involuntarily terminate parental rights of a parent to a child, the court must find that a two-tiered series of conditions are met. For the first series of conditions, the court must find by clear and convincing evidence that one of the following three conditions exists:

- Child has been adjudged by a court to be abused or neglected, as defined by KRS 600.020(1);
- Child is found to be abused or neglected in the termination of parental rights proceeding; or
- The parent has been convicted of physical or sexual abuse or neglect of any child, and that physical or sexual abuse or neglect or emotional injury to the child named in the termination proceeding is likely to occur if parental rights are not terminated; ***and***
- Termination would be in the best interest of the child.

KRS 625.090(1).

In addressing the second tier of conditions, the court must find by clear and convincing evidence that at least one of the following possible grounds to terminate parental rights exists:

- Parent has abandoned child for at least 90 days;
- Parent inflicted serious physical injury;
- Parent repeatedly inflicted physical injury or emotional harm;
- Parent convicted of a felony involving serious physical injury to any child;
- Parent has failed to provide essential care and protection for at least six months, and there is no reasonable expectation for improvement;
- Parent caused or allowed sexual abuse or exploitation to occur;
- Parent, for reasons other than poverty alone, repeatedly failed to provide essential food, clothing, shelter, medical care, or education, and there is no reasonable expectation for improvement;
- Parent's parental rights to another child were involuntarily terminated;
- Parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child; or
- Child has been in foster care for 15 out of the last 22 months preceding the filing of the petition to terminate parental rights.

KRS 625.090(2).

If the child has been placed with the Cabinet, the parent may present testimony concerning the reunification services offered by the Cabinet and whether additional services would likely bring about lasting parental adjustment that would enable the child to return to the parent. KRS 625.090(4). If the parent proves by a preponderance of the evidence that the child will not continue to be abused or neglected under KRS 600.020(1) if returned to the parent, the court has the discretion to refuse to terminate parental rights. KRS 625.090(5).

5. [12.34] Hearing and Final Order

A continuance of any final hearing date shall not be granted except upon a finding of good cause shown. FCRPP 34(2). After the conclusion of proof and argument of counsel, the court shall enter findings of fact, conclusions of law, and a decision as to each parent within 30 days. KRS 625.090(6). The order must either (a) terminate the rights of the parent or (b) dismiss the petition and state

whether the child will remain in the custody of the state or return to the parent. KRS 625.090(6).

If the court determines that parental rights are to be terminated involuntarily in accordance with this statute, then it shall enter an order that the termination of parental rights and the transfer of custody are in the best interest of the child. KRS 625.100(1). The order has the effect of terminating all parental rights and obligations of the parent and releasing the child from all legal obligations to the parent, along with vesting care and custody of the child in the person, agency, or cabinet the court believes best qualified. *Id.*

Any order resulting from the involuntary termination action shall contain only the name of the child, with no reference to the names of the parents whose rights have been terminated. KRS 625.108(1). Upon the entry of the final order, the court clerk must seal the case record, and it shall not be opened by any person, other than representatives of the Cabinet, without a written order of the court or as authorized under KRS Chapter 199, which governs adoptions involving children in the custody of the state. KRS 625.108(2). The clerk of the court shall send two certified copies of the order terminating parental rights to the state child protective agency. The prospective adoptive parent or his or her attorney, if any may obtain a certified copy of the order terminating parental rights from the state child protective agency to attach to the adoption petition. FCRPP 35.

If an order terminating parental rights is entered, there shall be a review hearing conducted 90 days from the date of the entry of the order of termination of parental rights and at least annually thereafter for the purpose of reviewing the progress towards finalization of placement or adoption for the child. FCRPP 36.

IV. [12.35] Representing Parents in Termination of Parental Rights Proceedings

A. [12.36] Determine Whether Parent Wants to Contest Termination

The first thing you should do when representing a parent in a termination proceeding is determine whether your client wants to contest the termination. For some parents, voluntarily surrendering their rights may be the best option, yet most will struggle with admitting this to themselves, not to mention to you. Therefore, discuss this option openly with the parent you represent and encourage your client to make the best decision for him or her.

You should also explain that voluntary termination may save the parent's chance for the return of any other children in foster care or may protect the parent's rights with respect to any children who might be placed in foster care later.[21] Under

[21] *Id.*

KRS 625.090(2), the Cabinet has the right to bypass reunification efforts if the parent's rights to a sibling of the child were involuntarily terminated. Therefore, if the chances of winning the termination appear unlikely, then voluntary termination would prevent the Cabinet from arguing for a waiver of reunification efforts on these grounds in the case of any other children.

B. [12.37] Steps in Contesting Termination

If your client chooses to contest the termination, then you must engage in a vigorous defense, undiluted by any consideration of the client's past working relationship with the agency.[22]

1. [12.38] Amass a Complete History

The first thing you should do is amass a complete history of the case, which includes conducting an interview with your client and obtaining written releases from your client, so that you may acquire confidential records, such as medical information, substance abuse records, and employment files. Virtually every aspect of a client's life can be of evidentiary significance.[23] While you should not rely exclusively on your client's perception of the circumstances that led to the termination action, the parent's explanation for his or her behavior may be an important source of rebuttal evidence.

Of course you will also want to interview witnesses, friends, relatives, the Cabinet caseworker, and anyone else with pertinent information. While interviewing the caseworker is important, be sure not to substitute the interview for your own thorough review of the Cabinet case file, court transcripts and records, and relevant records from any other sources.[24]

2. [12.39] Determine Grounds for Contesting Termination

The essence of the parent's defense is that the child can eventually return home, based on the history of Cabinet involvement with the family and/or that adoption would be impractical or detrimental to the child.[25] Typically, the grounds for contesting termination fall into one of the two areas set forth below.

a. [12.40] Contest Legal Grounds for Termination

In compiling a complete history of the case, be sure to identify the basis of the initial abuse or neglect allegations and carefully scrutinize the Cabinet's efforts to work with your client.[26] For example, you may find grounds for a plausible

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22 *Id*.
23 *Id*.
24 *Id*.
25 *Id*.
26 *Id*.

argument that the Cabinet failed to meet its obligation to make reasonable efforts to reunify your client with the child or that the Cabinet failed to provide services necessary for the child to safely live at home with the parent.

b. [12.41] Demonstrate that Some Other Arrangement is Best for the Child

Another basis to oppose termination is to show that termination may not benefit the child. For example, you might argue that adoption is impractical and that the child is likely never to obtain a permanent home. You might also claim that some other living arrangement is best for the child, such as a permanent living arrangement with a foster parent or legal guardian. Depending upon the circumstances, you might even want to explore the possibility of an open adoption arrangement that includes informal visits between the child and the parent. This may be especially true if the strength of your client's case is questionable, such that you choose to explore the Cabinet's amenability to a settlement that stops short of termination.

3. [12.42] Prepare for Trial

If settlement is unlikely, then you must prepare for trial. The Cabinet must prove its case by clear and convincing evidence. KRS 625.090. Realize that expert witnesses are often necessary to rebut the Cabinet's case. Therefore, you will want to consider motions for expert evaluations of, for example, the child's relationship with the parent and the foster parent; the child's response to interaction with the parent while in foster care; and the parent's capacity to care for the child.[27] Additionally, in some situations, such as where termination rests upon mental illness or some other diagnosis, expert testimony will be critical to the case.

Oftentimes the parent you represent will be indigent and unable to pay for experts. In those situations, you will want to determine whether the court will entertain a motion asking the court to appoint an expert to testify on behalf of your client. Any time you make such a motion, consider including a list of potential experts, to avoid the court making a potentially undesirable choice for you.

V. [12.43] Adoptions

A. [12.44] Jurisdiction

Under KRS 199.470, any person who is at least 18 years of age and is a resident of Kentucky or has resided in the state for 12 months before filing may petition to adopt a child in the county in which the petitioner resides. For those counties without a family court division of circuit court, the circuit court has

[27] *Id.*

jurisdiction. KRS 199.470(1) and KRS 23A.100(1). For those counties with a family court division of circuit court, the family court division has jurisdiction. KRS 23A.100(1). When filed in the same county, adoption proceedings shall be assigned to the same court division as heard the dependency, neglect or abuse action. Otherwise venue shall be determined pursuant to KRS 625.050(4). FCRPP 32(1). A separate petition shall be filed for each child and individual case numbers assigned pursuant to KRS Chapter 625 and all siblings shall be heard by the same judge. FCRPP 32(2)(a). Every petition in an adoption action shall also include the case number of any underlying juvenile case, specifically dependency, neglect, abuse or termination of parental rights cases and shall include the name of any guardian *ad litem* previously appointed in those actions. FCRPP 32(2)(b).

B. [12.45] Parties

If the petitioner is married, then the spouse shall join the petition, unless the court waives this requirement after making a finding that requiring a joint petition would serve to deny the child a suitable home. KRS 199.470(1). No petition shall be filed unless the child sought to be adopted was placed for adoption by a child-placing agency or by the Cabinet or with the written approval of the Cabinet. KRS 199.470(4). The only exception is that Cabinet approval is not necessary when a child is adopted by a stepparent, grandparent, sister, brother, aunt, uncle, great grandparent, great aunt, or great uncle. KRS 199.470(4)(a). Nonetheless, the court has the discretion even in these circumstances to order a report in accordance with KRS 199.510 and a background check as provided in KRS 199.473(8). *Id.*

In the adoption action, all of the following individuals shall be made parties to the petition: the child; the biological living parents, if the child is born in wedlock; the biological mother and any putative father, if the child is born out of wedlock; the child's guardian; and, if the care of the child has been transferred to the Cabinet or any other institution or agency, the Cabinet or other institution or agency shall be made a party, assuming it is not the petitioner. KRS 199.480(1). For a child born out of wedlock, a putative father must meet one of the following requirements before he must be made a party:

- He is known or voluntarily identified by the mother by affidavit;
- He has acknowledged the child by affirmatively asserting paternity in a termination action within 60 days of the birth of the child;
- He has caused his name to be affixed to the child's birth certificate;
- He has commenced a judicial proceeding claiming parental rights;

- He has contributed financially to the support of the child by paying medical or hospital bills associated with the birth of the child; or
- He has married the mother of the child or has lived or is living openly with the child or the person designated on the birth certificate as the biological mother. *Id.*

C. [12.46] Petition

An adoption petition must include the following:

- The name, date, place of birth, place of residence, and mailing address of each petitioner and, if married, the date and place of their marriage;
- The name, date, place of birth, place of residence, and mailing address, if known, of the child sought to be adopted;
- Relationship, if any, of the child to each petitioner;
- Full name by which the child shall be known after adoption;
- A full description of the property, if any, of the child so far as it is known to the petitioner;
- The names of the parents of the child and the address of each living parent, if known. The name of the biological father of a child born out of wedlock shall not be given unless paternity is established in a legal action, or unless an affidavit is filed stating that the affiant is the father of the child. If certified copies of orders terminating parental rights are filed as provided in subsection (2) of KRS 199.490, then the name of any parent whose rights have been terminated shall not be given;
- The name and address of the child's guardian, if any, or of the Cabinet, institution, or agency having legal custody of the child;
- Any further facts necessary for the location of the persons whose consent to the adoption is required or whom KRS 199.480 requires to be made a party to or notified of the proceeding; and
- If any fact required by this subsection to be alleged is unknown to the petitioners, then the lack of knowledge shall be alleged. KRS 199.490(1).

Along with the petition, the parties shall file certified copies of any orders terminating parental rights. KRS 199.490(2). Any consent to adoption shall be filed prior to the entry of the adoption judgment. *Id.*

Once a petition is filed, an adoption shall not be granted without the voluntary and informed consent of the living parents of a child born in wedlock or the mother of a child born out of wedlock. KRS 199.500(1). Under KRS 199.011(14), *consent* means that the person was fully informed of the legal effect of the consent, was not given or promised anything of value except allowable expenses, was not coerced, and voluntarily and knowingly gave consent. However, consent will not be considered valid if given prior to 72 hours after the birth of the child. KRS 199.500(5). Nonetheless, under the following limited circumstances, an adoption may occur without consent of the biological parents:

- The parent has abandoned the child for at least 90 days;
- The parent has inflicted or has allowed to be inflicted on the child serious physical injury;
- The parent has continuously or repeatedly inflicted physical injury or emotional harm on the child;
- The parent has been convicted of a felony involving the infliction of serious physical injury to the child named in the adoption proceeding;
- The parent for more than six months has continuously or repeatedly failed or refused to provide essential parental care and protection for the child with no reasonable expectation of improvement;
- The parent has caused or allowed the child to be sexually abused or exploited;
- The parent has continuously or repeatedly failed to provide essential food, shelter, clothing, education, or medical care reasonably necessary, and there is no reasonable expectation for improvement;
- The parental rights to another child have been involuntarily terminated; or
- The parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect.

KRS 199.502(1).

Any attorney who represents the prospective adoptive parents by filing a petition on their behalf is prohibited from also representing the biological parents. KRS 199.492(1). To do so is a Class A misdemeanor under Kentucky's penal code. KRS 199.492(2). Furthermore, it is a Class A misdemeanor for an adoptive parent, proposed adoptive parent, agency, or intermediary to pay the attorney's fees for a biological parent in the adoption proceeding, except as approved by the court. KRS 199.493(2).

D. [12.47] Investigation and Report

Once a petition has been filed, the Cabinet or any person designated by the court, including a guardian *ad litem*, shall create a report in writing for the court verifying that the contents of the petition are true; whether the proposed adoptive parents are financially able and morally fit to have the care and custody of the child; and whether the adoption is in the best interest of child and the child is suitable for adoption. KRS 199.510(1). This report must not be filed later than 90 days after the child has been placed with the family or 90 days after the filing of the petition. KRS 199.510(2).

E. [12.48] Hearing and Judgment

After the report called for under KRS 199.510 has been made, and any additional report has been filed by the guardian *ad litem*, the court shall hold a hearing on the petition. KRS 199.515. No request for a final hearing shall be made prior to the filing of the state child protective service agency report and the guardian *ad litem* report. FCRPP 33(1). In the event of an uncontested adoption, a hearing shall be held within 30 days of the filing of a request for final hearing. FCRPP 33(2). A continuance of any final hearing date shall not be granted except upon a good cause shown. FCRPP 33(3).

After the hearing, the court shall enter a judgment of adoption if it finds as follows:

- The facts stated in the petition were established;
- All legal requirements, including jurisdiction, relating to the adoption have been complied with;
- The petitioners are of good moral character, of reputable standing in the community, and have the ability to properly maintain and educate the child;
- The best interest of the child will be promoted by the adoption; and
- The child is suitable for adoption.

KRS 199.520(1).

Upon entry of the judgment of adoption, from and after the date of the filing of the petition, the child shall be deemed the child of the petitioners and shall be considered for purposes of inheritance and succession and for all other legal considerations, the natural child of the parents adopting the child. KRS 199.520(2). After granting the adoption, all legal relationships between the adopted child and the biological parents shall be terminated, except the relationship of a biological parent who is the spouse of an adoptive parent. *Id.*

F. [12.49] Inspection of Records

The files and records of the court during adoption proceedings are not open to inspection by anyone other than the parties and their attorneys and representatives of the Cabinet, except under court order expressly permitting otherwise. KRS 199.570(1)(a). Once the final order is entered, the court clerk shall seal the record, and it shall not be open for inspection except on written order of the court. KRS 199.570(1)(b).

However, there are limitations to the provision in KRS 199.570(1)(b). Biological parents who voluntarily give up a child for adoption will be asked at that time whether they consent to the inspection of the adoption records, to personal contact by the child, or to both once the child becomes an adult. KRS 199.572(1). If consent is given, then it may later be revoked. *Id.* Also, if the biological parents withhold consent when giving up the child, then they can later give consent. *Id.* When any adult adopted person applies to the court for authorization to inspect his or her adoption records and the biological parents have previously refused consent to inspect the records and to personal contact, the court has the discretion to authorize inspection by the adult adopted person only if written consent is obtained from the biological parents. KRS 199.572(2). However, if both biological parents identified in the original birth certificate are deceased or cannot be located, then the court has the discretion to open the adoption records for inspection to the adult adopted person, but must limit the inspection only to identifying information about the biological parents. KRS 199.572(7). An *adult adopted person* is any person 21 years of age or older. KRS 199.011(5).

G. [12.50] Birth Certificate

Following entry of an adoption judgment, the court clerk must promptly report to the Cabinet full information necessary to make a new birth certificate. KRS 199.570(2). If the child is under age 18, the new birth certificate shall not contain any information revealing that the child is adopted and shall show the adoptive parent(s) as the biological parent(s). The Cabinet must issue the new certificate and file it with the original certificate, which will be stamped, "Confidential – subject to copy and/or inspection only on written order of the court." *Id.* Thereafter, when any copy of the birth certificate is issued, it will be a copy of the new certificate, except when a court order requests the issuance of the original. KRS 199.570(4). For more on the private adoption process, *see* Private Adoption in Kentucky, 4th edition (UK/CLE 2006).

VI. [12.51] Appeals

A. [12.52] Right to Appeal

There is a right to appeal in dependency, neglect, and abuse, termination of parental rights, and adoption proceedings. When dependency, neglect, and abuse actions are concerned, any interested party, including the parent, child, guardian *ad litem*, the Cabinet, and the county attorney may appeal to the circuit court level as a matter of right. KRS 620.155. An appeal may also be taken in an involuntary termination of parental rights action. KRS 625.110. The same is true in an adoption proceeding. KRS 199.560.

B. [12.53] Representing Parents in Appeals

While a right to appeal exists, whether a party should appeal is another matter. When you represent a parent considering an appeal, the first question is whether an appeal is in the parent's interest. The primary consideration is time.[28] Because appeals take time, sometimes consisting of several years of litigation, it is not always a service to the parent to appeal. The emotional toll of leaving the family in limbo may be too great.

If you decide to file an appeal on behalf of your client, consider filing a motion to expedite the appeal.[29] In this motion, you might attach expert affidavits detailing the damage to both the parent and the child if the appeal is not expedited. Kentucky has adopted an expedited appeal and briefing schedule for dependency, neglect and abuse cases however the same is not true for termination of parental rights or adoption cases. CR 76.12(2)(a)(i).

Some additional considerations in whether to appeal are that you must find the legal error, focus on the child, and humanize the parent.[30] When legal error is concerned, never lose sight of the notion that it is not enough that your client is unhappy with the case outcome. The case must have legal merit, and the legal error committed by the trial court must be clear and unambiguous. Also, let the child be the focus in your appeal. In other words, make sure to explain in your appellate argument how the child is being affected. For example, you may want to consider finding experts to explain why the child would be best served if ultimately allowed to remain with your client.[31] Finally, humanize your client. You can best achieve that by getting some background information about the parent before the court.[32] Make it your duty to educate the court about the parent's unique situation that brought him or her before the court. For more general information on appellate

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28 *Id*.
29 *Id*.
30 Sandt, 2001.
31 Rauber & Granik, 2000.
32 Sandt, 2001.

practice and procedure, *see* **Chapter 16** of this Handbook and UK/CLE's KENTUCKY CIVIL PRACTICE AFTER TRIAL HANDBOOK, (3d ed. 2010).

13

INTIMATE PARTNER VIOLENCE: IMPLICATIONS FOR THE DOMESTIC RELATIONS PRACTITIONER

CAROL E. JORDAN
Center for Research on Violence Against Women
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Lexington, Kentucky

Preface

**SHOOTINGS LEFT A FAMILY SHATTERED:
FEW KNEW OF HIDDEN RAGE THAT KILLED
THREE IN FAMILY**

Excerpted from *Lexington Herald-Leader*, December 30, 1990:

The Whitaker family was in contact the day of the shooting for Myrtle Whitaker to comply with court-ordered visitation for her son Darvin with his father, Allen Whitaker. Their other two children, Kermitt and Burniece were also in the car that day.

The Whitaker family included Myrtle (wife and mother), Allen (husband and father), and their children Burniece, Kermitt and Darvin.

"For years, some relatives said, Allen Whitaker Jr. of Magoffin County used a horse whip and threats of murder to control his family. When they finally left him, he brooded for months. On Dec. 15, he killed two of his children, paralyzed his wife, then committed suicide. . . . [O]n that day, Allen Jr. pointed his pistol into the family car, which was near Myrtle's apartment building. Myrtle had been reaching into the back seat for a plate of food for him and Darvin. Darvin, 7, pleaded: "Daddy, please don't. Daddy, I'll do anything for you. Please don't, Daddy." Allen Jr. fired anyway, again and again, until Darvin and Kermitt were dead. A bullet hit Myrtle, paralyzing her. Allen Jr. shot at Burniece and missed. Then he reloaded the gun, aimed it at his forehead and fired, just as he had said he would. The Whitakers' divorce would have been final five days later."

I. [13.1] Introduction

The rate of divorce in the United States has increased significantly over the past two decades. Divorce carries with it inherent turmoil and conflict for families, particularly when children are involved and impacted by the separation process. When the family disintegration also involves violence, both the turmoil and complexity is substantially increased. Aside from legal issues pressing any domestic relations case, intimate partner violence can dramatically heighten the complexities of intense conflict, dangerousness to the victim of abuse, and acute impacts on children.

This chapter provides an overview of the problem of intimate partner violence through the lens of a case example. The story of Jane and John Doe is a

patchwork of actual cases that together raise many of the key issues that will face domestic relations practitioners, including dangerousness, types of violence experienced, allegations of mutual violence, whether women stay in violence, profiles of victims and offenders, and the impact of intimate partner violence on children. A motion, petition and affidavit relating to the case are also provided as a means to highlight the critical legal issues that are pertinent to dissolution of marriages among families experiencing domestic violence. Following the issues section of the chapter, the economic, health and mental health implications of separation are reviewed, and the impact of intimate partner violence in custody cases is examined. The final section of the chapter highlights practice issues for domestic relations attorneys, including ensuring safety for clients and how best to assess intimate partner violence. The appendices to this chapter offer an example safety plan and a table of civil and criminal offenses related to domestic violence.

Domestic relations practitioners play a vital role in representing parties in dissolution actions in which intimate partner violence has occurred. A keen awareness of safety concerns, legal issues, and common pitfalls involved in these cases will improve the practice for attorneys and help ensure effective legal representation for their clients.

II. [13.2] Putting a Face on Intimate Partner Violence: A Case History

A. [13.3] The Story of Jane and John

I never thought I'd be one of those women. You know the kind: beaten down, weak, letting a man run her life. Getting hit. Getting hurt. Being scared all the time. That's not me. Maybe other women, but that's not me.

When I met John, I knew in an instant he was the one. He was athletic, strong and quiet, and treated me like I would break if he touched me too hard. He didn't say much about his childhood, but his mother used to tell me they 'had a hard life' when John was growing up. At my wedding rehearsal dinner, his aunt told me about how violent John's father had been to his mother. But, I thought, that's not John.

The first year of our marriage was great. He was so romantic and I could tell him anything. I even told him secrets that none of my girlfriends knew. I told him I was raped in high school and got so depressed I contemplated suicide; that I had to see a therapist and take antidepressants for a while. He was so supportive and understanding.

Then it changed. The first time John hit me, we had been in a fight. I had bought a dress and John couldn't believe I spent the money. It was just a slap and

didn't hurt that much. Mostly it hurt my pride and I was way too embarrassed to tell anyone. I was certain it would never happen again, because that's not John.

I had always planned to go to law school and join my father's firm. John was very career-focused, too, getting his MBA in no time flat, but something about me doing well seemed to make him angry. When I was accepted at State University College of Law he was so mad. He beat me that night so hard I lost a tooth and had bruises all over my back. But I didn't agree to drop out of school, because that's not me.

I left John for just over a week, but he came to the apartment where I was staying and to campus every day while I was gone. Sometimes angry and threatening. Sometimes seeming desperate and saying he'd kill himself if I didn't come back. Sometimes romantic and solicitous. But always present. My parents couldn't understand and kept telling me to stop having such high expectations of him. His mother didn't say anything at all. After a week I went back home because he seemed genuinely sorry and I genuinely loved him. It really wasn't because I was weak, because that's not me.

Law school was a challenge, but I graduated in the top ten of my class. Law Review, the whole bit. By that time, John was bringing in lots of money, but it seemed like with every successful account, he got increasingly stressed. The abuse started happening more and more. Sometimes when he was mad at me; sometimes when he was drinking; sometimes when he was depressed and unreachable; sometimes I felt like it was my fault; sometimes I knew better. I thought about divorce a few times, but I loved him and didn't want to give up on him. And God knows I didn't want anyone at the firm to know because, well, that's not me.

While I was studying for the bar, I found out I was pregnant. John was overjoyed, I thought this would mean our relationship would improve. At first I was touched by how attentive he was. He didn't want me to work too hard, or cook, or drive places. He really wanted to take care of me. He wanted me to postpone the bar exam and just focus on my pregnancy, but I wouldn't. After four months, I realized his attentiveness was really just his control. I told him he needed to give me room to breathe and that he needed to trust me, but that's not John.

The miscarriage. That was John.

During my first year of practice I was working so many hours a week, just like every other new attorney in the firm, but after a while John started showing up at my office. Sometimes he would even sit in his car and just stare at the building. He kept swearing that I was seeing a guy at the firm, but that wasn't true. No matter how jealous John was and what he accused me of, it wasn't true. I didn't have an affair, because that's not me.

My father died the following year. I felt so alone without him. I dove into my work because I knew now more than ever that I had to make partner and make him proud. For months I felt so depressed, tired and stressed trying to get

in the expected number of billable hours. A friend started giving me some of her prescription pills as a remedy to my fatigue. I admit that for a time I drank to get to sleep and took pills in the morning to get me going. I rationalized my drug use as just being temporary and that I just needed to be numb for a while. Numb from my grief, numb from my job stress, and numb from John's abuse. It didn't make me a drug addict because that's not me.

One Friday night I went out with all the junior partners after we won a big case and I got home late and a little drunk. John was waiting for me in the bedroom with the light off. He accused me of sleeping with several of the other lawyers at the firm, even telling me he thought my high school rape was probably just me being loose, and then he made me have sex with him. So hard he made me bleed. At one point I hit him to get him off me, but even with that I couldn't bring myself to call it rape because that couldn't be John.

For weeks after, John was apologetic and solicitous, attentive and kind. He wasn't drinking at all and he was even supportive of my career. He was romantic and tender, because that, too, could be John.

I knew I wanted to get pregnant again, so I had to clean up my act. I started going to drug treatment, and the therapy really helped. And sure enough, later that year I became a mother of twins. I tried hard to balance the babies and work, and I know that was hard on John. He hated them being in daycare all day and he felt shut out. He got so jealous of men who didn't exist, and sometimes, I think, even of the babies. Sometimes he just seemed crazy, accusing me of things, telling me no other man could have me or his children. But no one else ever saw him like that, and no one else would have believed me because that's not John.

The end of the marriage began on a Saturday. The fight was like so many others, with him accusing me of infidelity. This time when he hit me, though, I was holding one of the twins. The terror in my child's eyes reflected the end of the marriage. Being a battered wife maybe I could live with, but never a battered child. That's not my child.

I told him the marriage was over, that I would leave him. That I wouldn't any longer be one of those women. You know the kind, beaten down, weak, letting a man run her life, getting hit, getting hurt, being scared all the time. That's no longer me. Maybe other women, but that's no longer me.

Before I had a chance to file, he did.

B. [13.4] The Motion

COMMONWEALTH OF KENTUCKY
_____ COUNTY FAMILY COURT
_____ DIVISION

IN RE THE MARRIAGE OF:

JOHN DOE
PETITIONER

AND NO. XX-CI-XXXX

JANE DOE
RESPONDENT

MOTION FOR TEMPORARY CUSTODY

Comes the Petitioner, John Doe, through counsel, and hereby moves this Court for an Order awarding temporary custody of the parties' two minor children to him, pursuant to KRS 403.280. In support of this Motion, the Petitioner's Affidavit is attached hereto and incorporated herein, as if set forth in full.

NOTICE

Notice is hereby given that the foregoing Motion will be brought on for hearing before the County Circuit Court, First Division, County Courthouse, City, Kentucky, on Friday, August 12, 20___, at the hour of _____ a.m., or as soon thereafter as counsel may be heard.

Respectfully submitted,

ATTORNEY AT LAW

By: _____

Lois L. Lawyer
201 West Main Street
City, Kentucky 40507-0000
Telephone: (859) 555-9000
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion has been served this ___ day of August, 20____, by first class mail, postage prepaid, to the following:

Anne A. Attorney
123 West Main Street
City Ky 40507-0000
ATTORNEY FOR RESPONDENT

_____

ATTORNEY FOR RESPONDENT

C. [13.5] The Petition

COMMONWEALTH OF KENTUCKY
_____ COUNTY FAMILY COURT
_____ DIVISION

IN RE THE MARRIAGE OF:

JOHN DOE
PETITIONER

AND NO. XX-CI-XXXX

JANE DOE
555 S. BROADWAY
CITY, KENTUCKY 40508-0000
RESPONDENT

PETITION FOR DISSOLUTION OF MARRIAGE
(WITH MINOR CHILDREN)

Comes the Petitioner, John Doe, by counsel, and for his Petition for dissolution of the marriage between the parties, states as follows:

1. Petitioner resides in the Commonwealth of Kentucky and has been a resident thereof for more than 180 days next preceding the filing of this Petition;
2. Petitioner, John Doe, is 30 years of age, SSN: 999-99-9999, currently resides at 555 S. Broadway, Lexington, Kentucky 40508, and is presently employed as a CPA in the firm of Smith, Jones and Wilder, P.S.C. Petitioner has resided in Kentucky since 1994;
3. Respondent, Jane Doe, is 30 years of age, SSN: 888-88-8888, currently resides at 555 S. Broadway, Lexington, Kentucky 40508, and is presently employed as a lawyer with Big Law Firm in City, Kentucky. Respondent has resided in Kentucky since her birth;
4. The parties were married on August 1, 2004, in County, Kentucky, where the marriage is so registered;
5. The parties continue to share the marital residence but separated within the meaning of KRS 403.170(1) on July 1, 2012, and have lived together without sexual cohabitation since that date;
6. There are two (2) living infant children born of this

marriage, namely, Megan Marie Doe, age 3, born May 1, 2009, SSN: 111-11-1111, and Julia Taylor Doe, age 3, born May 1, 2009, SSN: 222-22-2222. Petitioner states that to the best of his knowledge and belief Respondent is not pregnant;

7. In accordance with KRS 403.150, Petitioner certifies that there are no EPOs or DVOs entered involving these parties;
8. In accordance with KRS 403.383, Petitioner gives the following additional information concerning the minor children:
   A) Said children have resided with Petitioner and Respondent since birth;
   B) Petitioner has not participated as a party, witness, or in any other capacity in any other proceeding concerning the custody of or visitation with said children in this or in any other state;
   C) Petitioner has no information of any custody proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions concerning said children in any court of this or any other State; and
   D) Petitioner knows of no other person not a party to this proceeding who has physical custody of the children or claims rights of legal custody or physical custody of, or visitation right with, said children;
9. No arrangements have been made between the parties regarding custody, visitation, or support of the minor children or maintenance of Respondent;
10. Neither party is currently in the military service;
11. The marriage between the parties is irretrievably broken;
12. Petitioner states that he is the fit and proper person to have sole custody of said minor children, and that such a custodial arrangement would be in the best interest of the children;
13. There is marital property to be divided by the Court;
14. Petitioner and Respondent have accumulated debts during the marriage that need to be assigned; and
15. Petitioner will claim certain non-marital property.

WHEREFORE, Petitioner prays:

1. For dissolution of the parties' marriage;
2. For the Court to grant sole custody of the parties' twin daughters to Petitioner with visitation established in accordance with the best interests of the children;
3. For the Court to award child support to Petitioner according to the Kentucky state guidelines;
4. For the Court to award maintenance, both temporary and permanent to the Petitioner;
5. For restoration of non-marital property;
6. That the Court make an equitable division of all marital property and debts;
7. That the Court require Respondent to pay Petitioner's attorney's fees and Court costs incurred in this action; and
8. For any and all other appropriate relief to which he may appear entitled.

Grant Masters & Anderson, P.S.C.

_____

Lois L. Lawyer, Esq.
201 West Main Street
City, KY 40507
Telephone: (859) 555-9000
ATTORNEYS FOR PETITIONER

The Petitioner, John Doe, states that he has read the allegations contained in the foregoing document and states that they are true and correct to the best of his knowledge and belief.

_____

John Doe
PETITIONER

COMMONWEALTH OF KENTUCKY)
) SS:
COUNTY OF FAYETTE)

Subscribed and sworn to before me by John Doe on this the _____ day of _____, 20___.

My Commission expires: _____

_____

NOTARY PUBLIC, STATE AT LARGE, KENTUCKY

D. [13.6] The Affidavit

COMMONWEALTH OF KENTUCKY
COUNTY FAMILY COURT
FIRST DIVISION

IN RE THE MARRIAGE OF:

JOHN DOE
PETITIONER

AND NO. XX-CI-XXXX

JANE DOE
RESPONDENT

AFFIDAVIT

Comes the Affiant, John Doe, and after being duly sworn, states as follows:

1. Affiant is the Petitioner in the above-referenced case.
2. Jane and I have been married for eight years.
3. We have two children, twins, date of birth May 1, 2009.
4. Jane and I recently separated after Jane became distant and expressed her desire for a divorce. I strongly suspect that she is having an affair. In fact, I strongly suspect she has had affairs with several different men throughout the course of our marriage.
5. Throughout our marriage, my wife's first priority has been her career as a lawyer. This has created tremendous stress on Jane, on our marriage and on our family. Jane went through law school during our marriage. She graduated at the top of her class, was on Law Review and studied long hours during that period of time. She had a miscarriage while studying for the bar exam even though I had begged her to postpone the exam until after the baby was born because I could tell she was not handling the stress well.
6. Since she started practicing law five years ago, she has consistently worked long hours and many weekends in her drive for success. About four years ago, the stress of her career caused her to become dependent on alcohol to go to sleep at night and simultaneously dependent on prescription "uppers" to wake up in the morning. She had to go into drug and alcohol rehab. Shortly thereafter, she became pregnant with the twins.

7. Her alcohol and drug use has caused her to act out inappropriately. One example is that one night after staying out late with a group of men she arrived home under the influence of alcohol and struck me in the face. I felt I needed to remove the children from this influence, so I took the girls to my parents' home. My parents are witness to the scratch she left on my face by her assault.
8. I encouraged my wife to work part-time or even to stop working entirely after the children were born because of the stress associated with her work schedule and her history of mental health problems but she insisted on going back to work and putting the kids in daycare when they were three months old.
9. I have been the girls' primary caregiver since Jane returned to work. I usually take them to daycare in the morning and pick them up in the evening because Jane is usually at work very early until well after 6:00 pm. I take the girls to their doctor appointments and other appointments and activities. I am primarily responsible for feeding and dressing the children. When I need assistance, my mother often offers her time and assistance in watching the girls or picking up items they need.
10. The children need to have as little disruption and change in their routines as possible during our divorce. That can only be accomplished by awarding temporary custody to me. An award of temporary custody to Jane will unnecessarily result in extended day care hours for the girls. Further, I am concerned that the stress of our divorce will cause Jane to have a mental health relapse which could create an issue of safety.
11. For the foregoing reasons, the best interests of the children are served by awarding temporary sole custody to me.

Further Affiant saith naught.

_____

JOHN DOE

STATE OF KENTUCKY)
) SS:
COUNTY OF FAYETTE)

Subscribed and sworn to before me by JOHN DOE, this ____ day of

August, 20____.

My Commission expires: _____

_____

NOTARY PUBLIC, STATE AT LARGE, KENTUCKY

III. [13.7] Issues Raised by Jane and John's Story

A. [13.8] Introduction

The case found within this chapter is written from the perspective of a female victim of intimate partner violence. Her experience is not a terribly unique story; it is a mirror on the stories of thousands of women each year who face violence from an intimate partner. She is not unique by being upper middle class and white, nor does the fact that she is a strong woman contradict her status as a battered woman. Jane's experience of violence and how it is played out in court is also relatively common. For domestic relations practitioners, Jane's story can illuminate several issues: How often will I encounter intimate violence in the lives of my clients? Are there profiles for victims and offenders? Do women really stay in violence? And are they sometimes violent, too? What factors influence how dangerous a case will be? What about the children? This section of the chapter will seek to address these key issues.

B. [13.9] The Prevalence of Intimate Partner Violence in General Population and Divorcing Couples

The divorce rate in the United States has increased substantially over the past three decades, with the number of divorced women and men quadrupling between 1970 and 1996 (Saluter & Lugaila, 1998). Research shows that while the vast majority of adults in this country will marry (approximately 92%); up to 50% of those first marriages will end in divorce (Kreider & Fields, 2002). Among remarriages, the divorce rate climbs to almost two-thirds of couples (Bumpass, Sweet, & Castro Martin, 1990; Cherlin, 1992). While in more recent years the divorce rate has begun to plateau, the United States has the highest divorce rates in the world (Goldstein, 1999).

The rate of intimate partner violence is also exceedingly high in the United States. For example, 25% to 41% of women reporting a lifetime history of intimate partner physical or sexual assault (Richardson et al., 2002; Tjaden & Thoennes, 2000; Wilt & Olson, 1996). In the most recent national prevalence study on the subject, the Centers for Disease Control reported that more than one in three women (35.6%) in the United States have experienced rape, physical violence, and/or stalk-

ing by an intimate partner in their lifetime; and among these victims, more than one third experience multiple forms of victimization (Black, 2011). The vast majority of cases of violence against women represent violence inflicted by a male partner. In fact, a woman is more likely to be physical or sexually assaulted or killed by a current or former male partner than by any other type of offender (Browne & Williams, 1993), a finding not true for men. Additionally, rape of a female victim is a crime least likely to be committed by a stranger; rather, it is most often committed by the victim's intimate partner (Koss, 1992). Similarly, studies find that the majority of women who reported an experience of intimate partner violence reported that the perpetrator was male (Tjaden & Thoennes, 1998).

C. [13.10] Who Are the Victims and Is There a Profile?

While a significant amount of research has focused on battered women, no specific profile has ever been identified. Previous attempts to create profiles, including within the Diagnostic and Statistical Manual, have failed. Battered women, not unlike Jane, come from middle and upper incomes, from families in poverty, from every race and ethnicity, and from every educational bracket and age group. Violence is not an experience from which certain categories or classes of women are not vulnerable or excused. As to profiles of battered women, the greatest similarities lie not in what the women bring to the experience (personality structures or traits), but rather in what is done to them (specific forms of violence, and repeat victimization over time) and the effect that the experience has on cognitions, emotions and behaviors. While no profile exists, there are populations of women who appear to be at particular risk for violence, including women of color and women who live in poverty (*e.g.,* Belle, 1990). In fact, at least one study found that femicide is the leading cause of death in the United States among young African American women aged 15-45 years (Greenfield et al., 1998). Additionally, research has consistently found that household income is one of the best community-level predictors of rates of intimate partner violence (Cunradi, Caetano, & Schafer, 2002; Goodman, Smyth, Borges, & Singer, 2009). For instance, research using data from the National Crime Victimization Survey (NCVS) reported a domestic violence rate five times lower for top-earning households compared to the lowest-earning households (Greenfield et al., 1998), and the highest likelihood of intimate victimization among women 19-29 years old in the lowest income families (Bachman & Saltzman, 1995).

D. [13.11] Who Are the Offenders: Is There a Profile?

The earliest research on intimate partner violence offenders attempted to understand the characteristics of offenders by comparing violent married men to non-violent men, an approach that failed as it became clear that the former group is not homogeneous. Instead, intimate partner offenders are a heterogeneous group, with varying patterns and motivations for violence, and distinguishable personality and psychological traits (Holtzworth-Munroe & Stuart, 1994; Jordan et al., 2004). As in the case of John, some batter only family members, while others are violent in

multiple domains of their lives. John evidenced remorse after his use of violence, but other offenders do not. Some combine substances and violence while others do not drink or use drugs to excess. Still others such as John are episodic drinkers and can be violent sober or under the influence. A significant percentage of offenders were abused as children, and many intimate partner offenders witnessed violence in their childhoods, as is indicated in John's case.

To better understand the population of intimate partner offenders and ultimately structure effective treatment programs for them, researchers have developed several typological models, one of the more widely categorizing offenders into three sub-types: family-only offenders who direct violence solely against the intimate partner; dysphoric/borderline batterers who primarily target family members, but can be aggressive outside the relationship as well; and a the third category of generally violent men whose violence against family members is part of an overall pattern of violent or criminal behavior (Holtzworth-Munroe & Stuart, 1994) (see Table 1 below).

While insufficient detail is available from the case study to accurately compartmentalize John within this typology, evidence does exist of dysphoric or borderline traits. This is particularly true given his apparent emotional volatility, his reaction to Jane leaving him on one occasion, a suicide threat, his episodic substance abuse, and the suggestion of severe childhood abuse history. Dysphoric and borderline traits may also indicate increased dangerousness at the point of separation, a key safety issue for Jane and her children and also for any domestic relations attorney representing her.

Table: The Typology of Intimately Violent Men (Holtzworth-Munroe & Stuart, 1994)

Sub-Categories of Typology	*Characteristics*
Family Only Batterers	• 50% of clinical populations • Least severe, least sexual and emotional abuse • Little psychopathology and either no personality disorder or a passive-dependent personality disorder • Marital violence function of factors such as impulsivity, poor aggression management, stress • Attitudes not accepting of violence • Remorseful; more successful in treatment • Substance abuse common • Abuse is family focused, not external • Less severe or prevalent child abuse history • Most liberal sex role attitudes
Dysphoric/Borderline Batterers	• 25% clinical populations • Moderate to severe violence • Violence mostly directed at partner, some extra-familial and criminal behavior may be evident • Dependent on relationship and jealous of partner; preoccupied attachment and obsessiveness • Dangerous at separation • Most dysphoric, psychologically distressed, emotionally volatile; suicide threats • May evidence borderline and schizoidal characteristics • Substance abuse • Childhood history more prevalent

Generally Violent/Antisocial Batterer	• 25% of clinical samples • Escalating severe physical, sexual & emotional violence • Domestic violence is part of overall pattern of antisocial, criminal behavior • Function of violence is instrumental, used to control victim through fear, low self-esteem • Little remorse; blame others, refuse responsibility; view violence as acceptable; less amenable to treatment • Small sub-sample of psychopaths • Psychological impact on victim severe • Most significant levels of violence in family of origin • History of abuse in prior relationships

E. [13.12] The Impact of Violence on Divorce Rates: Do Women Really Stay?

There is significant evidence that intimate partner violence impacts the rate of divorce. For example, while the percentages offered above represent the rate of violence occurring among all couples, in high-conflict and/or entrenched custody cases, rates of violence are reported to be significantly higher, with estimates in the 72% to 80% range (Johnston & Roseby, 1997; Newmark, Hartell, & Salem, 1995). What these data suggest is that the commonly held view that "battered women stay" in violent marriages is more myth than reality. In fact, studies show that violence early in marriage almost doubles the risk of divorce, with 82% of couples separating within two years. After four years, 93% of couples experiencing severe violence separated, 46% of couples experiencing moderate violence separated, and 38% of non-violent couples separated (Bradbury & Lawrence, 1999).

F. [13.13] Incidence of Violence by Gender: Are Women Equally Violent?

In the affidavit, John alleges that Jane struck him one night while under the influence of alcohol. Given that this is a common allegation in conflicted divorce, this issue merits attention. In addition to the anecdotal experience of judges and attorneys, research studies measuring the incidence of intimate partner violence have documented the use of aggression by both men and women. In fact, in at least

one national survey, roughly as many women as men reported having used violence on at least one occasion during the pendency of their relationship (Straus, 1990).

However, these data should not be oversimplified to suggest that violence on the part of women and men is equal, as the picture begins to change when such factors as frequency, severity, and motivation for violence are considered. For example, the largest national study documenting equal incidence of violence by gender simply asked women and men in the study if they had used violence; it did not ask why they used violence or what the end result was in terms of injury. Studies that explore frequency in the use of violence find that men commit aggression against a partner significantly more often than women do (21% more often when considering physical assault and 42% more often when the abuse rises to the level of "severe") (Straus, 1989), and studies on the severity of injuries resulting from acts of aggression consistently find that women are much more likely to sustain injury than are men (Stets & Straus, 1990). Understanding patterns in the use of physical aggression by parties in the relationship also requires considering such factors as the intent of the actor (*i.e.*, was the aggression an act of self-defense or primary aggression) and the overall pattern involved (*i.e.,* is the aggression an isolated act or part of a pattern of systematic control against the partner) (Jordan, Nietzel, Walker & Logan, 2004).

As noted above, women are more likely to be killed by a male intimate partner than by any other type of offender. That same context of intimate relationships comes to play when women commit homicide, as the most likely victim of female offenders is an intimate partner (Rodriguez & Henderson, 1995; Greenfeld & Snell, 1999). Studies find that 42-44% of female homicide offenders killed a male intimate (Greenfeld & Snell, 1999; Gauthier & Bankston, 1997; Starr, Hobert & Fawcett, 2004), while male homicide offenders killed a female intimate only around 7% of the time (Gauthier & Bankston, 1997; Greenfeld & Snell, 1999). There are distinct differences in the motivation for homicidal acts by male and female intimate partners. Studies find that men's motives for killing female partners frequently relate to jealousy and a need to control the female (Block, 2000; Block & Christakos, 1995; Wilson, Daly, & Daniele, 1995). Men often perpetrate the homicide at the point when a woman attempts to leave the abusive relationship (Kellermann & Heron, 1999; McFarlane et al., 1999). In contrast, a number of studies show that women's use of violence usually occurs as a response to violence inflected by male partners (Campbell, 1995; Kellermann & Mercy, 1992). One study, for example, analyzed homicide cases and found that self-defense or a physical attack accounted for 56% of female-perpetrated homicides and 12% of male-perpetrated homicides (Felson & Messner, 1998). Interestingly, rates of intimate partner-related homicides have decreased significantly over the past two decades (Greenfeld et al., 1998); and studies find that the decrease is attributable largely to a drop in the number of female-perpetrated homicidal acts (Greenfeld et al., 1998).

For domestic relations practitioners and judges, the important point is that reports of aggression made by parties in a contested divorce must be contextualized

(Jordan et al., 2004). An accusation of use of violence by both parties does not automatically imply "mutual violence." That is not to say that females are never violent, nor that they are never the primary aggressor in a relationship. The data tell us, however, that the majority of the time they are not. The data also suggest that when accusations are made, that should not be the end of the investigation, but rather the beginning. In short, "mutuality is, more often than not, a myth that is shattered by understanding the context within which the violence has occurred." (Jordan et al., 2004, page 7). In the case above, Jane physically assaulted her husband one night, but a closer look reveals her intent (self-defense) and that her reaction was an isolated use of violence to protect herself, not a regular pattern of violence or coercion against her spouse.

G. [13.14] What Does Intimate Partner Violence Look Like: Types of Violence

Another way in which Jane's experience is extremely common among battered women is that she experiences multiple forms of violence rather than just physical assault. Most often, violence in the context of intimate relationships occurs, not as a singular act or form of abuse, but rather as the aggregate of physically, sexually and psychologically abusive behaviors directed by one partner against another. Research is now clear that when one form of abuse exists, it is coupled with other forms as well (Jordan et al., 2004).

Four primary types of abuse have been documented in intimate relationships: physical, sexual, and psychological abuse, and most recently, stalking victimization (literature cited and descriptions adapted from Jordan, Gleason, Hosea & Sexton, 2003).

1. [13.15] Physical Abuse

Research suggests that each year 4.4 million women are physically abused by a partner, and 1.7 million of these women experience severe abuse (Plichta, 1996). The CDC study noted earlier reported that approximately one in four victims of intimate partner violence have experienced severe physical violence (Black, 2011).

Other studies find that one in three women will be assaulted by an intimate partner during her lifetime (Browne 1993). Physical abuse includes a wide variety of behaviors against the victim, including throwing objects, pushing, shoving, slapping or hitting, grabbing, kicking, biting, burning, trying to hit with a fist or an object, choking, beating, threatening with or using a knife or other weapon, and other like behaviors (Crowell & Burgess, 1996).

2. [13.16] Sexual Abuse

Sexual violence against women was also documented in the National Violence Against Women Survey, with almost 18% of women reporting being victims of rape or attempted rape. Survey results also indicated that in the 12 months preceding the survey, 302,091 women were the victims of forcible rape. As is the case with other forms of abuse, rape committed by an intimate partner is more common than sexual assault committed against a woman by a stranger (Bachman & Saltzman, 1995). The CDC study reported that nearly one in ten women have experienced forcible rape by an intimate partner (Black, 2011).

3. [13.17] Psychological Abuse

A form of abuse less obvious to attorneys, but extremely relevant to civil cases, is psychological maltreatment. Most often women who experience physical or sexual violence are also victimized by psychological forms of abuse. In one study, for example, a full 99% of women who experienced physical abuse by a partner also experienced psychological abuse (Follingstad, Rutledge, Berg, Hause, & Polek, 1990; Stets & Straus, 1990). Psychological abuse, whether it involves name calling, ridicule, harassment, threats, or other forms, is systematic and purposeful and has the effect of giving power to the abusive partner. Other forms of psychological abuse include forced isolation, harm or torture directed at the woman or other family members, children, friends or pets, and damage or destruction of the woman's personal property or pets (Marshall, 1996; 1999; O'Leary, 1999; Sackett & Saunders, 1999). Psychological forms of abuse also include jealousy, accusations of infidelity, repeated threats of abandonment, monitoring movements, and driving fast and recklessly to frighten someone (American Medical Association, 1992). When threats occur within a relationship in which violence has previously occurred, the ability to induce fear is significantly enhanced. This so-called "psychological battering" is particularly terrorizing, for a victim need not imagine what violence might be like, nor is she able to deny the possibility that violence might actually occur. In the case of psychological battery, the victim's anticipatory anxiety which results from threats can be as debilitating as the violence itself.

4. [13.18] Stalking

In addition to physical and sexual violence, a growing number of studies now document stalking, particularly in the context of intimate partner violence. In a recent review of stalking studies to date, the prevalence rate was reported to be 27% of all women (Spitzberg, 2002). The National Violence Against Women Survey also documented stalking victimization among women and further reported that over three-fourths (77%) of victims in the study were stalked by a person known to them, most often a current or former spouse or cohabitant or a current or former boyfriend or girlfriend (59%) (Tjaden & Thoennes, 1998). The CDC

study reported that more than one in ten women have experienced stalking by an intimate partner (Black, 2011).

Other research has shown that nearly one-fourth of female stalking victims are also physically harmed by the stalker (Bjerregaard, 2000), and there appears to be a high correlation between physical assault and stalking among populations of severely battered women (Mechanic, Weaver, and Resick, 2000).

As a legal matter, stalking became a criminal offense for the first time when codified by the legislature of California in 1990; Kentucky passed anti-stalking legislation in 1992 (Jordan, Quinn, Jordan & Dailander, 2000). In a study looking at stalking cases prosecuted in Kentucky, researchers found that, of approximately 350 misdemeanor and felony cases prosecuted, the vast majority were dismissed. In fact, over of half of the felony charges and over two-thirds of the misdemeanor charges were dismissed by the court (Jordan, Logan, Walker & Nigoff, 2003). A significant percentage of the stalking defendants were also respondents to protective orders and/or had relatively significant criminal histories. Familiarity with the stalking law as a criminal matter is of relevance to domestic relations practitioners as studies have found an important association between stalking, the separation of the couple, and dangerousness (see next section).

H. [13.19] Victim's Physical Safety: The Danger of Separation

Studies on intimate partner violence have shown repeatedly that the most dangerous time in these relationships is the point of separation. Because this is the time when parties seek legal separation and dissolution of a marriage, domestic relations attorneys need to be routinely attentive to whether their clients pose, or are at risk of, danger. One study found that separated women are more at risk than married or divorced women. Specifically, women who are separated from their spouses are three times more likely than divorced women and 25 times more likely than women still married to the violent partner to be victimized (Bachman & Saltzman, 1995). Similarly, in the National Violence Against Women Survey, estranged wives were four times more likely to report that husbands raped, assaulted or stalked them than were women living with their husbands (Tjaden & Thoennes, 2000). In fact, the Survey found that rates of stalking were actually higher after the relationship ended, with 43% of victims reporting post-relationship stalking, 21% reporting stalking during the relationship, and 36% reporting stalking during and after the pendency of the relationship (Tjaden & Thoennes, 2000). In addition to escalated risk of continued physical assault and stalking, separation often entails ongoing psychological abuse of women (Hotton, 2001; Logan, Walker, Jordan, & Campbell, 2004).

Studies of intimate partner-perpetrated homicide also show the serious risk often posed by the act of separation. Numerous studies have found that these types of murder are frequently preceded by a recent attempt at, or completion of, separation by the victim (Arbuckle et al., 1996; Wilson & Daly, 1993; Ellis & De-

Keseredy, 1997; Sev'er, 1997; Stark & Flitcraft, 1996; Browne & Williams, 1993; Campbell, 1992). For example, in a study of intimate partner violence homicides in Ohio, more than half of the women were killed at the point of separation in the relationship (Campbell, 1992); and in a study of men incarcerated for killing their female intimates, over half the murders occurred during separation (Stout, 1993). Pointedly, most homicides committed by intimates occur within the first few months following separation (Stout, 1993; Wilson & Daly, 1993).

I. [13.20] The Impact on Children of Exposure to Intimate Partner Violence

Among those directly impacted by intimate partner violence are children who live in homes where the violence occurs. Over a decade ago, the National Family Violence Survey projected that ten million American children were exposed to intimate partner violence each year (Straus, 1992), and more recently, a survey of undergraduate college students which asked about witnessing violence estimated that 17.8 million children were exposed to intimate partner violence during their childhoods (Silvern et al., 1995). As would be true in Jane and John's home, studies show that children who witness intimate partner violence are most often exposed to multiple occurrences (Straus, 1992).

Domestic relations practitioners should be aware of three primary ways in which children are impacted by intimate partner violence. First, there are safety concerns for children who live in violent homes where assaultive and threatening behavior, weapons, and high conflict are present. Children are often harmed directly by witnessing or experiencing abuse and by the upheaval and chaos resulting from the use of violence by one parent or parent-figure against another. For example, children growing up in homes in which their mothers are being abused are at serious risk of behavioral disturbance (Cummings, Pepler, & Moore, 1999; Fantuzzo et al., 1991; Holden et al., 1998; Kernic, et al., 2003; Wildin, Williamson, & Wilson, 1991) and poor academic performance (Gleason, 1995; Wildin et al., 1991). As is the case for John, studies also find long-term negative impacts in that the population of intimate partner offenders is largely comprised of males who witnessed violence in their childhoods (Ehrensaft et al., 2003; Fagan & Browne, 1994).

Secondly, children may also be directly harmed as studies of abusive men show that approximately half of those who frequently assault their wives also assault their children (Suh & Abel, 1990). Similarly, reviews of more than 36 studies indicate that 30% to 60% of children of abused mothers are also abused (Appel & Holden, 1998; Edelson, 1999). Female children whose fathers batter their mothers are 6.5 times more likely to be sexually abused by those men than are girls from homes in which there is no violence (Bowker, Arbitell, & McFerron, 1988). Also, a history of violence between the two partners does not bode well for future parental cooperation with regard to child rearing (Austin, 2000). Notably, not only do children suffer from direct exposure to violence and its consequences on their parents, children are also harmed indirectly as they are often made pawns in the conflicted legal process.

IV. [13.21] Factors Associated with Intimate Partner Violence That Impact Separation and Divorce

A. [13.22] Factors to Consider in Dissolution Cases: Introduction

The dissolution of marriage has dramatic impacts on both spouses' social networks, health and psychological well-being, and their standard of living, even when violence has never occurred in the relationship. However, when the marriage includes violence, there is evidence that the impact on the woman will be qualitatively different than the experience women separating from non-violent relationship have (Logan, Walker, Jordan, & Campbell, 2004), and pointedly more negative. Many of these factors are those that make successful separation difficult, if not impossible, for a woman who faces violence, and may be among the primary reasons she returns to an abusive partner.

B. [13.23] Standard of Living and the Economic Impact of Divorce

While the economic status of both spouses is impacted by divorce, there is evidence that women tend to have more significant negative outcomes from the dissolution process. For example, studies find that divorce often significantly diminishes the economic status of women while having less impact, or in some cases even a positive effect, on the income of men (Amato, 2000; Holden & Smock, 1991; McKeever & Wolfinger, 2001; Shapiro, 1996). In one study, 29% of recently divorced women were living below the poverty level compared with 12% of men (Kreider & Fields, 2002). In cases of separation and divorce that involve children, studies find that half of single mother families received limited or no child support (Meyer, 1999; Sorensen & Zibman, 2000). For example, one study found that among single mothers who had a court order for child support, approximately one-fifth received only part of what the court had ordered and over one-third received no support at all (Sorensen & Zibman, 2000). In Jane's case, the fact that she has a well-paying job does not insulate her from a fear of financial concerns, particularly because John includes requests for child support and maintenance payments within his court filings.

C. [13.24] Social Networks and General Social Support

Studies have found that, on average, a separating person's social network is reduced by about 40% after marital separation (Rands, 1988 as cited in Marks & McLanahan, 1993). This typical reduction in social support may be even more acutely felt in cases involving intimate partner violence, as professionals and advocates who work with battered women often find these families to be extremely isolated from others. Whether a result of embarrassment, shame, threats to keep the violence a secret, the jealousy of the offender, or other related factors, women suffering violence are often without social networks or support systems.

D. [13.25] Health and Mental Health Effects on Divorcing and Battered Women

For most women and men, the point of separation or divorce is a stressful time. Whether the dissolution is agreed to or conflicted, often this period is characterized by upheaval and intense emotions. For women, studies support that the end of a committed relationship is a difficult experience that can take a toll on their emotional well-being. For example, one study reported that divorced women had a higher rate of depression symptoms compared to married women, and those with higher rates of depression reported more health problems (Lennon, 1996). For women separating from a violent marriage, the stress can be compounded. First, studies are now clear that the experience of intimate partner violence can have significant impacts on the mental health of a woman. In fact, most of the non-organic forms of mental distress have now been found to be associated with this form of victimization (see Briere & Jordan, 2004 for review of mental health effects). While historically some have minimized the impact of violence inflicted by a spouse or partner as somehow less psychologically traumatizing for the victim than stranger-perpetrated assaults, research now demonstrates that abuse inflicted by an intimate does not mitigate the traumatic impact (Riggs et al., 1992). For example, although even one episode of violence can inflict psychological trauma on a victim, the chronicity and severity characterized by intimate partner assaults can be associated with greater psychological impairment (Follingstad, Brennan et al., 1991). The specific way in which a woman's mental health will be impacted by intimate partner violence is as unique as she is, and is affected by several key factors, including any history of victimization; the severity and recency of assault; and the level of social support now available to her (Jordan et al., 2004).

Many of the most common effects that will be seen by domestic relations practitioners are those that relate to the exposure their clients have endured to chronic and intense levels of violence-induced stress. For many women, the mental health effects seen during the pendency of the relationship and during the time immediately following separation are naturally alleviated by the removal of the primary stressor. For example, studies find that depression is the most common mental health reaction women have to sustained intimate partner violence and that rates of depression among battered women are higher than the general population of women (Gleason, 1993). However, in a study of 234 battered women, most perceived their physical and mental health as deteriorating from the initial stages of the relationship, worsening during the time of abuse, and improving once the relationship ended (Follingstad, Brennan et al., 1991). Similarly, in a study which followed women over two years, 91% experienced decreased depression following the end of the abusive relationship (Campbell et al., 1994).

In the context of disputed dissolution actions, the mental health of the victim may be used as a weapon in the court process, either by abusive partners who threaten to disclose a woman's struggle with mental health concerns, or as a means to show to the court a woman's unfitness as a parent. This is clearly the

strategy being used in Jane and John's case as evidenced in the affidavit. For domestic relations practitioners, it may be helpful to suggest professional support for a battered woman going through divorce (for example, an advocate from the local battered women shelter, or attending support groups with other battered women, or seeing a therapist with special training related to intimate partner violence). As discussed later, care must be taken to protect both the woman and her medical/mental health records from misuse in the court process.

V. [13.26] Factors Associated with Intimate Partner Violence That Impact Custody and Visitation

A. [13.27] Custody Proceedings and Intimate Partner Violence

Each year, more than one million children are the subject of custody determinations by a court in the United States (Clarke, 1995; Munson & Sutton, 2004). Before coming to the attention of the court, more than 150,000 of these children have been exposed to intimate partner violence (Clarke, 1995; Holden, Geffner, & Jouriles, 1998). A number of studies have documented that intimate partner offenders often used custody and visitation as a means to further control, harass or threaten the victim (Bow & Boxer, 2003; Shalansky, Erickson, & Henderson, 1999; Zorza, 1995). For example, studies find that women separated from an abusive partner experience threats of custody disputes (30%), of harm to their children (10%), and threats to abduct their children (17%) (Mechanic, Weaver, & Resick, 2000). In one study that characterizes the difficulties faced by women in these circumstances, researchers found that 25% of intimate partner offenders verbally or emotionally abused their ex-partners, 10% physically abused them, and 34% threatened child kidnapping during child visitation (Liss & Stahly, 1993). Additionally, almost one-fifth of the offenders threatened contesting custody in an effort to force their victims to return to the abusive relationship. Importantly, this study also found that 20% of women report returning to the abusive partner as a result of the offender's threats to hurt or take the children (Liss & Stahly, 1993). Finally, domestic relations practitioners need to be aware that court-ordered visitation can be a time of danger to a woman, as studies find that one-third of violations of protective orders occur during visitation exchanges (McMahon & Pence, 1994). For Kentucky practitioners, no case brings this concern home more compellingly than the case of Myrtle Whitaker and her children described in the preface to this chapter.

B. [13.28] Allegations of Intimate Partner Violence and Custody Decisions by the Court

In 1994, the National Council of Juvenile and Family Court Judges issued a Model Code on Domestic and Family Violence. In addressing custody and

intimate partner violence, the Model Code declared that "it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence" (National Council of Juvenile and Family Court Judges, 1994, page 33). This view has also been supported by the American Bar Association and the American Medical Association (Drye, 1999; Lemon, 1999). In addition to the Model Code, the statutes of a number of states include a rebuttable presumption that it is not in the best interest of the child to be placed, either through sole or joint custody, with an intimate partner offender, and most states include the presence of intimate partner violence as a factor to be considered when judges make custody and visitation decisions (Roberts & Kurst-Swanger, 2002).

While national legal and health policy bodies and state legislatures have addressed custody and intimate partner violence, studies have identified continuing primary concerns in this area, the first being that during the court process there is a lack of identification of intimate partner violence even among cases with a documented history. For example, in a review of records from marriage dissolutions involving children, researchers in one study found that while 11.4% of dissolution cases involved police- or court-documented intimate partner violence histories, half of those cases made no mention of violence in the case file. In the other half of the cases, the allegation was mentioned in the record, but the available documentation was not included in the file (Kernic, Monary-Ernsdorff, Koepsell, & Holt, 2005). This lack of effective presentation of actual, legally-documented intimate partner violence history to courts making determinations regarding custody and visitation is exemplary of the problem of courts having insufficient evidence upon which to make safe decisions regarding the best interests of a child.

A second major problem is that, even when women provide documented evidence to the court of a history of intimate partner violence, they are not more likely than other mothers to be awarded child custody (Kernic et al., 2005). In that same study, over 80% of fathers in these cases who had a substantiated history of intimate partner violence that was known to the court were allowed unsupervised visitation with the children (Kernic et al., 2005). The implication for domestic relations practitioners in these cases is to assess for intimate partner violence experiences in their clients and then to document those allegations to the court thoroughly (through police reports, protective order histories, medical records, mental health records, 911 calls, witnesses, and similar methods). Another critical step is to request court-ordered evaluations of family members, although as indicated below, evaluations must be conducted by trained evaluators or the practice will not be effective and may, in fact, harm the outcome of the case.

C. [13.29] Child Custody Evaluations

Not unlike the court itself, therapists who provide custody evaluations face the difficult challenge of exacting a balance between the safety of a child, the child's need for parental contact, and the rights of both parents. Studies have found

that this is a balancing test evaluators often face, as evidenced in a recent study in which child custody evaluators reported that 37% of their referrals involved allegations of intimate partner violence (Bow & Boxer, 2003).

As noted above, evaluations that ultimately offer recommendations to the court must have adequately assessed for intimate partner violence, have documented its occurrence to the extent that any records or other evidence exists, and must offer recommendations that incorporate the impact of potential future risk to the child. Unfortunately, there is significant evidence in the literature that such comprehensive evaluations are very often not provided, an omission that can place both the child and the adult victim at risk (Logan, Walker, Jordan, & Horvath, 2002). In general, criticisms of child custody evaluators have identified the following pitfalls: (1) having insufficient basic knowledge about intimate partner violence; (2) failing to use collateral sources and record reviews; (3) over-reliance on psychological testing; (4) failing to consider intimate partner violence as a major issue in custody determination by assuming that allegations are exaggerated or fabricated; or (5) operating with a bias in favor of male offenders (Bow & Boxer, 2003; Bancroft & Silverman, 2002; Dalton, 1999; Jaffe & Geffner, 1998).

The National Center for State Courts (1997) offers guidelines for custody evaluations when intimate partner violence is present which include:

- Identify the existence, nature, and potential consequences of intimate partner violence within the family and document any collaborating evidence;
- Identify the strengths, vulnerabilities, and needs of all other members of the family;
- Develop a plan for custody and visitation that builds on the strengths of each family member and that will serve the best interests of the children; and
- If intimate partner violence is a factor in the dispute, develop a plan that addresses the potential dangers of continuing contact between the victim and the batterer, and any need to restrict visitation (pp. 36-37).

A general rule of thumb for domestic relations practitioners is to ensure that custody evaluators are trained on intimate partner violence and child maltreatment. Effective training can help ensure that reports do not over-pathologize trauma symptoms that may be experienced by victims of intimate partner violence (Koss et al., 1994). The mental health responses that some women may have to the experience of victimization, while relevant to any evaluation, do not translate into unfitness as a parent. Training should also aid evaluators in understanding offender typologies to ensure that they are keenly sensitive to how adept offenders may be at projecting an image to evaluators and to the court that is totally incongruent with the violence alleged by an intimate partner (Bancroft & Silverman, 2002). Finally, domestic relations attorneys should be aware of the complexity of child custody

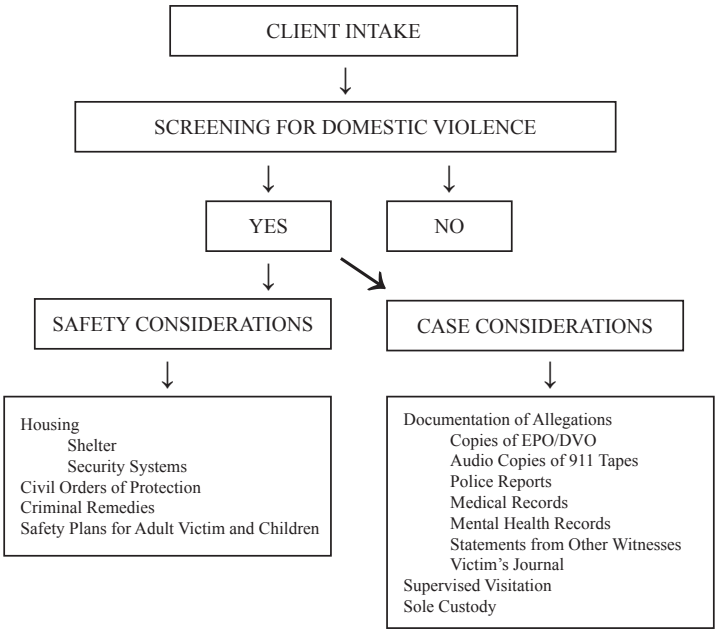
evaluations, as studies have found that the appropriate amount of time for these evaluations is approximately 35 hours (Bow & Boxer, 2003).

VI. [13.30] Practice Issues in Domestic Relations Cases

A. [13.31] Assessing Domestic Violence

The data provided above reveal how often domestic relations practitioners will need to address intimate partner violence in the course of handling a dissolution action. It is advisable, as a result, to routinely ask clients whether violence has or is occurring in the home. That type of universal screening can ensure that all appropriate legal steps are taken and that any needed safety concerns are addressed. The figure below suggests a straightforward process of asking each client about any incidents of physical, sexual, psychological or stalking victimization and then attending to both safety and case considerations.

Intake Procedure for Domestic Relations Practitioners



B. [13.32] Safety Considerations

1. [13.33] Attorney-Client Communication to Prioritize Safety

Safety of both the client and the attorney as civil cases are undertaken should remain a paramount consideration. In situations where the client has experienced interpersonal violence in an intimate relationship, she may be at risk. Offenders are often indiscriminate in who they target when attempting to control and harm their victims. Therefore, these situations can put attorneys at risk personally, and possibly professionally. When confronted with a situation that includes ongoing violence, be sure to advise clients concerning resources for their safety. Recommend that the client have a "safety plan" and/or refer her to a domestic violence or sexual assault resource program. This plan increases the victim's ability to protect herself and her children. An effective safety plan can provide a tool for continually assessing the level of danger from the offender. Detailed information on making a "safety plan" is included in Appendix B to this chapter.

It is imperative that attorneys address security issues with clients at the outset of the case and throughout the pendency of all related civil matters. Safety concerns in these cases may be quite different depending on whether the client

knew her offender. However, the fear experienced by the victim can be equally debilitating in both types of cases. Below are some strategies for safety:[1]

- Ask for your client when you call and speak only to your client about the case.
- Do not leave messages with unknown individuals or on an answering machine or voice-mail unless your client has specifically given permission to do so. If questioned by an unknown party, give an innocuous reason for the call, such as taking a survey.
- Always ask your client first if it is safe to talk. Never assume the abusive partner is not there, even if they no longer live together.
- Develop a code word to signal danger or the abusive partner's presence.
- Allow clients to use your phone or initiate calls at your client's request.
- To prevent an abusive partner from using "caller ID" to discover that your client is seeking legal assistance, contact your local phone company to identify call block procedures.
- Because abusive partners often track victims through third parties, such as court personnel or social service providers, never disclose your client's addresses, telephone numbers, or information concerning children without her permission and prior knowledge.
- Postal mail or e-mail should be sent only if your client has advised you it is safe.
- If a client misses an appointment or fails to return your calls, make confidential efforts to confirm that your client is safe. Possible approaches include contacting a victim advocate or writing your client an innocuous letter requesting a response without disclosing your identity as an attorney.
- Assist clients in developing plausible explanations for legal appointments.
- Since exposure to the legal system can often exacerbate an already dangerous situation, tell clients when an abusive partner is about to be served or when a hearing is scheduled,

[1] Author's Note: The following is adapted from the *American Bar Association Commission on Domestic Violence, The Impact of Domestic Violence on Your Legal Practice: A Lawyer's Handbook*. (Deborah M. Goelmal et al, eds., 1996). Reprinted with permission. Copyright © 1996 by the American Bar Association.

so the client may take extra safety precautions.

- Depending on the level of risk posed by the abusive partner, it may be important for you to assist with name and social security number changes in order for a client to go into hiding or assume another identity.
- If a client requests that a court action be dropped, try to verify that the client has not been threatened or coerced into making this request.
- Develop a resource list including national and local domestic violence hotline numbers, domestic violence programs, legal advocates, certified offender treatment providers, and social service agencies.

Support services for victims and hotline numbers are described in Appendix C. A list of domestic violence offender treatment providers may be found on the Kentucky court system's website: <http://www.kycourts.net>. A list of domestic violence shelters may be found at: <http://www.kdva.org>. A list of rape crisis centers may be found at: <http://www.kasap.org>.

2. [13.34] Safety in the Courtroom

- If possible, arrange to be in court before your client so that your client will not be alone with the abusive partner.
- Advise your client to bring a friend, relative or advocate to be with her until the case is heard and make security guards or a bailiff aware of the potential risk posed by the abuser.
- With your client's permission, communicate with victim advocates since they may have invaluable information concerning the abusive partner's history of violence.
- Always position yourself between the abusive partner and your client when you are discussing the case or waiting for the case to be called. Threatening body language is a powerful tool used by many abusers in a court setting and may have a negative impact on your client's ability to proceed with the case.
- If it is necessary to discuss court related issues, communicate directly with the batterer or the batterer's attorney and then report back to your client. Do not allow the abusive partner to speak to your client. Even if you are present during a conversation you may be unaware of the complex history of victimization and that the abusive partner is using the conversation as a tool to threaten your client.
- Use the same considerations with the abusive partner's

family members. It is not uncommon for them to threaten or abuse the victim in court.

- Since abusive partners often stalk or assault victims as punishment for exposing the abuse to public scrutiny through legal action, make certain that your client is safe when exiting the courthouse. This may require asking the judge to keep the abuser in the courtroom while your client exits, or contacting law enforcement for escort from the building.
- Be aware of your own safety. Most abusers focus their controlling and violent behaviors on former or current partners, but attorneys representing victims of domestic violence have also been threatened or assaulted by abusers or their family members.

3. [13.35] Safety Resources for Victims and Their Families

Kentucky offers numerous resources, both legal and physical, for victims of intimate partner violence and their families. One key resource for victims of intimate partner violence is the regional Domestic Violence Program in the community where the victim lives. The programs can offer protective shelter, legal/court advocacy, case management, safety planning, support groups, individual counseling, housing assistance, job search assistance, and support groups for children. Additionally, if a woman needs to leave her home community for safety reasons, Domestic Violence Programs offer assistance in accessing protective shelter in other regions of Kentucky and other states across the nation. Appendix C to this chapter provides a description of support services for victims, including a description and contact information for Domestic Violence Programs.

In addition to civil protective orders (discussed in more detail in Sections [13.41] to [13.67], *infra*), the Kentucky Penal Code sets forth numerous statutes that criminalize behavior such as assault, stalking, forced sexual relations or otherwise harassing their spouses. If a woman chooses to file criminal charges, domestic relations practitioners are advised to recommend the support of a victim advocate for his or her client. Advocates are based in non-profit victim agencies (such as Rape Crisis Centers and Domestic Violence Programs), and in prosecutors' offices (both County and Commonwealth's Attorneys). Practitioners should be advised that statutory privileges provided for victim advocates pursuant to KRE 506 (discussed, *infra*, Section [13.39]) specifically exclude prosecutor-based advocates. Civil remedies are also available for victims who wish to sue the offender.

C. [13.36] Case Considerations

1. [13.37] How Do I Ask the Question?

Asking questions of clients or patients regarding victimization history can be difficult for any professional. Studies have found, however, that women are not offended or angered by questions. For example, studies show that most women want their physicians to inquire about victimization history (Webster, Stratigos & Grimes), and that it was easier for them if health care providers routinely asked about abuse (Gielen et al., 2000). Similarly, the majority of abused (60.5%) and non-abused (80.6%) women in another study said they were not insulted or offended by being asked about abuse (Gielen, et al., 2000). For a woman seeking professional help from a domestic relations practitioner, a professional whose role is to provide aid in the client's best interest, the outcome is likely to be the same. To ease the introduction of a question regarding victimization, domestic relations practitioners should use simple, direct, and normalizing questions. For example:

- "Because violence in relationships is so common, I now ask every woman who I represent whether she has experienced violence or some form of abuse. Is it ok with you if I asked that type of question?"
- "Has your husband ever slapped, hit, punched, kicked, choked or physically hurt you in any way?"
- "Has your husband ever forced you to have sex when you didn't want to do that?"
- "Has your husband ever followed you or spied on you? Stood outside your home or workplace? Showed up at places where you were even though he had no specific reason for being there? Deliberately destroyed something you loved?"
- "Has your husband ever threatened to kill you, your children or other loved ones or himself? Does your husband possess or have access to weapons?"

If a client affirms that one or more of these acts has occurred, several types of follow-up questions are in order. Follow-up questions are intended both to elicit additional information and to assess the level of risk to which the client and her children are exposed. These include:

- "You said your husband did _____. Can you tell me if that occurred once or multiple times?"
  - (if multiple times) "Would you estimate less than 5 times, between 5 to 10 times, or more than 10 times?"
- "Were you physically injured by the abuse? Did you seek medical treatment?"

- "Did you or someone else call the police when that happened?"
- "Did your children witness the abuse?"
- "When was the most recent time the abuse occurred?"

While this minimal number of questions cannot provide a true risk assessment, domestic relations practitioners should be particularly concerned if the abuse occurred recently, in various forms, multiple times, and with injuries to the victim. Additionally, concern should attach if the abuse included stalking (particularly in instances when the client has made previous attempts to leave her husband), if the offender has threatened to harm her or himself, and if he has access to weapons. In these types of cases, domestic relations practitioners need to address the client's physical safety concerns as the first priority. She and her children may need protective shelter, protective orders, or other aid. It is recommended that, at a minimum, a victim advocate be contacted to assist with completing a fuller risk assessment and safety plan with the victim/client.

2. [13.38] How Do I Document the Allegations?

As noted in the figure in Section [13.31], there are numerous sources of documentation for incidents of abuse that are disclosed by a client. Examples of documentation include copies of emergency protective orders ("EPOs") or domestic violence orders ("DVOs"), audio copies of 911 tapes if the client/victim or other person contacted law enforcement, police reports, medical or mental health records, statements from other witnesses, and even a journal kept by the victim.

3. [13.39] Confidentiality of Victim Records

While use of mental health records may provide evidence of abuse history or the impact that the violence has had on the client and her children, domestic relations practitioners must be cautioned regarding the potential misuse of such records by the offender. As in Jane's case, mental health records would also document prior victimization and drug abuse history for Jane, all of which could be inappropriately used by her husband to prove her unfitness as a parent. Domestic relations practitioners should, to the extent possible by court rule, protect the private information of their clients in these cases.

The Kentucky Rules of Evidence ("KRE") establish two privileges which protect communications between victims (patients or clients) and their mental health providers. KRE 506 defines the Counselor-Client Privilege, which applies to sexual assault counselors, victims advocates (except those employed by Commonwealth's or county attorneys), certified professional counselors, certified marriage and family therapists, certified school counselors, certified professional art therapists, and individuals who provide community crisis response services. The privilege may be claimed either by the client or by the counselor on the client's behalf. This rule states that:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of counseling the client, between himself, his counselor, and persons present at the direction of the counselor, including members of the client's family.

KRE 506(b).

> A communication is confidential if it is not intended to be disclosed to third persons, except persons present to further the interest of the client in the consultation or interview, persons reasonably necessary for the transmission of the communication, or persons present during the communication at the direction of the counselor, including members of the client's family.

KRE 506(a)(3).

Notably, the Counselor-Client Privilege is subject to certain exceptions. For example, it does not apply to cases in which the client asserts her (or his) physical, mental, or emotional condition as an element of a claim or defense. Moreover, the privilege does not apply if a judge finds that all three of the following conditions exist: (1) that the substance of the communication is relevant to an essential issue in the case; (2) that there are no available alternate means to obtain the substantial equivalent of the communication; and (3) that the need for the information outweighs the interest protected by the privilege. To protect victim records, domestic relations practitioners should seek *in camera* review of requested documents, and if the court determines that certain material in the record meets the relevancy standard, the practitioner should seek to have the court extract only those relevant portions for disclosure.

The second privilege established for mental health professionals is more stringent as it does not contain an exception to permit judges to abolish the privilege based on relevancy. KRE 507 establishes the psychotherapist-patient privilege, defining "psychotherapist" to include those who are licensed to practice medicine while engaged in the diagnosis or treatment of a mental condition (psychiatrists); licensed or certified psychologists; licensed clinical social workers; and licensed registered nurses who practice psychiatric or mental health nursing. This rule states that:

> A patient, or the patient's authorized representative, has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purpose of diagnosis or treatment to the patient's mental condition, between the patient, the patient's psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

KRE 507(b).

The privilege established by KRE 507 does not apply to proceedings to hospitalize the patient for mental illness, when communication was made during a court-ordered examination and the patient was informed that the communication was not privileged, or when the patient asserts a physical, mental, or emotional condition as an element of a claim or defense.

4. [13.40] Practice That Carries Extra Risks for Victims

The application of two common court practices in cases of intimate partner violence merits a note of caution. First, many jurisdictions encourage or even require litigants to mediate conflicts within dissolution actions, including custody decisions. Effective mediation is predicated on a presumption that both parties carry equal power and that one party is not afraid or intimidated by the other. Given that a victim of intimate partner violence is not likely to perceive or to actually have equal power, mediation in cases of intimate partner violence is not advisable. The National Council of Juvenile and Family Court Judges' Model Code on Domestic and Family Violence (NCJFCJ, 1994) specifically prohibits mediation if a protection order is in place. Additionally, the American Bar Association House of Delegates adopted a policy recommending that mediation laws include "opt-out" provisions to allow a victim of intimate partner violence to avoid mediation conditions. *See also,* Section [13.62].

The second ill-advised practice is that of "couples" or marital therapy. There is fairly widespread agreement that couples therapy is not appropriately applied in cases of intimate partner violence, particularly when it is mandated by the court or with severely violent men (Crowell & Burgess, 1996). As an empirical matter, insufficient research on the safety of marital counseling has been conducted to warrant recommended use of conjoint counseling in violent relationships (Aldarondo & Mederos, 2002).

VII. [13.41] The Civil Protective Order Process[2]

As most domestic relations practitioners are well aware, KRS Chapter 403 provides, within the Domestic Violence and Abuse Act, civil orders of protection. Protective orders, while not a complete assurance of safety, can be a very important safety resource. They can set forth conditions that remove offenders and add the court's authority to instructing the offender to cease any further violence. In fact, with the involvement of the domestic relations practitioner, the court can be petitioned to order conditions that are directly tailored to the woman's needs. Court orders cannot ensure absolute safety, but they do establish a means of enforcement by peace officers in that they are entered into the Law Information Network of

[2] Adapted from Jordan, C.E., Gleason, M., Hosea, K., & Sexton, M. (Eds.), Civil Remedies for Women Victimized by Violence: A Practice Manual for Attorneys (UK/CLE) (2003).

Kentucky ("LINK" System), such that officers can check the validity of orders 24 hours a day, and can arrest offenders for violations. Additionally, for women being stalked by an offender, having an order of protection in place elevates that offense from a misdemeanor to a felony.

Kentucky has two types of protective orders. These orders are called an emergency protective order ("EPO") and a domestic violence order ("DVO"). An EPO is only issued if there is an immediate and present danger of domestic violence. Furthermore, it is an *ex parte* order of short duration (usually two weeks). In contrast, a DVO is issued if it is determined that an act or acts of domestic violence have occurred and may again occur. It is issued after a hearing and is of longer duration. These differences and others will be discussed more thoroughly below.

Significantly, this protection is outside the criminal justice system and, as such, an alternative to it. Thus, victims are afforded protection without the necessity of going through the criminal system. Consequently, the domestic violence statutes were enacted to supplement the criminal statutes, and the two types of legislation are not mutually exclusive. Cases may proceed simultaneously through the civil and criminal dockets. However, any testimony offered at a domestic violence hearing is not admissible in a later criminal proceeding involving any of the parties. KRS 403.780.

A. [13.42] What Is Domestic Violence?

KRS 403.715 to 403.785 contain the provisions for the issuance of emergency protective orders and domestic violence orders. Domestic violence and abuse are defined, at KRS 403.720(1), to mean physical injury, serious physical injury, sexual abuse, assault or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault.

B. [13.43] Who Is Eligible for Protective Orders?

The domestic violence statutes provide protection for "family members and members of an unmarried couple." "Family member" includes a person's spouse or former spouse and it includes any relative within the second degree of consanguinity, so that the perpetrator's children, stepchildren, grandparents, and siblings all may file seeking protective orders against the perpetrator. "Members of an unmarried couple" are defined as unmarried couples who have children in common (and the children of such a couple) and couples who are living together or have formerly lived together. The language of the statutes is gender-neutral and does not provide for the denial of protective orders based upon the sexual orientation of the parties. KRS 403.720(2) and (3).

C. [13.44] Where Should the Petitioner File for a Protective Order?

The petitioner should file the petition in the county where she resides. However, if the petitioner is fleeing her county of residence because of domestic violence, she may file her petition in the county to which she has fled, whether she is fleeing in-state or out-of-state domestic violence. KRS 403.725(1).

D. [13.45] How Does One File the Petition?

When a victim of domestic violence seeks protection from the Kentucky Court system, she will be instructed to complete and file a verified domestic violence petition pursuant to KRS 403.725. A district or circuit judge or trial commissioner then reviews the petition. Based upon a review of the allegations contained in the petition, particularly the determination as to whether an immediate and present danger of domestic violence exists, the judge or trial commissioner will decide whether to issue an *ex parte* EPO.

However, if upon review of the petition, the judge or trial commissioner determines that the allegations in the petition do not indicate an immediate and present danger of domestic violence, the court shall set the date for a hearing and issue a summons to the respondent. KRS 403.745.

E. [13.46] What Forum Is the Proper One for Filing a Petition?

The proper forum for filing such a petition will usually be in district court. KRS 403.725(1). Every county will have a specific location for the filing of petitions. Generally, one would go to the building where district or family court is located.

Further, if a divorce action or child custody action has been filed, the petitioner must inform the district court of that action. KRS 403.725(1). In those cases, the circuit court has jurisdiction to issue a protective order. KRS 403.725(4). If a district judge is unavailable to issue an EPO, then the circuit court shall issue it. KRS 403.725(5).

F. [13.47] What Time of Day Can One File for a Protective Order?

People must be able to obtain an EPO any hour of the day or night. According to statute, all courts are required to provide 24 hour access to emergency protective orders. KRS 403.735.

G. [13.48] How Much Does a Protective Order Cost?

There are no filing fees or court costs for seeking a protective order. KRS 403.730(3). Neither can the petitioner be required to post bond. KRS 403.750(5).

H. [13.49] How are Petitioners Protected from Respondents Finding Out Where They Are?

When the court issues an EPO, authenticates a foreign protective order, or issues a summons, the court clerk shall delete the petitioner's address and the address of any minor children from the document. KRS 403.770(1). This information is protected throughout the process.

I. [13.50] What Protection May Be Granted in an EPO?

The protective options available for inclusion in the EPO are listed in KRS 403.740 and include:

- Restraining the adverse party from contact or communication with the petitioner;
- Restraining the adverse party from committing further acts of domestic violence and abuse;
- Restraining the adverse party from disposing of or damaging any of the parties' property;
- Directing the adverse party to vacate the residence shared by the parties;
- Granting temporary custody using the criteria set forth in the divorce statutes; and
- Entering other orders of assistance to eliminate future acts of domestic violence and abuse.

J. [13.51] What Is LINK?

When a protective order (EPO or DVO) is issued, it is immediately entered into the LINK system, a computerized law enforcement information network. Therefore, when an officer responds to a call, he or she already has the information necessary to serve the respondent with the EPO or arrest the respondent if the situation warrants. KRS 403.737.

K. [13.52] When Is the Hearing Following the Issuance of an EPO or Summons?

After the respondent is served, a hearing is held to determine whether an act of domestic violence and abuse did in fact occur. The hearing shall occur within 14 days of the issuance of the summons. If the respondent has not been served, the summons may be reissued, and the EPO remains in place (prior to 2010, Kentucky statute required that in the event of lack of service or a failure to appear on the part of the adverse party, the court would have to issue a new order). The continuation of an EPO under these circumstances may not extend beyond a six month period of time. After that point, the victim may petition for a new protective order, but

the length of time that a series of EPOs may remain in effect without service upon the respondent is limited to two years. KRS 403.740(5), (6).

L. [13.53] When Is a DVO Issued, and What Protection Is Available?

If the court determines that an act of domestic violence and abuse did occur and might occur again, it may issue a domestic violence order (DVO) pursuant to KRS 403.750, which can include all of the features listed in 403.740, as well as provisions for temporary child support and counseling services.

M. [13.54] Should Petitioners Bring Any Information with Them to the Hearing?

Because child support can be awarded at DVO hearings, the petitioner should be prepared to testify regarding her own income. She should bring recent pay stubs, W-2 forms, or the previous year's income tax return, if possible. If she has access to the respondent's financial documents, she should bring those as well. If these documents are not available, then she should be prepared to testify regarding the current, recent, and past income of herself and the respondent. Also helpful will be documentary proof of child care expenses, maintenance paid to a prior spouse, support paid for a prior-born child, and expenditures for health insurance. The child support guidelines provided in KRS 403.212 will be used.

N. [13.55] How Long Will a DVO Be Effective?

Domestic violence orders may be issued for a period of time not to exceed three years. Although the statute provides that the court may reissue a DVO any number of times "upon expiration," the petitioner should be advised to make such a motion for reissuance approximately one month before the actual date of expiration. KRS 403.750.

O. [13.56] Does the Issuance of a Protective Order Affect Gun Ownership?

Upon the issuance of protective orders, respondents are subject to legal prohibitions regarding their gun ownership and possession. According to state statutes, a respondent is required to immediately surrender a permit to carry a concealed weapon to either the judge or the officer serving the protective order. KRS 237.110(10). Surrender is required for both EPOs and DVOs, and the permit must be surrendered during the duration of the protective order.

Federal law also provides that persons restrained under a DVO may not, with certain exceptions, possess or attempt to possess a firearm. The Brady Bill has been amended so that individuals subject to a domestic violence protective order are banned from possessing guns or ammunition. 18 USC § 922(g). Not all DVO's issued in Kentucky trigger the gun ban. The federal law applies only to protective orders between an intimate partner or child of the respondent and it only applies to

certain types of weapons (the federal gun ban does not apply to antique weapons or replicas, or to service weapons issued for the use of government agencies). The penalty for knowingly violating the federal gun ban is up to ten years in prison.

P. [13.57] Can a Petitioner Be Notified When the Respondent Attempts to Purchase a Gun?

KRS 237.100 authorizes notification of petitioners when the respondents attempt to purchase firearms. Under the authority of 18 USC § 922(g)(8), Kentucky has introduced a notification system, which has been implemented by the Appriss Company. This Brady notification system operates like the VINE system. When information is received that a respondent has attempted to purchase a firearm, the petitioner, who meets state and federal qualifications, will be contacted and informed about this attempt.

Q. [13.58] When Does the Violation of a Protective Order Become a Criminal Offense?

Violation of a protective order prosecuted criminally is a Class A misdemeanor. KRS 403.763. Alternatively, the offender may be held in contempt by the court. KRS 403.760. By statute, the violation must be prosecuted criminally **or** handled as a civil matter, since civil and criminal proceedings for the same violation of a protective order are "mutually exclusive." KRS 403.760(5). "Once either proceeding has been initiated the other shall not be undertaken regardless of the outcome of the original proceeding." KRS 403.760(5).

If a prosecutor or the court is acting upon the violation, nothing precludes the Commonwealth for also proceeding criminally against the respondent for any other criminal offenses committed in addition to violation of the order. Although the violation of a protective order is a criminal offense, the restrained party must have received notice of the order to be convicted of violating it. Without service, the restrained party might be successfully prosecuted for an underlying offense, such as battery, but not for violation of the EPO.

If the respondent commits what the statute defines as a "substantial violation" of an order, the court shall advise the petitioner that the court may require the respondent to wear a global positional monitoring system device and to pay the costs associated with operating that system (KRS 403.761).

R. [13.59] Why Are Protective Orders More Effective Than Restraining Orders?

Because a person who violates an emergency protective order or domestic violence order can be immediately arrested by the police when there is probable cause to believe a violation of the order has occurred, protective orders are more effective than civil restraining orders, which are enforceable only by motion be-

fore the civil court. This means that protective orders are realistically and reliably enforceable 24 hours a day.

S. [13.60] Do Police Officers Have Any Special Powers to Arrest Violators of Protective Orders?

Police officers have different arrest powers in domestic violence situations. Generally speaking, a police officer may only make warrantless arrests of offenders who commit misdemeanors in the officer's presence or offenders whom the officer has reasonable cause to believe have committed a felony crime. KRS 431.005. However, the officer may make a warrantless arrest when he believes an individual has intentionally or wantonly caused physical injury to a family member or member of an unmarried couple. KRS 403.715. If a protective order has been issued, the police may immediately arrest an offender whom they have probable cause to believe has violated the order. KRS 403.715(3). Finally, if an offender is released in accordance with KRS 431.064 (pre-trial release conditions for domestic violence and sexual assault perpetrators), the officer shall arrest the offender without a warrant if the officer has probable cause to believe the offender has violated the pre-trial release conditions and the officer verifies that the offender received notice of the conditions. KRS 431.005(4).

T. [13.61] What Special Duties Do Police Officers Have Toward Domestic Violence Victims?

Police officers have special duties with regard to domestic violence victims. By statute, when a police officer has reasonable cause to suspect that an act of domestic violence and abuse has occurred, the officer is required to "use all reasonable means to prevent further abuse." KRS 403.785. These duties include, but are not limited to, remaining at the location of the violence as long as the officer reasonably suspects there is danger to the safety of those present; assisting the victim in obtaining medical treatment and providing transportation for such; and advising the victim immediately of the rights available to her.

U. [13.62] What About Mediation and Protective Orders?

KRS 403.275(5) provides that courts may not require mediation, conciliation or counseling as a condition precedent to entry of a protective order. Some courts require parties to "discuss" whether an agreement can be reached before a domestic violence hearing will be held. This practice raises several concerns.

First, the practice may be in violation of the above statute, as the "discussion" may very well constitute mediation or conciliation for the purpose of the above statute. Second, an unrepresented and often frightened petitioner may be at a significant disadvantage if negotiating with an attorney for a respondent. An agreement may be reached that the parties will "stay away" from each other. The protective order entered will very likely fail to include a finding that a perpetrator

committed an act of domestic violence. **Remember, without this finding, any order entered is merely a civil restraining order and cannot be prosecuted criminally.** (Emphasis added.)

Notably, KRS 403.036 provides that a court may not require mediation between parties in divorce or child custody cases when a finding has been made pursuant to 403.720 that an act of domestic violence and abuse has occurred between them, except under certain circumstances. This prohibition exists because mediation is predicated upon the belief that two parties to a dispute can represent their own interests well enough to state their respective position and negotiate toward an equitable result. Domestic violence is based upon one party's attempts to control the other through physical violence or threats. When parties are involved in the cycle of abuse, these attempts to control have likely had some degree of success in the past. The mediation process is tainted by the perpetrator's attempts to control the survivor, and the survivor's fear of being a strong advocate for herself and her position.

The General Assembly recognized this dynamic when it included provisions in KRS 403.036 requiring that mediation may be ordered only when the victim specifically requests the mediation. Further, the court must conduct an additional inquiry resulting in a finding that the request is voluntary and not a result of coercion, and that the mediation will, despite the violence, be a realistic and viable alternative. The court is in this way given the burden of examining the dynamics between the parties in question before ordering any mediation. Although this examination may very well consist only of brief interviews of the parties, it should be seen as significant that the legislature has placed this burden upon the court.

V. [13.63] What About Mutual Protective Orders?

KRS 403.735(2) provides that courts may issue mutual protective orders only if both parties file separate petitions. Cross-petitions are not uncommon, as perpetrators often engage in a "race to the courthouse," or file a cross-petition as a response to receipt of an EPO. Without separate petitions and separate findings of domestic violence, such protective orders are not entitled to Full Faith and Credit.[3] Because of provisions with the Violence Against Women Act ("VAWA"), other states will not recognize protective orders that do not have a finding of domestic violence for each party. Furthermore, federal funding for programs to assist victims of domestic violence could be jeopardized if state laws do not require separate petitions and separate findings of domestic violence.[4]

Even in the absence of a cross-petition, some courts attempt to restrain the petitioner from contacting the respondent by entering a restraining order under authority of KRS 403.750(h), which permits the court to "enter other orders the court believes will be of assistance in eliminating future acts of domestic violence

[3] 18 USC § 2265.

[4] 42 USC § 3796hh.

and abuse." The attorney should attempt to convince the court that this might not be the best course of action. One problem with mutual orders is that they often make it difficult for law enforcement to recognize who is the perpetrator and who is the victim. The General Assembly recognized this potential problem when KRS 403.735(2) was adopted, which provides that, if mutual orders (pursuant to cross-petitions) are issued, "the court shall then provide orders, sufficiently specific to apprise any peace officer as to which party has violated the order if there is probable cause to believe a violation of the order has occurred."

Entry of a restraining order against a domestic violence survivor could send a wrong message to both parties that the survivor has done something wrong. If the parties are deeply involved in the cycle of domestic violence, the court's action in restraining the petitioner could reinforce the perpetrator's idea that he remains in control, and the survivor's idea that she has no control.

If a cross-order is properly entered pursuant to a cross-petition, the attorney will want to utilize KRS 403.735(2) to have very specific orders entered providing for when parties are to be in specific places. Each party would likely have no good reason to be at the workplace or home of the other. Very detailed provisions regarding exchange of children during visitation should be requested, and clients should be advised to follow those provisions diligently.

W. [13.64] Are Civil Protective Orders Accorded Full Faith and Credit?

The Violence Against Women Act provides for mandatory interstate enforcement of domestic violence protective orders: "**any** protection order...**shall** be accorded full faith and credit by the court of another State or Indian tribe." 18 USC § 2265. (Emphasis added.) In addition, the federal statute has no requirement that such orders be authenticated or otherwise registered or domesticated in the sister (*i.e.*, non-originating) state. However, while the protective order is entitled to full faith and credit, any support and custody orders therein do not receive full faith and credit. 18 USC § 2266. Rather, the only requirement listed in the federal legislation for mandatory, interstate enforcement of such orders is that the court have jurisdiction over the parties, subject matter jurisdiction, and the respondent must have reasonable notice and an opportunity to be heard. *Id.*

X. [13.65] What About Protective Orders for Victims of Stalking Who Do Not Qualify for Protective Orders Under KRS Chapter 403?

KRS 508.155 allows for a "restraining order" upon conviction for Stalking I or Stalking II. A verdict of guilty or a plea of guilty to these offenses (KRS 508.140 or KRS 508.150) shall operate as an application for a restraining order limiting the contact of the defendant and the victim who was stalked**,** unless the victim requests otherwise. The court must give the defendant notice of the right to request a hearing if the victim requests a restraining order. If the defendant waives this right, the court may issue the restraining order without a hearing. However, if

the defendant does not waive the right to the hearing, it will be heard in the court where the verdict or plea of guilty was entered.

A restraining order may grant the following specific relief:

(1) Restrain the defendant from entering the residence, property, school, or place of employment of the victim; or

(2) Restrain the defendant from making contact with the victim, either directly or through another person that initiates any communication likely to cause serious alarm, annoyance, intimidation, or harassment, including but not limited to personal, written, telephonic, or any other form of written or electronic communication or contact with the victim.

(3) While the order shall limit the defendant from communication with the victim in her school, place of business, or similar non-residential location, it shall be sufficiently limited not to interfere with the defendant's right to employment, education, or the right to do legitimate business with the employer of a stalking victim as long as the defendant does not have contact with the stalking victim.

(4) The provisions of this subsection shall not apply to a contact by an attorney regarding a legal matter.

(5) These orders are valid for a period of not more than ten years. The court determines the duration.

(6) These orders ban the defendant from the purchase or possession of a firearm if the defendant has been convicted of a felony or is otherwise ineligible to purchase or possess a firearm under federal law; otherwise, the restraining orders do not operate as a ban on possession or purchase of a gun.

(7) These orders are entered within 24 hours to the Law Information Network of Kentucky (LINK).

(8) A violation of a restraining order issued pursuant to KRS 508.155 shall be a Class A misdemeanor.

KRS 508.155.

Y. [13.66] What Should Attorneys Tell Their Clients About Protective Orders?

Attorneys must advise clients of the scope of the protective features of the orders in a very clear fashion. Because the domestic violence hearing is often quite traumatic for the survivor (and she may not understand the order), each

feature of the order should be explained in detail. For instance, clients often do not understand that orders providing for no contact mean exactly that. The client should be encouraged to file criminal warrants upon receiving superficially harmless love letters, flowers, or other tokens of affection because, if the abuser violates the court's order during the honeymoon phase of the domestic violence cycle and no repercussions follow, he is less likely to be deterred from committing even more harmful and dangerous acts in the future. Furthermore, the survivor needs to know to report *all* violations so that when more serious violations occur, she does not blame herself for not reporting sooner. Strictly complying with the order can help restore a sense of control to the survivor.

Z. [13.67] What Should Attorneys Advise Their Clients to Do to Increase the Ability to Prosecute Violators of Protective Orders?

Some violations are difficult to prove. Clients should be advised to keep a journal of suspected violations. Repeated telephone hang-ups, pages, slashed car tires, or drive-bys may not prompt swift action from enforcing courts when it is not clear that the respondent to the protective order is to blame. However, if one incident can be linked to the respondent, and is supported by client testimony and documentation of patterns of harassment indicating time, place, and manner, courts may be more responsive. Clients should be advised to notify neighbors and local law enforcement of the description of the respondent and the respondent's vehicle. Another technique would be to advise clients to carry a camera or to use a cellular telephone to photograph incidents wherein the respondent violates specific zones of no contact. Further, if the victim has a protective order that requires the respondent to remain five hundred feet away from her, she should measure the distance from her house to the road. When the respondent drives by the house, she can then be prepared to testify accurately about the violation.

VIII. [13.68] Appendices

A. [13.69] Appendix A: References

Amato, P., *The consequences of divorce for adults and children*, 62 Journal of Marriage and the Family 1269 (2000).

American Medical Association, *Diagnostic and treatment guidelines on domestic violence*, 1 Archives of Family Medicine 39 (1992).

Arbuckle, J., Olson, L., Howard, M., Brillman, J., Anctil, C., & Sklar, D., *Safe at home: Domestic violence and other homicides among women in New Mexico*, 27 Annals of Emergency Medicine 210 (1996).

Austin, W. G., *Assessing credibility in allegation of marital violence in the high-conflict child custody case,* 38 Family and Conciliation Court review 504 (2000).

Bachman, R., & Saltzman, L., *Violence against women: Estimates from the Redesigned Survey,* NCJ-154348, Washington, D.C.: Bureau of Justice Statistics, U.S. Department of Justice (1995).

Bancroft, L., & Silverman, J.G., The batterer as parent: Addressing the impact of domestic violence on family dynamics. Thousand Oaks, CA: Sage, (2002).

Belle, D., *Poverty and women's mental health,* 45 American Psychologist 385 (1990).

Bjerregaard, B., *An empirical study of stalking victimization*, 15(4) Violence and Victims 389 (2000).

Black, Michele C. et al., *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report.* Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, (2011).

Block, C.R., *The Chicago Women's Health Risk Study risk of serious injury or death in intimate violence: A collaborative research project*. Chicago IL: Illinois Criminal Justice Information Authority (2000).

Block, C.R., & Christakos, A., *Intimate partner homicide in Chicago over 29 years*, 41 Crime and Delinquency 496 (1995).

Bow, J. N., & Boxer, P., *Assessing allegations of domestic violence in child custody evaluations,* 18(12) Journal of Interpersonal Violence 1394 (2003).

Bradbury, T., & Lawrence, E., *Physical aggression and the longitudinal course of newlywed marriage.* In X. Arriaga & S. Oskamp (eds.), VIOLENCE IN INTIMATE RELATIONSHIPS, (pp. 181-202). Thousand Oaks, CA: Sage (1999).

Briere, J., & Jordan, C.E., *Violence against women: Outcome complexity and implications for treatment*, 19(12) JOURNAL OF INTERPERSONAL VIOLENCE 1252 (2004).

Browne, A., & Williams, K., *Gender, intimacy and lethal violence: Trends from 1967 through 1987*, 7 GENDER AND SOCIETY 78 (1993).

Bumpass, L., Sweet, J., & Castro Martin, T., *Changing patterns of remarriage,* 52 JOURNAL OF MARRIAGE AND THE FAMILY 747 (1990).

Campbell, J.C., *Prediction of homicide of and by battered women.* In Campbell, J.C. (ed.), ASSESSING DANGEROUSNESS: VIOLENCE BY SEXUAL OFFENDERS, BATTERERS, AND CHILD ABUSERS (pp. 96-113). Thousand Oaks, CA: Sage (1995).

Campbell, J.C. (1992) *"If I can't have you, no one can": Power and control in homicide of female partners.* In J. Radford & D.E.H. Russell (eds.), FEMICIDE: THE POLITICS OF WOMAN KILLING (pp. 99-113). New York: Twayne (1992).

Campbell, J., Miller, P., Cardwell, M., & Belknap, R., *Relationship status of battered women over time,* 9(2) JOURNAL OF FAMILY VIOLENCE 99 (1994).

Clarke, S., *Advance report of final divorce statistics, 1989 and 1990.* In MONTHLY VITAL STATISTICS REPORT (Vol. 43, No. 9). Hyattsville, MD: National Center for Health Statistics (1995).

Cummings, J.G.; Pepler, D.J., & Moore, T.E., *Behavior problems in children exposed to wife abuse: Gender differences*, 14 JOURNAL OF FAMILY VIOLENCE 133 (1999).

Crowell, N.A., & Burgess, A.W. (eds.), UNDERSTANDING VIOLENCE AGAINST WOMEN. Washington, D.C.: National Academy Press (1996). Cherlin, A., *Marriage, divorce, remarriage*, SOCIAL TRENDS IN THE UNITED STATES. Cambridge, MA: Harvard University Press (1992).

Cunradi, C.B., Caetano, R., & Schafer, J., *Socioeconomic Predictors of Intimate Partner Violence Among White, Black, and Hispanic Couples in the United States,* 17(4) JOURNAL OF FAMILY VIOLENCE 377 doi: 10.1023/a:1020374617328 (2002).

Dalton, C., *When paradigms collide: Protecting battered parents and their children in the family court system*, 37 FAMILY AND CONCILIATION COURT REVIEW 273 (1999).

Drye, J., *The silent victims of domestic violence: Children forgotten by the judicial system*, 34 GONZAGA L. REV. 229 (1999).

Dugan, L., Nagin, D.S., & Rosenfeld, R., *Explaining the decline in intimate partner homicide: The effects of changing domesticity, women's status, and domestic violence resources*, 3 Homicide Studies 187 (1999).

Ellis, D., & DeKeseredy, W.S., *Rethinking estrangement, interventions, and intimate femicide*, 3 Violence Against Women 590 (1997).

Ehrensaft, M.K., Cohen, P., Brown, J., Smailes, E., Chen, H., & Johnson, J.G., *Intergenerational transmission of partner violence: A 20-year prospective study,* 71 Journal of Consulting and Clinical Psychology 741 (2003).

Fagan, J., & Brown, A., *Violence between spouses and intimates: Physical aggression between women and men in intimate relationships.* In A.J. Reiss & J.A. Roth (eds.), Understanding and preventing violence, Vol. 3: Social influences (pp. 115-292). Washington, DC: National Academy Press (1994).

Felson, R. B., & Messner, S. F., *Disentangling the effects of gender and intimacy on victim precipitation in homicide*, 36 Criminology 405 (1998).

Follingstad, D.R., Brennan, A.F., Hause, E.S, Polek, D.S., & Rutledge, L.L., *Factors moderating physical and psychological symptoms of battered women,* 6 Journal of Family Violence, 81 (1991).

Follingstad, D.R., Rutledge, L.L., Berg, B.J., Hause, E.S., & Polek, D.S., *The role of emotional abuse in physically abusive relationships,* 5(2) Journal of Family Violence 107 (1990).

Gleason, W., *Mental disorders in battered women: An empirical study,* 8 Violence and Victims 53 (1993).

Gleason, W. J., *Children of battered women: Developmental delays and behavioral dysfunction*, 10 Violence and Victims 153 (1993).

Greenfield, L.A., Rand, M.R., Craven, D., Flaus, P.A., Perkins, C.A., Ringel, C., Warchol, G., Maston, C., & Fox, J.A., *Violence by intimates: Analysis of data on crimes by current or former spouses, boyfriends, and girlfriends* (NCJ –167237). Washington, D.C.: Department of Justice, Bureau of Justice Statistics (1998).

Greenfeld, L. A., & Snell, T. L., Bureau of Justice Statistics Bulletin: women offenders (NCJ 175688). Washington, D.C.: U.S. Department of Justice (1999).

Goldstein, Joshua R., *The leveling of divorce rates in the United States,* 36(3) Demography 409 (1999).

Holden, G., Geffner, R.A., & Jouriles, E.N. (eds.), *Children exposed to marital violence: Theory, research, and applied issues,* Washington, D.C.: American Psychological Association (1998).

Holden, K. & Smock, P., *The economic costs of marital disruption: Why do women bear a disproportionate cost?* 17 Annual Review of Sociology 51 (1991).

Holtzworth-Munroe, A., & Stuart, G.L., *Typologies of male batterers: Three subtypes and the differences among them,* 116(3) Psychological Bulletin 476 (1994).

Hotton, T., *Spousal violence after marital separation,* 21 Juristat 1 (2001).

Jaffe, P.G., & Geffner, R., *Child custody disputes and domestic violence: Critical issues for mental health, social service, and legal professionals*. In G.W. Holden, R. Geffner, & E.N. Jouriles, (eds.), Children exposed to marital violence: Theory, research, and applied issues (pp. 371-408). Washington, D.C.: American Psychological Association (1998).

Johnston, J.R. & Roseby V., In the name of the child: A developmental approach to understanding and helping children of conflicted and violent divorces, New York: Free Press (1997).

Jordan, C.E., Clark, J.J., Pritchard, A.J., & Charnigo, R. (in press), *Lethal and other serious assaults: disentangling gender and context,* Crime and Delinquency.

Jordan, C.E., Nietzel, M.T., Walker, R., & Logan, TK, *Intimate Partner Violence: A Clinical Training Guide for Mental Health Professionals,* New York: Springer Publishing Company, Inc. (2004).

Jordan, C.E., Logan, TK., Walker, R., & Nigoff, A., *Stalking: An examination of the criminal justice response*. 18(2) Journal of Interpersonal Violence 148 (2003).

Jordan, C.E., Gleason, M., Hosea, K., & Sexton, M. (eds.), *Civil remedies for women victimized by violence: A practice manual for attorneys.* (UK/CLE) (2003).

Jordan, C.E., Quinn, K., Jordan, B., & Daileader, C.R., *Stalking: Cultural, clinical and legal considerations*, 38(3) Brandeis Journal of Family Law 513 (2000).

Kellermann, A., & Heron, S., *Firearms and family violence*, 47 Emergency Medicine Statistics Reports 28 (1999).

Kellermann, A.L., & Mercy, J.A., *Men, women and murder: Gender-specific differences in rates of fatal violence and victimization*, 33 Journal of Trauma 1 (1992).

Kernic, M.A., Monary-Ernsdorff, D.J., Koepsell, J.K., & Holt, V.L., *Children in the crossfire: Child custody determination among couples with a history of intimate partner violence*, 11(8) Violence Against Women 991 (2005).

Koss, M.P., Goodman, L.A., Browne, A., Fitzgerald, L.F., Keita, G.P., & Russo, N.F., *Male violence against women at home, at work, and in the community.* Washington, D.C.: American Psychological Association (1994).

Kreider, R. & Fields, J., *Number, timing, and duration of marriages and divorces: 1996.* Current Population Reports, Census Bureau, pp. 70-80. U.S. Census Bureau, Washington, D.C. (2002).

Lemon, N.K., *The legal system's response to children exposed to domestic violence,* 9 Future Child 67 (1992).

Lennon, M., *Depression and self-esteem among women,* In M. Falik, & K. Collins (eds), Women's health: the Commonwealth Fund Survey, (pp. 207-236). Baltimore, MD: Johns Hopkins University Press (1996).

Liss, M., & Stahly, G.B., *Domestic Violence and child custody*. In Battering and family therapy: A feminist perspective (pp. 175-187). Newbury Park, CA: Sage (1993).

Logan, TK, Walker, R., Jordan, C.E., & Campbell, J., *An integrative review of separation in the context of victimization: Consequences and implications for women,* 5(2) Journal of Trauma, Violence and Abuse 143 (2004).

Logan, TK, Walker, R., Jordan, C.E., & Horvath, L., *Child custody evaluations and domestic violence: Case comparisons,* 17(6) Violence and Victims 719 (2002).

Kernic, M.A., Wolf, M.E., Holt, V.L., McKnight, B., Huebner, C.E., & Rivara, F.P., *Behavioral problems among children whose mothers are abused by an intimate partner,* 27 Child Abuse and Neglect 1231 (2003).

Koss, M.P., *The underdetection of rape: Methodological choices influence incidence estimates,* 48 Journal of Social Issues 61 (1992).

Kreider, R. & Fields, J., *Number, timing, and duration of marriages and divorces: 1996.* Current Population Reports, Census Bureau, pp. 70-80. U.S. Census Bureau, Washington, D.C. (2002)

Marks, N. & McLanahan, S., *Gender, family structure, and social support among parents*, 55 Journal of Marriage and the Family 481 (1993).

Marshall, L., *The psychological abuse of women: Six distinct clusters,* 11 Journal of Family Violence 369 (1996).

Marshall, L., *Effects of men's subtle and overt psychological abuse on low-income women,* 11 Violence and Victims 69 (1999).

McFarlane, J., Campbell, J., Wilt, S., Sachs, C., Ulrich, Y., & Xu, X., *Stalking and intimate partner femicide,* 3(4) Homicide Studies 300 (1999).

McMahon, M., & Pence, E., *Doing more harm than good? Some cautions on visitation centers.* In E. Peled, P.G. Jaffe, & J.L. Edleson (eds.), Ending the cycle of violence: Community responses to children of battered women (pp. 186 – 206). Thousand Oaks, CA: Sage Publications (1994).

McKeever, M. & Wolfinger, N., *Reexamining the economic costs of marital disruption for women,* 82 Social Science Quarterly 202 (2001).

Mechanic, M.B., Weaver, T.L, & Resick, P.A., *Intimate partner violence and stalking behavior: Exploration of patterns and correlations in a sample of acutely battered women,* 15 Violence and Victims 55 (2000).

Meyer, D., *Compliance with child support orders in paternity and divorce cases*. In R. Thompson & P. Amato (eds.), The postdivorce family: Children, parenting, and society, (pp. 127-157). Thousand Oaks, CA: Sage (1994).

Munson, M., & Sutton, P.D., *Births, marriages, divorces, and deaths: Provisional data for 2003,* 52(22) National Vital Statistics Reports 1 (2004).

National Council of Juvenile and Family Court Judges, *Family violence: A model state code.* Reno, NV: Author (1994).

National Center for State Courts, *Domestic Violence and child custody disputes: A resource handbook for judges and court managers.* Williamsburg, VA: National Center for Sate Courts (1997).

Newmark, L., Hartell, A., & Salem, P., *Domestic violence and empowerment in custody and visitation cases,* 33 Family and Conciliation Courts Review 30 (1995).

O'Leary, K., *Psychological abuse: A variable deserving critical attention in domestic violence,* 11 Violence and Victims 3 (1999).

Plichta, S.B., *Violence and abuse: Implications for women's health.* In M.M. Falik & K.S. Collins (eds.), Women's health: The Commonwealth Survey (pp. 237-272) Baltimore: Johns Hopkins University Press (1996).

Richardson, J., Coid, J., Petruckevitch, A., Chung, W., Moorey, S., & Feder, G., *Identifying domestic violence: Cross sectional study in primary care,* 324 British Medical Journal 1 (2002).

Riggs, D.S., Kilpatrick, D.G., & Resnick, H., *Long-term psychological distress associated with marital rape and aggravated assault: A comparison to other crime victims,* 7(4) Journal of Family Violence 283 (1992).

Roberts, A.R., & Kurst-Swanger, K., *Court responses to battered women and their children*. In A.R. Roberts (ed.), Handbook of Domestic Violence Intervention Strategies: Policies, Programs, and Legal Remedies (pp. 127 – 146). New York: Oxford University Press (2002).

Rodriguez, S.F., & Henderson, V.A., *Intimate homicide: Victim-offender relationships in female-perpetrated homicide,* 16 Deviant Behavior 45 (1995).

Sackett, L. & Saunders, D., *The impact of different forms of psychological abuse on battered women,* 11 Violence and Victims 105 (1999).

Saluter, A. & Lugaila, T., *Marital status and living arrangements: March 1996.* Current Population Reports, Census Bureau, pp. 20-496. U.S. Census Bureau, Washington, D.C. (1998).

Sev'er, A., *Recent or imminent separation and intimate violence against women,* 3 Violence Against Women 566 (1997).

Shalansky, C., Ericksen, J. & Henderson, A., *Abused women and child custody: The ongoing exposure to abusive ex-partners,* 29 Journal of Advanced Nursing 416 (1999).

Silvern, L., Karyl, J., Waelde, L., Hodges, W.F., Starek, J., Heidt, E., & Min, K., *Retrospective reports of parental partner abuse: Relationships to depression, trauma symptoms and self-esteem among college students,* 10 Journal of Family Violence 177 (1995).

Sorensen, E. & Zibman, C., *Child support offers some protection against poverty*, National Survey of America's Families, Series B, The Urban Institute (2000).

Stark, E., & Flitcraft, A., *Preventing gendered homicide.* In E. Stark & A. Flitcraft (eds.), Women at risk: Domestic violence and women's health (pp. 121 – 153). Thousand Oaks, CA: Sage (1996).

Starr, K., Hobart, M., & Fawcett, J., *Findings and recommendations from the Washington State Domestic Violence Fatality Review,* Washington State Coalition Against Domestic Violence 1-98 (2004).

Stets, J.E., & Straus, M.A., *Gender differences in reporting of marital violence and its medical and psychological consequences.* In M.A. Straus & R.J. Gelles (eds.), Physical violence in American families: Risk factors and adaptation to violence in 8,145 families. (pp. 151-165). New Brunswick, NJ: Transaction (1990).

Stout, K.D., *Intimate femicide: A study of men who have killed their mates,* 19 Journal of Offender Rehabilitation 81 (1993).

Straus, M.A., *Children as witness to marital violence: A risk factor for lifelong problems among a nationally representative sample of American men and women*. In D.F. Schwarz (ed.), CHILDREN AND VIOLENCE. Columbus, OH: Ross Laboratories (1992).

Straus, M.A., *The national family violence surveys*. In M.A. Straus & R.J. Gelles (eds.). PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATION TO VIOLENCE IN 8,145 FAMILIES. (pp. 3-16). New Brunswick, NJ: Transaction (1990).

Straus, M.A., *Assaults by wives on husbands: Implications for primary prevention of marital violence*. Debate at the annual meeting of the American Society of Criminology, Reno, NV (1989).

Suh, E., & Abel, E., *The impact of spousal violence on the children of the abused*, 4 JOURNAL OF INDEPENDENT SOCIAL WORK 27 (1990).

Tjaden, P. & Thoennes, N., *Stalking in America: Findings from the national violence against women survey.* NCJ-1669592. National Institute of Justice, Centers for Disease Control and Prevention. Washington, D.C.: Bureau of Justice Statistics, U.S. Department of Justice (1998).

Tjaden, P., & Thoennes, N., *Prevalence and consequences of male-to-female and female-to-male intimate partner violence as measured by the National Violence Against Women Survey,* 6 VIOLENCE AGAINST WOMEN 142(2000).

Wildin, S.R., Williamson, W.D., & Wilson, G.S., *Children of battered women: Developmental and learning profiles*, 30 CLINICAL PEDIATRICS 299 (1991).

Wilson, M., Daly, M., & Daniele, A., *Familicide: The killing of spouse and children,* 21 AGGRESSIVE BEHAVIOR 275 (1995).

Wilt, S. & Olson, S*., Prevalence of domestic violence in the United States,* 51 JOURNAL OF THE AMERICAN MEDICAL WOMEN'S ASSOCIATION 77 (1996).

Zorza, J., *How abused women can use the law to help protect their children*. In E. Peled, P. Jaffe, & J. Edleson (eds.), ENDING THE CYCLE OF VIOLENCE: COMMUNITY RESPONSE TO CHILDREN OF BATTERED WOMEN, (pp. 147-169). Thousand Oaks, CA: Sage (1995).

B. [13.70] Appendix B: Personal Safety Plan

DOMESTIC VIOLENCE PERSONAL SAFETY PLAN

1. [13.71] Your Safety During an Explosive Incident

- ❑ If an argument seems unavoidable, try to have it in a room where you have access to an exit. Try to stay away from the bathroom, kitchen, bedroom or where weapons may be available.
- ❑ Practice how to safely get out of your home. Identify which doors, windows, elevator or stairwell would be best.
- ❑ In order to leave quickly, have a packed bag ready and keep it at a relative's or friend's home.
- ❑ Identify one or more neighbors you can tell about the violence and ask that they call the police if they hear a disturbance coming from your home.
- ❑ Devise a codeword to use with your children, family, friends and neighbors when you need the police.
- ❑ Decide and plan for where you will go if you have to leave home (even if you don't think you will need to).
- ❑ Use your instincts and judgment. If the situation is very dangerous, consider giving the abuser what he wants to calm him down. You have the right to protect yourself until you are out of danger.

2. [13.72] Your Safety with a Protective Order

- ❑ If you or your children have been threatened or assaulted you can request a protective order from the _____ District Court Clerk, ( )_____-_____. You may request a protective order 24 hours a day, 7 days a week. After business hours you will need to go to the _____ Police Department to seek one. Among other things, you may obtain custody, an order for no contact, and/or an order for the batterer to vacate the home.
- ❑ Keep your protective order with you at all times. Give a copy to a relative or a friend.
- ❑ Call the police if your partner breaks the protective order.
- ❑ Inform employees, family, friends, neighbors and your physician that you have a protective order in effect.

3. [13.73] Your Safety When Preparing to Leave

- ❑ Open a savings account and/or credit card in your own name to start to establish or increase your independence. Think of other ways in which you can increase your independence.
- ❑ Get your own post office box. You can privately receive checks and letters to begin your independence.
- ❑ Leave money, an extra set of keys, copies of important documents, extra medicine and clothes with someone you trust or in a safe place so you can leave quickly.
- ❑ Determine who would be able to let you stay with them or lend you some money.
- ❑ Keep the shelter or hotline phone numbers close at hand at all times for emergency phone calls or memorize the numbers.
- ❑ Review your safety plan as often as possible to plan the safest way to leave the batterer.
- ❑ REMEMBER, *leaving your batterer is the most dangerous time.*

4. [13.74] Your Safety in Your Own Home

- ❑ Change the lock on your doors as soon as possible. Buy additional locks and safety devises to secure your windows.
- ❑ Discuss a safety plan with your children for those times when you are not with them.
- ❑ Inform your children's school and day care about who has permission to pick them up.
- ❑ Inform neighbors and landlord that your partner no longer lives with you and they should call the police if they see him near your home.

5. [13.75] Your Safety on the Job and in Public

- ❑ Decide who at work you will inform of your situation. This should include office or building security. Provide a picture of your batterer, if possible.
- ❑ Arrange to have an answering machine, caller ID, or a trusted friend or relative to screen your calls, if possible.
- ❑ Devise a safety plan for when you leave work. Have someone escort you to your car or bus. Vary your route when you go home, if possible. Think about what you

would do if something happened while going home (*i.e.,* in your car, on the bus, taxi, etc.)

6. [13.76] A Checklist: What You Need to Take When You Leave

a. [13.77] Legal Papers

- ❑ YOUR PROTECTIVE ORDER – keep it with you at all times
- ❑ Lease, rental agreement, house deed
- ❑ Car title, registration and insurance papers
- ❑ Medical records for you and your children
- ❑ School records
- ❑ Work permits/Green card/VISA
- ❑ Passports
- ❑ Divorce/custody papers; marriage license

b. [13.78] Other

- ❑ House and car keys
- ❑ Medications
- ❑ Jewelry
- ❑ Address book
- ❑ Pictures of you, your children and your abuser
- ❑ Children's small toys
- ❑ Toiletries/diapers
- ❑ Change of clothes for you and your children

c. [13.79] Identification

- ❑ Driver's license
- ❑ Children's birth certificates
- ❑ Your birth certificate
- ❑ Social Security Cards
- ❑ Welfare identification

d. [13.80] Financial

- ❑ Money and/or credit cards
- ❑ Bank books
- ❑ Check book

Emergency Resources in _____County

City or County Police Department _____

Sheriff's Department _____

Kentucky State Police 1(800) 222-5555

Other Community Resources

_____ **Mental Health**

_____ **Pre-trial Services**

_____ **Detention Center**

National Hotline 1-800-656-HOPE

Local Center: _____ **Rape Crisis Center**

National Hotline 1-800-799-SAFE

Local Shelter: _____ **Domestic Violence Crisis Line**

_____ **Department for Community Based Services**

_____ **Department for Social Insurance**

_____ **Commonwealth Attorney's Office**

_____ **County Attorney's Office**

C. [13.81] Appendix C: Support Services for Victims of Intimate Partner Violence

1. [13.82] National Hotlines

National Domestic Violence Hotline: 1-800-799-SAFE

National Sexual Assault Hotline: 1-800-656-HOPE

2. [13.83] Direct Services for Kentucky Victims and Survivors

a. [13.84] Domestic Violence Programs

There are 17 Domestic Violence Programs in Kentucky. Recent statistics show that these programs shelter nearly 5,000 survivors of domestic violence and their dependent children each year, and provide non-residential services to an additional 22,000 victims. The nearly 30,000 victims who seek help each year from these programs receive services which include legal/court advocacy, case management, safety planning, support groups, individual counseling, housing assistance, job search assistance, and children's groups. For more information on these programs, visit the website of the Kentucky Domestic Violence Association at: <http://www.kdva.org>.

b. [13.85] Rape Crisis Centers

There are 13 Rape Crisis Centers in Kentucky, which served over 8,000 victims/survivors of sexual assault in 2002. Services include hospital advocacy, legal/court advocacy, case management, individual counseling and therapy, support groups, professional referrals, and assistance with victim compensation claims. These services are available regardless of whether the sexual violence occurred recently or long ago, and are provided not only to survivors, but also to their family, friends, partners, or others close to them. For more information on these Centers and their services, visit the website of the Kentucky Association of Sexual Assault Programs at: <http://www.kasap.org>.

c. [13.86] Court Advocates

Each of the Domestic Violence Programs and Rape Crisis Centers has at least one court/legal advocate available for those victims who are receiving their services. The court advocate helps the victim navigate the legal system in the event she is called upon to participate in the prosecution of the offender. These advocates have received specialized training in the legal process and are familiar with the legal personnel (prosecutors, judges, clerks) in their communities. They are vital to the well being of the victim as she takes part in court proceedings, often as a witness who is unrepresented by counsel, unfamiliar with the legal rights she may exercise, and inexperienced at testifying in court.

Significantly, these advocates are permitted by statute to assist the victim. KRS 421.575 provides that "[i]n all court proceedings, a victim advocate, upon request of the victim, shall be allowed to accompany the victim during the proceedings to provide moral and emotional support. The victim advocate shall be allowed to confer orally and in writing with the victim in a reasonable manner." The statute goes on to admonish the court advocate that she cannot give legal advice or counsel.

In civil litigation, the court advocate can be very important to the attorney representing a victim of domestic violence or sexual assault. The advocate will be familiar with her client's situation, and any safety issues there may be, or concerns surrounding protective orders that may have been issued or for which the victim may want to apply. The advocate's knowledge of the victim's history, her close relationship with the victim, her familiarity with the legal process, and her understanding of the dynamics of domestic violence and sexual assault will likely be invaluable to the attorney. Hopefully, when the victim so desires, these two professionals can work together to provide the very best of legal and support services.

d. [13.87] Children's Advocacy Centers

There are 13 Children's Advocacy Centers in Kentucky which offer comprehensive services to child abuse victims and their non-offending family members. These services are provided at each Center by a team of professionals comprised of a law enforcement investigator, child protection worker, prosecutor, mental health professional, victim advocate, and physician. Services offered include forensic interviewing, medical examinations, mental health services, and court-related advocacy services. For more information on the Centers, visit the website of the Governor's Office of Child Abuse and Domestic Violence Services at: <http://www.gocadvs.ky.gov>.

e. [13.88] Prosecutor-Based Victim Advocates

If the offender has been criminally prosecuted, then the client may have already received services from a prosecutor-based Victim Advocate. These advocates, based in the local Commonwealth or County Attorney's office, act as liaisons between victims of violent crime and the criminal justice system. Their services may include crisis intervention, assistance with protective orders and criminal complaints, court-related services, referrals to supportive community services, assistance in filing for victim compensation benefits, and safety planning. For more information on Kentucky's Victims' Advocacy program, visit the website at: <http://www.kyattorneygeneral.com/crime.htm>.

14

GUARDIANS *AD LITEM* AND WARNING ORDERS

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I. [14.1] Introduction

According to KRS 26A.140(1)(a), courts may implement measures to accommodate the special needs of children, including a trained guardian *ad litem* ("GAL") or special advocates to serve in circuit and district courts to offer consistency and support to the child and to represent the child's interests when necessary. Therefore, guardians *ad litem* may be appointed for various types of cases to protect a child's welfare. A GAL may be appointed by the court, upon motion of the plaintiff, or upon the motion of any friend of the defendant. KRS 387.305(2). However, neither the plaintiff nor his attorney may serve as the GAL or propose the name of a proposed GAL. *Id.* Furthermore, a GAL is entitled to a reasonable fee for his or her services. KRS 387.305(3). When the court appoints an attorney, it should make clear to all parties, both orally and in writing, how the GAL's fees will be determined, including the hourly rate or other computation system used, and the fact that both in-court and out-of-court work by he GAL must be paid. American Bar Association, *Standards of Practice for Lawyers Representing Children In Custody Cases,* 37 FAM. L.Q. 131, 158 (2003).

II. [14.2] Qualifications of the Guardian *Ad Litem*

A guardian *ad litem* must be a regular, practicing attorney of the court. KRS 387.305(2). Therefore, as an attorney, a GAL must abide by the professional standard of conduct required of attorneys. These standards include providing competent representation, which requires legal knowledge, skill, thoroughness, and preparation. SCR 3.130(1.1). The attorney must also abide by a client's decision concerning the objectives of representation and must also consult with the client as to the means by which these objectives will be pursued. SCR 3.130(1.2)(a). A GAL must act with reasonable diligence and promptness in representing a client, as well as keep a client reasonably informed and promptly comply with reasonable requests for information. SCR 3.130(1.3); SCR 3.130(1.4)(a). Moreover, a GAL should explain a matter to the extent reasonably necessary to permit the client to make informed decisions. SCR 3.130(1.4)(b).

III. [14.3] Duties of the Guardian *Ad Litem*

The GAL has a duty to attend properly to the preparation of the client's case. KRS 387.305(3). Likewise, when a GAL is appointed by the court, he or she has a duty to advocate for the child's best interest in the proceeding. KRS 387.305(5). Under *Black v. Wiedeman*, 254 S.W.2d 344, 346 (Ky. Ct. App. 1953), a GAL is obligated to stand in the infant's place and determine what his rights are

and what his defense and interests demand. Moreover, the GAL fully represents the infant and is both a fiduciary and lawyer of the infant, and in a special sense, the representative of the court to protect the minor. *Id.* The GAL does not promote the child's interest by suing, but instead defends the minor's interests in a lawsuit. *Id.*

Some practical responsibilities of a GAL to fulfill these duties, as recommended by the Commission on Guardians *ad litem*, include the following:

- A GAL should first determine the facts of the case by interviewing all relevant parties. This would include the child, the service worker with the Cabinet for Families and Children, family members, and therapists. Facts of the case may also be determined by reviewing all reports and inspecting the home or place of care.
- A GAL should meet with the child to assess adequately the child's needs and wishes with regard to the representation and issues in the case. Moreover, meeting with the child enables the GAL to explain the proceedings to the child in a manner the child can understand.
- A GAL should appear at all hearings concerning the child.
- A GAL should make recommendations for clear and specific orders for evaluation, services, and treatment orders for the child and the child's family.
- A GAL should file all necessary pleadings and papers, and maintain a complete file with notes instead of relying solely on the court files.
- A GAL should monitor the implementation of court orders and determine whether the services ordered for the child or child's family are being provided in a timely manner. If the GAL believes the services are not accomplishing their purpose, he or she should file a motion for appropriate relief.
- A GAL must continue to represent the child as long as the appointing authority retains jurisdiction over the child.
- Consistent with the Rules of Professional Responsibility, a GAL should identify the common interests among the parties and, if possible, promote a cooperative resolution to the matter.
- A GAL should consult with an additional person who is knowledgeable of the child and/or the child's family to determine future placements that would be in the best interest of the child and any other necessary services the child might need.

- A GAL should submit an oral or written report to the court as ordered.
- A GAL should advocate for the child's best interests. However, when the child disagrees with the attorney's assessment of the case, the GAL has a duty to advise the court of this disagreement.

Kentucky Court of Justice, Recommendations of the Commission of Guardian *ad litem*, *Responsibilities of a Guardian ad litem*, 1 (1999), available at: <courts.ky.gov/stateprograms/gal>.

IV. [14.4] Ethical Considerations for the Guardian *Ad Litem*

While the Code of Professional Ethics guides a GAL in his or her representation of a child, there are some duties a GAL must fulfill that directly conflict with the Code. One such conflict involves the recommendations that a GAL is required to make to the court. These recommendations may or may not be based on evidence that is available to the court. Also, a GAL will often contact different parties who are directly connected to the child and conduct interviews without the presence of the party's lawyer. Moreover, the GAL may divulge information that the child has requested to remain confidential.

Regarding confidentiality, under Supreme Court Rule 3.130(1.6), a GAL must comply with the rules of professional conduct governing client confidentiality. Moreover, a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation. However, there are exceptions that apply to this rule for the attorney serving as a GAL. First, a lawyer must explain to the child in detail and in a manner that is understandable to the child whether and to what extent the child's communications will be kept in confidence. Second, the GAL may reveal information to the extent that the lawyer reasonably believes necessary, or to prevent a client from committing a criminal act. A GAL may also reveal information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and a client; to establish a defense to a criminal charge or civil claim against the lawyer based on client conduct; or to respond to allegations in a proceeding concerning the representation of the client. A GAL may also reveal information when necessary to comply with other laws or a court order. SCR 3.130.

There is also the potential for conflict when the GAL makes decisions on behalf of the child. According to traditional legal roles, lawyers do not make decisions on behalf of their clients. Consequently, a GAL does not advocate for the child's express wishes, but instead determines what is in the child's best interest. Therefore, GALs must make decisions with caution and in a contextual, self-aware,

deliberate, and principled manner.[1] Moreover, to determine a child's capability in directing the representation, the GAL should seek guidance from appropriate professionals and concerned parties, and participate in training that includes familiarity with child development and basic skills involved with interviewing children. *Id.* A GAL should also become educated about the roles culture, race, ethnicity, and class may play in the choices that a child might make so as to eliminate any bias that might influence the GAL. *Id.* In order to assess the child's capacity to direct his or her representation, a GAL should look to the child's developmental stage, cognitive ability, socialization, emotional development, expression of relevant position, ability to communicate with the lawyer, ability to articulate reasons, individual decision-making process, conformity, ability to understand consequences, ability to understand risk of harm and ability to understand the finality of a decision. *Id.*

Overall, a GAL is bound to provide competent representation to the client. Such representation requires legal knowledge, skill, thoroughness and preparation. To be competent in a particular matter, the attorney must inquire into and analyze the factual and legal elements of the problem, use methods and procedures that meet the standards of competent practitioners, and provide adequate representation.

V. [14.5] Appointment of the Guardian *Ad Litem*

A GAL will be appointed for various types of actions before the court that will be discussed in more detail in subsequent sections of this chapter. A GAL may be appointed in cases of custody, visitation, or adoptions. Likewise, in any involuntary action for termination of parental rights, a GAL will be appointed to represent the best interests of any child who is directly connected to the action, and the child will be made a party to the action. KRS 625.080. These types of actions are heard in circuit court. Additionally, GALs are appointed for dependency, neglect and abuse actions which are heard in district court. Finally, in the case of child victims, statutory law requires a trained guardian *ad litem* to be appointed. KRS 26A.140(a).

A sample GAL report can be found as Appendix A at Section [14.21] of this chapter.

[1] Excerpts taken from "Ethical Obligations in Representing Children," developed at the "Conference on the Ethical Issues in the Legal Representation of Children" hosted by Fordham University School of Law on December 3, 1995.

VI. [14.6] Special Considerations for a Guardian *Ad Litem*

A. [14.7] Low-Income Families

GALs must consider whether they are representing a low-income family. Attorneys can often take for granted the benefits of sick time, vacation, health care, choices in childcare, reliable transportation, and flexibility to meet life's demands. *Best Practices*.[2] Low-income families are often not fortunate enough to enjoy these luxuries. *Id.* Therefore, as a GAL, it is important to keep in mind certain government benefits that may help a family keep their home, allow a parent to care for a disabled or special needs child, or even allow a single parent to have access to daycare so that he or she may return to work. *Id.* If a GAL is aware of available community resources, communicating this knowledge to the parent will help in assisting him or her to meet the needs of the children better. *Id.* The following is a list of possible services a GAL can help a low-income family obtain:

- State-funded health insurance for children (if they are eligible)
- Government assistance programs, such as:
  - TANF/ASPIRE
  - Food Stamps
  - Earned Income Tax Credit
  - General Assistance
  - Fuel Assistance
  - Subsidized Housing
  - SSI/SSDI
- Parenting education courses;
- Domestic violence shelter information;
- Mental health services; and
- Educational/tutoring assistance.

Id.

It is important to keep in mind that when dealing with low-income families or those living in poverty, a family's income level has nothing to do with the quality of parenting or best interests of the child. *Id.* While there are risks created by poverty that a GAL must be aware of, these risks are not dispositive of the case or the recommendations that the GAL should make to the court. *Id.* Similarly, the fact that one parent makes more money than the other parent should not be a

[2] Adapted from "The Volunteer Lawyers Project: Best Practices Manual for Guardians *ad litem*." Because the citation to this particular source is so long, but is cited extensively thoughout Sections [14.6]-[14.9], use of *Id.* within the text refers to the source cited in this footnote.

deciding factor. *Id.* Instead, when there is a disparity of income between parents, it is often to the children's long-term benefit for the GAL to apply the best-interest standard found in KRS 403.270(2) after the parents have been connected with, and given the opportunity to participate in, needed services that are intended to benefit both the parent and the child. *Id.*

B. [14.8] Homelessness

Another factor for the GAL to consider is how to deal with a client who is homeless. According to federal law under the McKinney-Vento Act, a homeless student is one who is lacking a fixed, regular and adequate residence. 42 USC § 11431 (2005). This means that a student who lives in a homeless shelter, car or motel is considered homeless. *Id.* Homelessness also technically includes a student who is doubled up with family or friends who are also homeless. *Id.* Therefore, children who temporarily move in with relatives or a parent's friend are considered homeless. *Id.* Also, students living in a motel, hotel, trailer park or campground because they do not have another place to stay are considered homeless. *Id.* In cases of domestic violence, a child will be protected under McKinney-Vento if he or she is living with a parent in a domestic violence shelter or transitional housing. *Id.*

In terms of ensuring that a student who is homeless receives a proper education, a GAL should be familiar with the requirements under the McKinney-Vento Act. According to this Act, a homeless student has the choice of attending his or her "school of origin," which is the school the child attended prior to becoming homeless. The student may also attend a "school of placement," which is where he or she is currently enrolled. *Id.* Likewise, under this federal law, transportation should be provided to the student no matter where he or she decides to go to school. *Id.* Moreover, a child must be immediately enrolled in the chosen school even if proof of residency or his or her immunization records are not currently available. *Id.* The overriding goal of determining which school the student will attend is the choice that promotes the best interest of the child and a parent's preference for the school will be a key factor to consider when making this determination. *Id.*

C. [14.9] Culture

Another consideration for a GAL is the culture of the client. A GAL working with someone from another culture must be sensitive to the differences in cultural norms and expectations. *Id.* Such cultural differences would include family structure, rules, roles, customs, boundaries, communication styles, problem-solving approaches, and values based on cultural norms and/or accepted community standards. *Id.* Cultural norms may be defined as behavioral expectations that are based on cultural beliefs and practices. On the other hand, community standards are the shared values and expectations of a group of people living in geographical proximity. *Id.* One important cultural difference may be the role of extended families in raising children because, in some cultures, the extended family may be expected to play an extensive role in child-rearing. *Id.*

Some practices a GAL can incorporate into his or her dealings with multicultural clients include:

- Assume nothing about your client.
- Ask questions about specific behaviors, values, attitudes and perspectives.
- Pay attention to any signs of spirituality or religion and respect the family's beliefs.
- Do not insist on eye-to-eye contact because many cultures consider eye contact to be a sign of disrespect.
- If the family does not speak English, find an interpreter who is not related to any party.
- Set specific goals for achieving cultural awareness with respect to the various cultural groups your agency or practice may serve.
- Acknowledge the legacy and presence of cultural and racial bigotry and prejudice in the United States.
- Appreciate the difficulties and problems individuals and families encounter while trying to live and thrive in a cultural setting that is both different from their indigenous culture and antagonistic toward their specific cultural orientation.
- Explain the need for any and all information requested and, when possible, delay asking the most personal questions until the family has had time to understand why you are requesting this type of information.
- Communicate respect for your client by transmitting positive regard, encouragement and sincere interest.
- Avoid moralistic, value-laden, evaluative statements, and instead allow someone to fully share and explain themselves and their situation.
- Attempt to place yourself in the other person's life space and to understand how he or she feels about the matter under consideration.
- Be able to react to new, different and unpredictable situations with greater ease because too much discomfort can lead to frustration and hostility.
- Keep communication lines open despite ambiguity and possible misunderstanding.

Id.

D. [14.10] Abuse

Abuse is yet another consideration the GAL may have to cope with for one of his or her clients. Abuse can take on many different forms, including physical abuse, physical neglect, sexual abuse or emotional maltreatment. There are various physical and behavioral indicators for each of these forms of abuse that a GAL should be aware of to determine whether child abuse is occurring. *Best Practices* and *Guidelines for Schools*.[3] These include:

Physical Abuse

1. Physical Indicators
    - Unexplained bruises, welts, human bite marks, and bald spots in various stages of healing
    - Unexplained burns, especially cigarette burns or immersion burns
    - Unexplained fractures, lacerations, or abrasions
2. Behavioral Indicators
    - Self-destructive
    - Withdrawn and aggressive; behavioral extremes
    - Arrives at school early and stays late as if afraid to go home
    - Chronically runs away
    - Wears clothing inappropriate to weather to hide injuries

Physical Neglect

1. Physical Indicators
    - Abandonment
    - Unattended medical needs
    - Consistent lack of supervision
    - Consistent hunger, inappropriate dress, poor hygiene
    - Lice, distended stomach, emaciated
2. Behavioral Indicators
    - Regularly displays fatigue or listlessness, falls asleep during activities

[3] From *The Volunteer Lawyers Project: Best Practices Manual for Guardians ad litem*, and adapted from the American Association for Protecting Children, *Guidelines for Schools*, America Humane Association, Denver, CO, no date; Maine Child Welfare Training Institute (1993, University of Southern Maine). Because the citation to this particular source is so long, but is cited extensively thoughout Section [14.10], use of *Id.* within the text refers to the source cited in this footnote.

- Steals food, begs from peers
- Reports that no caretaker is at home
- Frequently absent or tardy
- Self-destructive
- Dropout

Sexual Abuse

1. Physical Indicators
   - Torn, stained, or bloody underclothing
   - Pain or itching in genital area
   - Difficulty walking or sitting
   - Bruises or bleeding in external genitalia
   - Venereal disease
   - Frequent urinary tract or yeast infections
   - Often, though, there may be no physical indicators
2. Behavioral Indicators
   - Withdrawal, chronic depression
   - Excessive seductiveness
   - Overly concerned for siblings
   - Poor self-esteem, self-devaluation, lack of confidence
   - Massive weight change
   - Eating disorders
   - Suicide attempts
   - Hysteria, lack of emotional control
   - Sudden difficulties in school
   - Chronically runs away
   - Inappropriate sex play or premature understanding of sex
   - Threatened by physical contact, closeness

Emotional Maltreatment

1. Physical Indicators
   - Speech disorders
   - Delayed physical development
   - Substance abuse
   - Ulcers, asthma, severe allergies

2. Behavioral Indicators
    - Habit disorders (sucking, rocking)
    - Antisocial, destructive
    - Neurotic traits (sleep disorders, inhibition of play)
    - Passive and aggressive; behavioral extremes
    - Delinquent behavior
    - Developmentally delayed

Id.

It is critical for GALs to be aware of possible abuse that is occurring in order to make a decision that is in the best interest of the child they are representing. Often, children may not be able to communicate that they have suffered from abuse because of their age, fear of getting a parent in trouble, or even their own inability to understand that they have been abused. Therefore, it is important for GALs to know these indicators of abuse so that they may make proper recommendations for the placement of the client, as well as obtain any services the client may need.

Beyond knowing the indicators that a child is being abused, it is important for a GAL to also be aware of factors indicating a parent is abusing a child. *Best Practices* and Bavolek.[4] With these factors, a GAL can perform a parental assessment of a parent's attitude, practices, as well as his or her physical, mental and emotional stability to determine if there is a legitimate fear that abuse is occurring. *Id.* Such factors include:

- Inappropriate parental expectations of the child because the parent does not have a good understanding of the child's development, including the child's physical needs, social needs, or age-appropriate behavior.
- Parental lack of empathic awareness of the child's needs because the parent will not try to view the world from the vantage point of the child or is unaware of the emotional needs of child.
- Whether the parent or caregiver holds a belief in the value of physical punishment and have few other skills for coping with the child.
- Whether the parent expects the child to meet his or her own needs.
- Whether there are physical conditions or disabilities that may prevent effective functioning or providing for the child's basic needs.

[4] From *The Volunteer Lawyers Project: Best Practices Manual for Guardians ad litem*. Sources: Bavolek, 1991 *Developing Nurturing Parenting* American Humane Association, 1991 *Helping in Child Protective* Services; Maine Child Welfare Training Institute (1993, University of Southern Maine).

- Whether the caregiver's behavior suggests that he or she is out of touch with reality.
- Whether the parent shows an inability to control his or her impulses and anger.
- Whether there are conflicts between the parents that tend to be blamed on the children or are taken out on the children.
- Whether the parent displays behavior that indicates an expectation of the child to provide him or her with emotional support beyond the child's capabilities.
- Whether the parent exhibits lack of remorse, guilt or concern over the child's injuries.
- Whether the parents are critical of all child behavior.

Id.

Again, by being aware of these factors, a GAL will be better informed to make an accurate recommendation of what is in the best interest of the child.

E. [14.11] Domestic Violence

Another consideration that is similar to child abuse is domestic violence occurring within the home. There are long-term negative impacts on children as a result of experiencing domestic violence, and therefore a GAL must be aware of how to deal with domestic violence situations. According to KRS 403.270(2)(f), if domestic violence or abuse is alleged, the court must determine the extent to which the domestic violence and abuse have affected the child and the child's relationship with both parents. Domestic violence affects the way a family is able to break up and reform. *Best Practices*.[5] Therefore, in cases of divorce or separation, victims of domestic violence will be emotionally, economically and physically unsafe because the abuser's primary focus is to maintain control. *Id.* In many instances, it is only the most horrible cases of domestic violence in which the safety of the victim and child are taken seriously. *Id.* This means that in "less serious" cases, the domestic violence is ignored, and the child(ren) and victim are put at risk because the abuse is allowed to continue. *Id.* Moreover, the problems are not addressed, and nothing is resolved. In fact, some prosecutors believe that abuse to wives or mothers is irrelevant to a male's parenting abilities, believing that men who are violent to their partners may still be good fathers. *Id.*

It is important for a GAL to be aware of the effects of domestic violence on the victim. Some of the effects include:

- Victims may give up control of what happens in the divorce because of the level of anger they see in the abuser.

[5] Adapted from *The Volunteer Lawyers Project: Best Practices Manual for Guardians ad litem*. *See also,* FN 1, *supra*.

- Victims may agree to reconcile with the abuser because it seems to be the safest choice.
- Victims are usually not in a good place to compromise because they have a heightened sense of justice and anger for what has happened to them.
- Victims may feel as if they cannot let anything slide because of the notion that they did not do enough to protect their children in the past. They may feel as if letting their children go for visitation means abandoning them to emotional and physical suffering, and therefore they may be unwilling to agree to what seems like reasonable child-parent contact.
- Domestic violence affects the victim's parenting skills and relationship with his or her children by either over- or under-disciplining them.

Id.

One thing a GAL should watch for is the way an abuser will try to maintain control. *Id.* There are some things a GAL should pay attention to when an abuser feels as if he or she is losing control, including:

- Abusers will want to remain in close contact with the victim to maintain their control.
- Abusers may use their children to maintain control by having them act as spies, by not showing up for visits if they know the other parent has to work, or disrupting or changing the visitation schedule.
- Abusers will bond with attorneys, guardians, and judges to convince them that the victim is unreasonable and crazy.
- Abusers will control the victim by controlling family resources.
- Abusers may give hints to the victim that the children are not safe alone with him.
- Abusers will work to make the children take sides.
- Abusers maintain control by never letting the family case end.

Id.

The effects on children who witness domestic violence are dramatic. Children who witness abuse frequently evidence behavioral, somatic and emotional problems similar to those experienced by physically abused children. *Id.* Pre-school children often become intensely fearful and experience insomnia, sleep walking, nightmares, bed wetting, headaches, stomachaches, ulcers and asthma. *Id.* Older boys tend to become aggressive, fighting with schoolmates and siblings, and having

temper tantrums. *Id.* Girls are likely to become passive, clinging and withdrawn and suffer from low self-esteem. *Id.* Daughters are also more likely than sons to become victims of a battering spouse. *Id.*

Therefore, if a GAL believes that domestic violence is occurring in the home, there are certain recommendations he or she may make to the court to protect the emotional and physical safety of the child. These include structured or explicit visitation schedules and expectations or limited contact between parents, including no contact when the children are present. *Id.* To ensure little contact between parents, a GAL may recommend neutral drop-off and pick-up locations or limit the number of transfers. *Id.* A GAL may also recommend a structured schedule for phone calls so that one parent may not use the phone to harass the victim. *Id.* Additionally, a GAL could also recommend the use of a traveling notebook instead of direct communication. *Id.* Recommendations would also include allocated parental rights, as well as parenting education that is appropriate and ongoing. *Id.* A GAL may create plans for contact that errs on the side of child safety which may be expanded once the abuser follows through with safe behavior and counseling. *Id.* Because ambiguity may allow for conflict, recommendations should be as clear and specific as possible. *Id.*

VII. [14.12] Functions of a Guardian *Ad Litem*

Guardians *ad litem* take on many different functions because they may be appointed to work on various types of cases. Some of these functions are discussed below.

A. [14.13] Custody and Visitation

One function of the GAL is to provide input into custody and visitation proceedings. This function encompasses any cases in which temporary or permanent legal custody, physical custody, parenting plans, parenting time, access, or visitation is adjudicated in instances of divorce, parentage, domestic violence, contested adoptions and contested private guardianship. American Bar Association, *Standards of Practice for Lawyers Representing Children In Custody Cases,* 37 Fam. L.Q. 131, 133 (2003) (hereafter *Standards of Practice*). It is important to keep in mind is that for these types of cases, an attorney may be retained for two different roles. First, an attorney may simply be asked to act as a child's attorney, which means that the lawyer provides independent legal counsel for the child and owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client. *Id.* Second, and contrary to the role of the child's personal attorney, is the "best interests" attorney, who provides independent legal services for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives. *Id.*

Accordingly, a lawyer should be independent of the court and other participants in the litigation, and unprejudiced and uncompromised in his or her independent action. *Id.* at 135. The attorney has a responsibility to exercise independent professional judgment in carrying out the duties assigned by the court and to participate in the case as fully and freely as a lawyer for the party. *Id.* Therefore, one of the lawyer's initial tasks after being appointed is to review the file and inform the parties of his or her appointment, and that as counsel of record, he or she should receive all copies of pleadings and discovery exchanges and reasonable notification of hearings and of major changes of circumstances affecting the child. *Id.*

Next, the attorney should meet with the child to establish a relationship with him or her. *Id.* In order to decide what is in the best interest of the child, the attorney must focus on the needs and circumstances of the individual child. *Id.* at 136. Moreover, meeting with the child allows the attorney to assess the child's circumstances in a way that gives greater understanding to the case and allows the attorney to develop creative solutions that are in the child's best interest. *Id.*

Under KRS 620.023, there are certain circumstances which are relevant for the court to consider in determining the best interest of child. These include mental illness or mental retardation of the parent, as attested by a qualified mental health professional, which renders the parent unable to care for the immediate and ongoing needs of the child; acts of abuse or neglect; alcohol or other drug abuse that results in the parent's incapacity to provide essential care and protection for the child; a finding of domestic violence; any other crime committed by the parent which results in the death or permanent physical or mental disability of a member of that parent's family; and the existence of any guardianship of the parent due to disability. *Id.* One way for an attorney to gather this evidence is to attend all relevant meetings so the lawyer can present the child's perspective and gather information. *Standards of Practice* at 137. Likewise, the attorney may interview individuals significantly involved with the child, including social workers, caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, and law enforcement officers. *Id.* at 149. An attorney should be aware of these circumstances when meeting with the child and the child's family to make proper recommendations to the court as to the best interest of the child in light of the circumstances laid out in KRS 430.270 and KRS 403.340.

One role which the attorney plays that works toward the best interest of the child is as someone who attempts to resolve matters in the case in the least adversarial manner possible. *Id.* at 137. This may include therapeutic intervention, parenting or co-parenting education, mediation or other alternative dispute resolution methods. *Id.* Likewise, the GAL can effectively assist in negotiations by focusing the parties on the child's needs. *Id.* Moreover, the GAL files any necessary pleadings on behalf of the child to ensure that appropriate issues are properly before the court so as to expedite the court's consideration of those that are important to the child's best interests. *Id.* These pleadings may include a mental or physical examination of the party or child; parenting, custody or visitation evaluation; an

increase, decrease or termination of parenting time; services for the child or family; finding of contempt for non-compliance with a court order; protective order concerning the child's privileged communications; and dismissal of petitions or motions. *Id.* An attorney may present the child's expressed desires to the court at hearings for custody or parenting time. *Id.* at 150. Overall, the best interests of the child should be based on the state's governing statutes and case law rather than the attorney's own personal values, philosophies and experiences. *Id.* at 151.

Accordingly, in *Calhoun v. Calhoun*, 559 S.W.2d 721 (Ky. 1977), the court stated that in weighing factors in consideration of a custody dispute between parents, the overriding issue is what is in the best interest of the child. In *Atwood v. Atwood*, 550 S.W.2d 465 (Ky. 1976), one of the critical factors laid out by the court in resolving a custody dispute is the mental and physical health of all of the parties and whether the child is in an environment likely to endanger his physical, mental, or emotional health. In determining whether to modify a custody decree, the present custodian should continue to have custody for the first two years unless it is shown that the environment may endanger the health of the child. *S. v. S.*, 608 S.W.2d 64 (Ky. 1980). This does not mean that injury to the physical, mental, moral or emotional health must have already occurred or be occurring at the present time. Instead, there must be the potential for such danger. *Id.* The court in *Squires v. Squires*, 854 S.W.2d 765 (Ky. 1993), found that the parties in a custody case are entitled to an individualized determination of whether joint custody or sole custody serves the child's best interests. Neither parent is the preferred custodian, and the parents' wishes are not binding on the court; instead the court shall consider the factors in KRS 403.270. *Id.*

In *Greathouse v. Shreve*, 891 S.W.2d 387 (Ky. 1995), which was later affirmed in *Shifflet v. Shifflet*, 891 S.W.2d 392 (Ky. 1995), the court found that a parent has a superior right of custody that is not lost to a non-parent, including a grandparent, simply because the child has been left in the care of the non-parent for a considerable length of time. Instead, the court should consider whether the parent knowingly and voluntarily relinquished his or her superior right to custody to which the parent was entitled and if the non-parent should be awarded custody in light of the best interests of the child. *Shifflet*, 891 S.W.2d 392. In order to be characterized as a de facto custodian, one must literally stand in the place of the natural parent to qualify for custody. *Consalvi v. Cawood*, 63 S.W.3d 195 (Ky. Ct. App. 2001). Moreover, a de facto custodian must be the primary caregiver and financial supporter of the child for a certain period of time under the statute. *Id.* For more on de facto custodians, *see* **Chapter 11.**

Under KRS 403.270, the "best interest of the child" factors include: (a) the wishes of the child's parent or parents, and any de facto custodian, as to his custody; (b) the wishes of the child as to his custodian; (c) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests; (d) the child's adjustment to his home, school, and community; (e) the mental and physical health of all

individuals involved; (f) information, records, and evidence of domestic violence as defined in KRS 403.720; (g) the extent to which the child has been cared for, nurtured, and supported by any de facto custodian; (h) the intent of the parent or parents in placing the child with a de facto custodian; and (i) the circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

In cases of custody and visitation proceedings, the court will not be able to properly decide the case without a more child-focused framing of the issues or without additional information concerning the child's best interests. *Standards of Practice* at 153. Therefore, a GAL is critical in helping the court learn this additional information. *Id.*

B. [14.14] Termination of Parental Rights

A GAL will also be appointed for the termination of parental rights. There are two types of termination: voluntary and involuntary.

1. [14.15] Voluntary Termination of Parental Rights

A voluntary termination is filed in the circuit court in the county where the petitioner or child resides or in the circuit court in the county where the juvenile court actions have commenced. KRS 625.040. This action can be filed by a parent or counsel for the parent only with appearance-waiver and consent-to-adopt forms. However, these forms cannot be filed until at least three days after the birth of the child. *Id.* The petition must include:

- Name and place of residence of each petitioner;
- Name, sex, date of birth, and place of residence of the child;
- Name and relationship of each petitioner to the child;
- Concise statement of factual basis for termination of parental rights;
- Name and address of the person, cabinet, or authorized agency to which parental rights are sought to be transferred; and
- Statement that the person, cabinet, or authorized agency to whom custody is to be given has facilities available, is willing to take custody of the child, and has applied for the written permission of the Secretary for the child's placement.

When a parent desires to file a petition for voluntary termination of parental rights, he or she may request the court to appoint an attorney to represent

him or her, even prior to the filing of the petition. KRS 625.0405. Accordingly, an attorney must be appointed within 48 hours of the request. *Id.* Once a petition is filed, the court shall appoint a guardian *ad litem* to represent the best interests of the child. *Id.*

The appearance-waiver and consent-to-adopt forms must contain a statement of acknowledgement and agreement, regarding the appearance at the proceeding, signed by the parent, counsel for the parent, and the Cabinet. KRS 625.041. If the parent is a minor, the form must also be signed by the guardian of the minor parent. *Id.* Additionally, the form must contain the parent's notarized signature and the address to which the parent requests the final judgment be served. *Id.*

Once the petition is filed, a final hearing is set within three days. KRS 625.042. The hearing date should not occur more than 30 days after the filing of the petition. *Id.* What is paramount in this hearing to grant the termination of parental rights is determining the best interest of the child. *Id.* If the circuit court determines that parental rights have been voluntarily terminated in accordance with the statute, it will enter an order terminating all parental rights and obligations of the parent and releasing the child from all legal obligations to the parent. KRS 625.043. Likewise, the order will vest all care and custody of the child in the person, cabinet, or agency the court believes is best qualified to receive custody. *Id.*

2. [14.16] Involuntary Termination of Parental Rights

On the other hand, in an involuntary action for termination of parental rights, the petition is brought by the Cabinet for Health and Family Services, any child-placing agency licensed by the Cabinet, a county attorney, a Commonwealth attorney, or a parent. KRS 625.050. The petition must include:

- Name and mailing address of each petitioner;
- Name, sex, date of birth and place of residence of the child;
- Name and address of the living parents of the child;
- Name, date of death and cause of death, if known, of any deceased parent;
- Name and address of the putative father, if known by the petitioner, of the child if not the same person as the legal father;
- Name and address of the person, cabinet or agency having custody of the child;
- Name and identity of the person, cabinet or authorized agency to whom custody is sought to be transferred;
- Statement that the person, cabinet or agency to whom custody is to be given has facilities available and is willing to take custody of the child;

- All pertinent information concerning termination or disclaimers of parenthood or voluntary consent to termination;
- Information as to the legal status of the child and the court so adjudicating; and
- A concise statement of the factual basis for the termination of parental rights.

Id.

The circuit court will conduct a private hearing and the child shall be made a party to the action. KRS 625.080. A guardian *ad litem* shall be appointed to represent the best interests of the child. *Id.* The GAL shall be paid a fee not to exceed five hundred dollars ($500), to be paid either by the Cabinet or by the proposed adoptive parent(s), agency or the petitioner. *Id.* The hearing is to be held within 60 days of a motion by any party or the GAL, and the parents shall have the right to counsel, including one being appointed for indigent parents. *Id.*

During this hearing, a court must first find one of the following by clear and convincing evidence: (1) the child has been adjudged to be an abused or neglected child by any court; (2) a child is found to be abused or neglected in the termination of parental rights proceeding; or (3) a parent has been convicted of criminal abuse or neglect of any child, and the child abuse or neglect is likely to occur if parental rights are not terminated. KRS 625.090.

The second requirement of the court during this hearing is to find at least one of the ten possible grounds for involuntary termination to be present. *Id.* These include:

1. Abandonment for at least 90 days;
2. Parent-inflicted serious physical injury;
3. Repeated "physical injury or emotional harm";
4. Parent(s) convicted of felony involving serious physical injury toward any child;
5. Parent has failed to provide essential care for six months, and there is no reasonable expectation for improvement;
6. Parent caused or allowed sexual abuse to occur;
7. Parent repeatedly failed to provide essential food, clothing, shelter, medical care, or education;
8. Involuntary termination of parental rights of another child;
9. Parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child; or
10. Child has been in foster care fifteen out of the last twenty-two months.

Id.

Based on these factors, the court will determine whether to grant an involuntary termination of parental rights. *Id.* If the circuit court determines that parental rights should be terminated involuntarily in accordance with this statute, it shall enter an order that the termination of parental rights and the transfer of custody are in the best interest of the child. KRS 625.100. Likewise, the order shall terminate all parental rights and obligations of such parent and release the child from all legal obligations to such parent and vest care and custody of the child in such person, agency, or cabinet as the court believes is best qualified. *Id.*

C. [14.17] Adoptions

According to KRS 199.470, any person who is at least eighteen years of age or who is a resident of the state or who has resided in the state for twelve months before filing may file a petition for leave to adopt a child in the circuit court of the county in which the petitioner resides. If the petitioner is married, the spouse shall join the petition, unless the court waives this requirement after making a finding that waiving the requirement is in the best interest of the child. *Id.* A petition may not be filed unless, prior to the filing of the petition, the child sought to be adopted was placed for adoption by a child-placing agency or the Cabinet, or the child has been placed with written approval of the Secretary. *Id.*

In the adoption proceeding, all of the following individuals shall be made parties to the petition: the child; both biological living parents, if the child is born in wedlock; if the child is born out of wedlock, then the mother and any putative father; the child's guardian; and the Cabinet for Health and Family Services. KRS 199.480. Consequently, a biological parent will not be made a party if a termination of parental rights proceeding has already been completed. *Id.*

For a child born out of wedlock, a putative father must meet one of the following requirements to be made a party: he is known or voluntarily identified by the mother in an affidavit; he has acknowledged the child by affirmatively asserting paternity in a termination action within 60 days of the birth of the child; he has caused his name to be affixed to the child's birth certificate; he has commenced a judicial proceeding claming parental rights; he has contributed financially to the support of the child by paying medical or hospital bills associated with the birth of the child; or he has married the mother of the child or has lived or is living openly with the child or the person designated on the birth certificate as the biological mother. *Id.*

When the parties file a petition, it must include the following:

- The name, date, place of birth, place of residence, and mailing address of each petitioner, and, if married, the date and place of their marriage;
- The name, date, place of birth, place of residence, and mailing address, if known, of the child sought to be adopted;

- Relationship, if any, of the child to each petitioner;
- Full name by which the child shall be known after adoption;
- A full description of the property, if any, of the child so far as it is known to the petitioner;
- The names of the parents of the child and the address of each living parent, if known. The name of the biological father of a child born out of wedlock shall not be given unless paternity is established in a legal action, or unless an affidavit is filed stating that the affiant is the father of the child. If certified copies of orders terminating parental rights are filed as provided in subsection (2) of KRS 199.490, the name of any parent whose rights have been terminated shall not be given;
- The name and address of the child's guardian, if any, or of the cabinet, institution, or agency having legal custody of the child;
- Any further facts necessary for the location of the person or persons whose consent to the adoption is required, or whom KRS 199.480 requires to be made a party to, or notified of, the proceeding; and
- The lack of knowledge as to any fact required by KRS 199.490 shall also be alleged.

KRS 199.490.

Along with the petition, the parties must file certified copies of any orders terminating parental rights. Any consent to adoption shall be filed prior to the entry of the adoption judgment. *Id.*

Once a petition is filed, an adoption shall not be granted without the voluntary and informed consent of the living parent or parents of a child born in lawful wedlock or the mother of a child born out of wedlock. KRS 199.500. Under KRS 199.011(14), consent means that the person was fully informed of the legal effect of the consent, the person was not given or promised anything of value except allowable expenses, there was no coercion, and consent was voluntarily and knowingly given. The consent should be in writing, signed and sworn to and contain the following: date, time, and place of consent; name of the child to be adopted; date and place of the child's birth; identity of the adoptive parents, if known; and a statement that after 20 days consent is irrevocable. *Id.* Consent will not be considered valid if given prior to 72 hours after the birth of the child. KRS 199.500.

However, an adoption may occur without the consent of the biological parents if certain circumstances exist. These include the same factors courts must consider when facing an involuntary termination of parental rights action. *See* Section [14.16], *supra*. KRS 199.502.

Once a petition is filed, the Cabinet or any person designated by the court, including a GAL, shall create a report in writing for the court verifying that the contents of the petition are true, whether the proposed adoptive parents are financially able and morally fit to have the care and custody of the child, and whether the adoption is in the best interest of child and the child is suitable for adoption. KRS 199.510. This report shall be filed no later than 90 days after the child has been placed with the family or 90 days after the filing of the petition. *Id.* After this report has been made, and any additional report has been filed by the GAL, the court shall hold a hearing on the petition. KRS 199.515.

Once a hearing has been held, the court shall enter a judgment of adoption if it finds that the facts stated in the petition were established; that all legal requirements (including jurisdiction) relating to the adoption have been complied with; that the petitioners are of good moral character, of reputable standing in the community and of the ability to properly maintain and educate the child; that the best interest of the child will be promoted by the adoption; and that the child is suitable for adoption. KRS 199.520. Upon entry of the judgment of adoption, from and after the date of the filing of the petition, the child shall be deemed the child of the petitioners and shall be considered for purposes of inheritance and succession and for all other legal considerations, the natural child of the parents adopting it the same as if it were born of their bodies. *Id.* After granting the adoption, all legal relationships between the adopted child and the biological parents shall be terminated, except the relationship of a biological parent who is the spouse of an adoptive parent. *Id.*

For more on the private adoption process, *see* PRIVATE ADOPTION IN KENTUCKY, 4th ed. (UK/CLE 2006).

D. [14.18] Dependency, Neglect and Abuse Proceedings

A GAL may also be appointed in a dependency, neglect or abuse case to protect the best interests of the child. In these cases, the GAL has many of the same duties required in a custody or visitation case, such as investigating the circumstances, interviewing parties close to the child, making pleadings on behalf of the child, etc. Likewise, the GAL may request certain services to be put in place to protect the child's interests. These services can include family preservation-related prevention and reunification services; sibling and family visitation; child support; domestic violence prevention, intervention and treatment; medical and mental health care; drug and alcohol abuse treatment; parenting education; independent living services; long-term foster care; termination of parental rights action; adoption services; education; recreational and social services; and housing.[6]

In order to adequately represent the best interest of the child, it is important for a GAL to know how dependency, neglect and abuse are defined and the

[6] American Bar Association, *Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases*, 9 (1996), available at: <http://www.abanet.org/family/reports/standards_abusen-eglect.pdf>.

court proceedings that occur as a result of a report being made. First, an abused or neglected child is one whose health or welfare is harmed or threatened with harm, when his or her parent, guardian, or other person exercising custodial control or supervision does one of the following:

- Inflicts or allows to be inflicted upon the child physical or emotional injury;
- Creates or allows to be created a risk of physical or emotional injury;
- Engages in a pattern of conduct rendering the parent incapable of caring for the child due to alcohol or drugs;
- Repeatedly fails to provide care and protection for the child;
- Commits or allows to be committed an act of sexual abuse;
- Creates or allows to be created a risk of sexual abuse;
- Abandons or exploits the child; or
- Does not provide supervision, food, clothing, shelter, education, or medical care for the child.

KRS 600.020.

A dependent child is any child, other than an abused or neglected child, who is under improper care, custody or guardianship. *Id.* It is generally thought to be through no fault of the parent, otherwise the child would be considered abused or neglected. *Id.* Therefore, a child cannot be both dependent and abused, or both dependent and neglected. *Id.* Emotional injury can be described as any injury to the mental or psychological capacity or emotional stability of a child, which must be tested by a qualified health professional. *Id.* A qualified mental health professional can be a physician, psychiatrist, psychologist, or registered nurse ("RN") with a Master's Degree in psychiatric nursing. *Id.*

The statute has established a difference between physical injury and serious physical injury. The former is a substantial physical pain or any impairment of physical condition. *Id.* Physical injury does not necessarily mean an emergency custody order will be granted unless the physical injury is repeatedly inflicted, or the court finds serious physical injury. *Id.* A serious physical injury means a physical injury that creates a substantial risk of death; causes serious and prolonged disfigurement; causes prolonged impairment of health, including mental health; or there is a prolonged loss or impairment of the function of any bodily member or organ. *Id.* It is within the judge's discretion to determine if there is physical injury or serious physical abuse. *Id.* Sexual abuse is defined as contacts or interactions in which the parent uses or allows, permits or encourages the use of a child for the sexual stimulation of the perpetrator or another person. *Id.*

Therefore, any person who knows or has reasonable cause to believe that a child is dependent, neglected or abused must immediately make an oral or

written report to the local law enforcement agency, the Cabinet, Commonwealth's attorney or county attorney. KRS 620.030. Upon receipt of this report, the Cabinet shall initiate a prompt investigation or assessment of the family needs, take action as necessary, and offer protective services toward safeguarding the welfare of the child. KRS 620.050. Consequently, the court in the county where the child is present may issue an *ex parte* emergency custody order in which removal is in the best interest of the child and any of the following circumstances exist:

- The child is in danger of death, serious physical injury, or sexual abuse;
- The parent has repeatedly inflicted or allowed physical or emotional injury, not including reasonable discipline; or
- The child is in immediate danger from the parent's neglect to provide for the safety and needs of the child.

KRS 620.060. This emergency custody order is effective for only 72 hours unless there is a temporary removal hearing with notice to the county attorney and parent exercising custodial care to determine if the child should be held for a longer period of time. *Id.*

A dependency, neglect or abuse action may also be commenced by the filing of a petition by any interested person in the district court. KRS 620.070. After the petition is filed, the clerk shall issue, and the sheriff shall serve, a copy of the petition and summons on the parent or person exercising care, custody or control. *Id.* Accordingly, unless waived by the parent, a temporary removal hearing shall be held within 72 hours of the emergency custody order or within ten days of the filing of a petition. KRS 620.080. During this hearing, the court will determine if there are reasonable grounds to believe that the child would be dependent, neglected or abused if returned to the parents. *Id.* Hearsay will be admissible during the hearing for "good cause," and the burden is on the Commonwealth to prove dependency, neglect or abuse. *Id.* During this hearing, a GAL may be appointed to represent the child during the temporary removal hearing or any upcoming hearings. *Id.* At the end of this hearing, if the court finds reasonable grounds to believe the child has been dependent, abused or neglected, the court will issue an order for temporary removal and grant temporary custody to the Cabinet or other appropriate person. KRS 620.090. There is a preference for available and qualified relatives, using the least restrictive appropriate placement. *Id.*

There are also provisions allowing the court to consider alternatives to removal if the child will be reasonably protected against dependency, neglect or abuse by these measures. KRS 620.130. These alternatives include provisions of medical, educational, psychiatric, physiological, social work, counseling, daycare or homemaking services with monitoring whenever necessary by the Cabinet. *Id.* Services will also be provided if the child is ordered to be removed to promote the protection of the child and return of the child safely to the child's home as soon as possible. *Id.* The Cabinet will create a treatment plan for the child so as to meet the child's needs, which may require a change in treatment or placement.

Id. All changes must be made known to the court within 14 days of the change. *Id.* Accordingly, once the court removes a child, it shall conduct an adjudicatory hearing and make a final disposition within 45 days of the removal of the child. KRS 620.090. If no reasonable grounds are found, the emergency custody order shall be dissolved and the child returned. *Id.*

In an adjudication hearing, the case shall be heard without a jury and the general public shall be excluded. KRS 610.070. Only immediate families or guardians of the parties before the court shall be admitted into the courtroom. *Id.* Likewise, the court may order a parent to be present at the hearing or any other proceeding. *Id.* In a juvenile proceeding, there shall be an adjudication hearing and a separate disposition hearing, held on separate days, unless the child waives the right to a formal predisposition investigation report after consulting with his or her attorney. KRS 610.080. The adjudication shall determine the truth or falsity of the allegations in the petition. *Id.* This determination is made on the basis of an admission or confession of the child or by taking evidence. *Id.*

The disposition hearing will determine what action shall be taken by the court on behalf and in the best interest of the child. KRS 610.110. It is during this hearing that the court will receive all information necessary to make a proper disposition, which will include a report from a GAL. *Id.* The possible dispositional alternatives include the following: informal adjustment of the case; protective orders such as requiring the parent to abstain from conduct abusing, neglecting, or making the child dependent, or orders authorized under KRS 403.740 or 403.750; or removal of the child to the custody of an adult relative, other person, or child-caring facility. KRS 620.140. The latter will take into consideration the wishes of the parents. *Id.* Before any child is committed to the Cabinet or placed out of the home under supervision of the Cabinet, the court will determine reasonable efforts it will undertake to prevent or eliminate the need for removal. *Id.* Likewise, the court may also commit the child to the custody of the Cabinet for placement for an indeterminate period of time not to exceed his or her attainment of the age of 18. *Id.* Throughout this entire process, the goal of the court and the appointed GAL is to decide what is in the best interest of the child.

For more on the public adoption process, dependency, abuse and neglect and termination of parental rights, *see* **Chapter 12.**

VIII. [14.19] Warning Order Attorney

In the event that the whereabouts of the defendant are unknown, the court may appoint a warning order attorney. CR 4.07 provides that the clerk at the time of making a warning order shall appoint, as attorney for the defendant, a practicing attorney of the court. The court may appoint another attorney as a substitute for the attorney appointed by the clerk. Neither the plaintiff nor his attorney shall be

appointed, or be permitted to suggest the name of the defendant's attorney. Such attorney must make diligent efforts to inform the defendant, by mail, concerning the pendency and nature of the action against him, and must report the result of his efforts to the court within 50 days after his appointment.

The rule further provides that if the warning order attorney cannot inform the defendant concerning the action, he or she shall so report to the court and shall then make a defense by answer if possible or shall report otherwise.

It must be kept in mind that if the warning order attorney knows or learns that the defendant is an unmarried infant or of unsound mind he or she shall include such information in the report, and upon the filing of such report he or she shall become the guardian *ad litem* for such defendant as if appointed under CR 17.03.

Nothing done by the warning order attorney acting in such capacity or as guardian *ad litem* under the above paragraph shall be treated as an appearance by the defendant. Furthermore, no judgment shall be rendered against a defendant for whom a warning order is made until a report required by this rule has been filed.

Failure to file a report required by this rule without good cause may be punished as a contempt of court. The court shall allow the warning order attorney a reasonable fee for his services, to be taxed as costs.

A sample warning order letter may be found as Appendix B at Section [14.22] to this chapter, and a sample warning order report is provided as Appendix C at Section [14.23] to this chapter.

IX. [14.20] Appendices

A. [14.21] Appendix A: Report of Guardian *Ad Litem*

COMMONWEALTH OF KENTUCKY
_____ CIRCUIT COURT
_____ DIVISION
FILE NO. _____

IN THE MARRIAGE OF:

_____ **PETITIONER**

VS.

_____ **RESPONDENT**

REPORT OF GUARDIAN AD LITEM

Comes now _____, a practicing attorney of this Court, and states that she is the duly appointed Guardian Ad Litem for _____ (DOB 7/3/2002), herein by virtue of an Order of the _____ Circuit Court dated _____.

In preparing this report, the Guardian Ad Litem has (1) reviewed the court files; (2) been in contact with counsel of record in this case; (3) spoke with Petitioner; (3) spoke with Respondent and (4) met the minor child.

The Guardian met with Petitioner in the marital residence on August 8, 2005. His concerns are as follows:

The Guardian met with Respondent in her home on _____. Her concerns are as follows:

The Guardian would recommend that . . .

[form continues next page]

Respectfully Submitted,

_____

[typed name of Guardian *Ad Litem*]

Guardian Ad Litem

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed by U.S. first class mail this _____, 2005 to _____, Attorney for Petitioner, _____ and to _____, Attorney for Respondent.

_____

[typed name of attorney]

B. [14.22] Appendix B: Letter of Appointment

_____, 2005

_____
_____
_____

In Re: _____, Petitioner and _____, Respondent
_____ Circuit Court, Case No._____

Dear _____:

I am writing this letter to advise you that I have been appointed by the _____ Circuit Court as Warning Order Attorney in the above captioned matter. It is my obligation pursuant to Kentucky law to advise you of the nature and pendency of the action filed in the _____ Circuit Court in Case No. 05-CI-0000, by _____ regarding your marriage.

After you receive this letter and enclosed Appointment of Warning Order Attorney, if you do not take any further action, *i.e.*, filing your response or objections through an attorney or personally, it is likely that your rights with respect to this action will be substantially affected. I would strongly encourage you that when you receive this letter, you consult an attorney of your choice as to your legal rights and responsibilities under Kentucky law. Further, if you will please call me and/or acknowledge receipt of this letter so that I may promptly notify the court, I would appreciate it.

In the event that you do not take any further action in this matter, a Judgment may be entered against your rights pertaining to this action in your absence. If you have any questions regarding this matter, please do not hesitate to contact my office.

Sincerely,

_____

Enclosure

C. [14.23] Appendix C: Warning Order Report

COMMONWEALTH OF KENTUCKY
_____ CIRCUIT COURT
_____ DIVISION
CASE NO. _____

_____ **PETITIONER**

AND

_____ **RESPONDENT**

WARNING ORDER REPORT

Comes now _____, and for her Warning Order Report states as follows:

1. That the undersigned was appointed by the _____ Circuit Court on _____, 2005 to notify Respondent of the nature and pendency of the action within.
2. That on _____, 2005, I sent a letter via regular U.S. Mail to Respondent to the address of _____ (Exhibit A).
3. That as of the date of filing this report, I have received no communication from Respondent, or anyone on her behalf.
4. That after careful examination of the pleadings, this Affiant is unaware of any legal disability except as otherwise set forth in this Warning Order Report on behalf of Respondent, and is unable to make any defense on behalf of Respondent.

Wherefore, _____, prays as follows:

A. That the Court accept this Warning Order Report.

B. That she be discharged from any further obligations as Warning Order Attorney.

C. That this Warning Order attorney be awarded a reasonable fee for her services rendered herein.

15

ALTERNATIVE DISPUTE RESOLUTION IN FAMILY LAW MATTERS

PATIENCE JAZDZEWSKI*
Mediation Center of Kentucky
Lexington, Kentucky

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Hoge & Kuhn, PLLC
Louisville, Kentucky

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I. [15.1] Introduction

No one ever promised us the practice of law would be easy. Family law is certainly no exception. The parties' emotions and motivations frequently propel the participants in directions directly contrary to any form of dispute resolution.

Though the term alternative dispute resolution ("ADR") is well recognized throughout the legal industry, most practitioners automatically associate ADR with the mediation process. In areas outside family law, ADR would generally be construed to include arbitration as well, but these are not our only options in helping clients resolve emotionally-charged personal relationship disputes.

In family law applications, use of mediation has fully matured, while the use of arbitration to resolve disputes is still embryonic. Collaborative law is a third process that is still evolving and gaining increasing popularity among family law practitioners across the country and beyond.

The underlying philosophy of ADR finds its very soul in effectively helping parties resolve their differences without resorting to the traditional courtroom and its attendant advocacy. As Albert Einstein once said, "You cannot simultaneously prevent and prepare for war."

II. [15.2] Understanding Divorce Mediation: A Primer for Lawyers

A. [15.3] Before the Mediation

1. [15.4] Understanding the Mediation Process

First, consider what mediation is and what it is not. According to the recently promulgated Kentucky Mediation Guidelines,

> Mediation is an informal process in which a neutral third person, called a mediator, facilitates the resolution of a dispute between two or more parties. The process is designed to help disputing parties reach an agreement on all or part of the issues in dispute. Decision-making authority remains with the parties, not the mediator. The mediator assists the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives. Parties should comply with orders of the court requiring participants in mediation to have settlement authority. *See Kentucky Farm Bureau Mut. Ins. Co. v. Wright*, 136 S.W.3d 455 (Ky. 2004).

> **Comment.** A mediator's obligation is to assist the parties in reaching a voluntary outcome. The mediator should not coerce a party in any way. A mediator may make suggestions, but the parties make all settlement decisions voluntarily.

Kentucky Mediation Guidelines for Court of Justice Mediators, § 3(1), (hereafter *Mediation Guidelines*); *see also,* SCR 61, Rule 2. This definition tracks most of the definitions used elsewhere. *See, e.g., Association for Conflict Resolution, Model Standards of Conduct for Mediators; Rules of Practice of the Jefferson Circuit Court*, Rule 1402.

Although mediator styles differ tremendously (*Mediation Guidelines* § 3(17)), the fundamental concept on which mediators should all be able to agree is that ultimately, in mediation, the parties themselves craft the solution. The mediator is not the judge in the case and does not give legal or financial advice or provide counseling. Rather, the mediator honors the parties' self-determination and helps them explore their options and come up with their own agreements. Attorneys who understand and embrace these goals are invaluable in the process, advising their clients on the various options under consideration, and helping their clients find the best results.

Most cases can benefit from mediation. Particularly in divorce cases, parties often come away from court hearings feeling that they were not given the opportunity to be heard, or that even if they were able to speak, their views were not taken into account. The formality of court, the rules of evidence, and the very presence of the judge, all militate against forthright communication, with the result that the parties themselves feel disenfranchised by the formal trial process. While attorneys feel at home in this environment and comfortable with the rules and the formality of the proceedings, the parties feel as though they have completely lost control of their lives and future. If nothing else, the mediation process will open up lines of communication, allow the parties to express themselves fully and be heard, and give them an opportunity to say what is on their minds in a way that they would never be able to do in court.

In addition, divorce cases present an amazing panoply of issues, most of which are very fact-intensive. It is often very time-consuming and can be prohibitively expensive for the attorneys to gain a thorough understanding of all of the details. While it is much more efficient to explore these issues in mediation, attorneys should prepare for mediation by gaining understanding of their respective client's needs, interest, and issues. The details of the issues can be explored in mediation, and the attorneys can help the parties understand the legal ramifications of their decisions.

Often, parties may come to mediation to settle some of the issues in their case, leaving other issues for the court to resolve. If nothing else, mediation can narrow the issues so that the court can efficiently address those matters that really need the court's attention. Any judge will appreciate attorneys who are respectful

of the court's time and use the court's resources only for issues that they absolutely cannot resolve out of court.

Finally, even if cases do not settle in mediation, most cases that have been mediated will settle before court, usually within a couple of weeks of mediation. The mediation process gets the parties focused, makes them understand the risks of litigation, and really encourages them to consider other options for resolving their disputes. Once in this mindset, parties usually figure out how to settle their cases.

2. [15.5] Determining if the Case is Appropriate for Mediation

Here is a bold assertion: almost every issue in almost every domestic case can be mediated…and should be. In Kentucky, anecdotally, this author is aware that the family courts in the central Kentucky area are referring almost all matters to mediation before conducting a hearing. The result of these judicial practices is often that the attorneys are scheduling the mediations themselves even before filing motions.

Nearly all issues that arise in a family case can be mediated. Any time there are two or more sides to a debate, mediation can be helpful. Even issues that seem to be cut and dry can benefit from discussion. For example, it might initially seem that child support issues could be more efficiently decided by the judge who simply refers to the chart to find the answer. But, in reality, every block of the worksheet presents opportunities for discussion. In mediation, the parties can consider all the factors and can usually come up with an agreed-upon amount that is mutually satisfactory. Most importantly, the parties retain their sense of self-determination throughout the process.

As a practical matter, when faced with an order to mediate, parties comply. Further, many cases settle in mediation – even those cases in which the attorneys thought that mediation would be a fruitless exercise. Therefore, attorneys should consider seriously the first proposition made above and welcome mediation as part of family law practice.

That being said, there are some issues in which mediation may not be the best solution. Most notably, it is very difficult to mediate cases in which the attorneys have a fundamental disagreement on a matter of law, and know that no matter what the circuit court or family judge decides, the case will be appealed. If everyone knows this, then certainly, it would be a waste of time to mediate the issue. However, when it comes down to it, this is a fairly rare circumstance; when faced with the costs of litigation and serious appeal, the parties will usually elect to find a solution that will not involve such an enormous expenditure of time and money.

However, there will be some families that cannot effectively mediate their issues. Mediation is about bargaining between parties on a reasonably level playing field. If there are concerns about an imbalance of power, impairment of the parties, or any general inability to bargain, then mediation would not be advisable.

Primary among these are cases in which there is a history of domestic violence or emotional abuse. In Kentucky, "if there is a finding of domestic violence and abuse…the court shall not order mediation unless requested by the victim… and the court finds that…[the] victim's request is voluntary and not the result of coercion; and…[m]ediation is a realistic and viable alternative…." KRS 403.036.

KRS 403.036 reflects the wisdom of victims' advocates. The complex dynamics of families that have experienced violence or abuse usually preclude mediation for several reasons. Most notably, if the victim is fearful or feels intimidated, mediation is likely to create a frightening environment. Under these circumstances, it is unlikely that the victim will be able to bargain and will either be so afraid that no agreement can be reached at all or will agree to anything just to end the mediation. Obviously, neither of these outcomes is acceptable.

3. [15.6] Explaining Mediation to the Client

Foremost, the client needs to know what to expect in mediation. It is likely that by the time of the mediation, there will have been several court hearings, and the client will be well indoctrinated into the adversarial process during which the attorneys talk, the clients say very little, and the judge tells the clients what to do. The client needs to understand that mediation is different than court and that there will be opportunity for the client to talk and even vent frustrations. The client needs to see mediation as an alternative through which the decisions come from the collective wisdom and understanding of the parties themselves as opposed to being handed down by a judge. In the event the mediation is conducted early on in the case, and the parties have not been exposed to courtroom proceedings, it is equally as important that the clients understand how the mediation process differs from courtroom proceedings. Clients with that understanding see the importance of working things out rather than submitting themselves to the adversarial winning/losing courtroom process which sometimes holds great appeal to those who have not been exposed to it.

It is helpful for the attorney to explain everything about the process. The attorney should tell the client about the room, where everyone is likely to sit, and anything that will make the client more comfortable with the surroundings. The attorney should help the client understand that the mediator is there to facilitate communication and that this will involve allowing everyone an uninterrupted time to tell their story, to state their concerns, and to listen and understand the other side. The attorney should advise the client to have an open mind, notwithstanding whatever positions have been advocated in the divorce thus far, and to be ready to consider options for settling the case, particularly options that have not already been presented or considered. The attorney should make sure that the client understands that this is a voluntary negotiation, that there will be give-and-take, and that no one will be coerced into anything. The client must feel that this is a safe environment, that all of the discussions will be confidential, and that this is an opportunity for the parties to resolve the issues in a non-adversarial way. The attorney should convey

optimism; if the attorney understands and believes in the mediation process, the client will be much more comfortable with it.

4. [15.7] Organizing the Case for Mediation

Think of the mediation as an opportunity to focus on the case. This will involve the same kind of organization required to prepare a case for trial, at least to the extent that the file is in order and the attorney understands the issues. The attorney should come into the mediation with a sufficient grasp of the case to be able to give good advice.

More and more, mediation is being used as another tool in case development. This can be a very positive way to manage the case. The attorneys can agree to work with a mediator to collect documents, share information, and generally shortcut discovery. In these cases, everyone can benefit because the attorneys are not spending a lot of time, energy, and the client's money on routine discovery that may not be necessary. Sometimes, the attorneys can do this with just the mediator, particularly when the attorneys are discussing legal issues concerning discovery issues. Later, when everyone meets in mediation, the attorneys will have a complete set of documents, and the discussions about how to resolve issues will not be interrupted while the attorneys haggle over documents.

Each attorney should come into mediation having completed all of the calculations in support of their theory of the case. It will also be helpful if each attorney has calculated the outcome for other scenarios (the mediator will likely do this during the mediation as well). The process moves along more smoothly if some of this groundwork has been completed before the mediation.

Most importantly, as has already been stated, the attorneys should have a positive attitude. This is an opportunity for the case to be settled in a way that is beneficial to the parties. But even if the case does not settle, the parties will always gain something by trying mediation; if nothing else, they will gain a better understanding of the case.

5. [15.8] Working With the Mediator Before the Mediation

Some mediators will want to have information about the case before the mediation begins. This might be as little as a couple of sentences, a paragraph describing the dispute, or it might be as much as a brief. Most mediators will not require the attorneys to prepare something extensive just for the mediation, and usually the attorneys will have already compiled information that will be useful to the mediator, such as routine disclosure statements. If the mediator does require this kind of information in advance, the parties should be ready to pay the mediator for the time spent in reviewing the materials.

Other mediators will not expect the attorneys to give them much, if any, information before the mediation, preferring to let the case develop in mediation.

Even if there has been some information provided in advance, the attorneys should not expect that the mediator has a complete understanding of the case. Rather, the mediator will rely on the parties and the attorneys to explain the issues fully during the mediation.

Even if they do not get information from the attorneys in advance, many mediators will want to interview the clients before the mediation, particularly in cases for which there may be concerns about physical or emotional abuse. Usually, these are short interviews that take place over the phone or in the mediator's office, and the attorneys do not participate. The mediator will use this kind of preliminary contact to develop rapport with the parties, to consider any power imbalance that might exist between them, and, ultimately, to determine if mediation is appropriate.

In domestic violence or emotional abuse cases, if the parties and the mediator decide to proceed with the mediation, notwithstanding the concerns about domestic violence or abuse, then the mediator will decide how best to protect everyone involved. Often, these mediations will take place at the courthouse or some other location where the parties have to be screened through a security system and metal detector. Usually, the parties are directed to come and go at staggered times, and kept in separate rooms for the entire process. The attorneys should absolutely cooperate with the mediator's directions in this regard; the mediator is protecting everyone's safety.

B. [15.9] Orientation and Opening Statements

1. [15.10] Mediator Opening Statement

The mediator will almost always make an opening statement to explain the process to the parties. The length and tone of this opening will vary widely, depending on the mediator, but will be designed to put the parties at ease and help them understand that mediation is different than the adversarial model they have experienced in court or in other negotiations with the attorneys.

The mediator may have some ground rules or suggestions for everyone's behavior to keep the conversation productive and civil. Here again, the rigidity of these rules will vary with the mediator. Most family mediators understand that the parties will benefit from venting to some degree and try to balance the parties' emotional needs with the constraints of process and decorum. Often, the mediator will be more comfortable with emotional outbursts than the attorneys are; the attorneys should follow the mediator's lead, unless they know that the situation is too stressful for their client or is otherwise unsafe. Overall, the mediator will encourage the parties to communicate openly, but to be respectful of one another.

There will be some discussion about confidentiality. A mediation is a settlement meeting, so the negotiations are protected from disclosure by Kentucky Rule of Evidence 408; *see Mediation Guidelines*, *supra*, § 3(8). Most mediators will require the parties to sign a mediation agreement that includes a confidentiality

provision. Generally, the parties cannot call the mediator as a witness or subpoena the mediator to court. In addition, if the parties have separate meetings with the mediator in caucus, the mediator will not disclose any information gleaned from those private meetings without permission. Each mediator will likely have some particular twist to the discussion about confidentiality, so it is important that the attorneys, the parties, and the mediator come to a complete understanding about what the confidentiality agreement means.

The mediator will explain that mediation assumes that the parties can and should solve their own problems. The mediator is not a judge or an advocate. He or she will not give the parties legal advice or therapy, and absolutely should not tell them what to do. While there are different approaches to this, every mediator is simply a facilitator, helping the parties explore their options in a safe and open forum. In the opening statement, the mediator will begin to empower the parties to solve their own problems.

2. [15.11] Parties' Opening Statements

The mediator will need to hear from the parties. Depending on the mediator, the attorneys may or may not be involved in this part of the mediation process. Most family mediators prefer to have the parties speak for themselves, recognizing that the parties need open communication between themselves to solve their problems. However, the mediator will want to hear from the attorneys at some point, particularly when addressing matters that involve legal issues.

At the beginning, the mediator will want each party to state his/her goals for the outcome of the mediation Depending on the parties and the mediator, this could take quite a bit of time, especially when there are many issues. The mediator will encourage the parties to listen carefully to each other and not interrupt; each party will have an opportunity to speak and be heard.

The mediator will listen carefully to each of the parties, encouraging them to clarify the issues as necessary. Most mediators will clearly state the requirement of mediating in good faith and may even ask for a commitment to get the case settled at the mediation, with most parties complying, groaning that they just want it all to be over.

It is very helpful for the attorneys to mirror the mediator's attention to the parties. This is not a time for the hard-boiled litigator to demonstrate tough courtroom tactics. The mediator will be encouraging the parties to be civil and respectful of one another, and this applies to the attorneys as well. Moreover, if the attorneys also demonstrate good listening skills, then the parties are more likely to do so, following the attorneys' example.

From the very start of the mediation, the parties and the attorneys have a tremendous opportunity to re-evaluate their approach to the problem. Often times the parties have long since stopped listening to each other, and the attorneys often

come into mediation with preconceived notions about the situation based on their client's perceptions. However, in mediation, it is the very exercise of listening that can bring new ideas into the dialogue as people may hear information that they never considered before.

Once the parties and their attorneys have made initial presentations about the case, the mediator will construct a list of issues to be addressed in the mediation. As part of this process, the mediator will summarize the parties' concerns and confirm that all of the issues have been listed. This will provide some framework for the mediation and reassure the parties that all of their issues will be addressed.

C. [15.12] The Parties' Needs and Interests

Attorneys are problem solvers. Almost from the start of a client interview, the attorney will be thinking about how to advocate for the client. By the time the parties come to mediation, the attorneys have usually arrived at fairly well-established ideas of how the case should be resolved.

In mediation, there is a different focus. Most mediators will approach the case by attempting to understand the parties' needs rather than what they present as their positions. Based on the fundamental principles of interest-based bargaining as described by the Harvard Negotiation Project, most mediators adopt the idea that mediation is an opportunity to explore solutions that will meet the parties' needs and interests, which are often very different from their positions in litigation. *See* Roger Fisher and William Ury, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981).

Generally, a party's position is a statement of the solution he or she advocates. A position sounds strident and inflexible, and it usually is; a position is essentially synonymous with a demand. Most mediations start with the parties' positions, which are usually miles apart, and it is the mediator's job to figure out how to bridge the gap.

It is possible to work from the positions and to try to figure out some marginally acceptable place in between the parties. Often, the solution which settles the case is something equally displeasing to both parties, making them feel as though they have left money on the table, or negotiated a deal for a used car. Many cases are resolved this way, but mediation can offer a better alternative.

Most mediators will shy away from the used-car-deal approach, particularly in family cases. Rather, they will try to explore how the parties came to their positions by looking for the parties' needs and interests. Once the parties' interests are identified, then the mediator can explore alternative solutions that might work better for everyone.

To illustrate, there is often a question about which party will keep the marital residence. Arguments then ensue about the value, refinancing the mortgage, dividing the equity, and, in some cases, dividing the obligation to pay for

the deficiency between the value and the mortgage balance. The parties can spend a lot of energy negotiating a "dollars and cents" settlement, fair on its face, which divides the equity or debt. However, the situation is often more complex than that. Certainly, the parties can agree that if they sell the house, they will both share in the financial hit associated with the costs of sale and the realtor's commission. When there are children, they worry about the effect of moving the children. A settlement that divides the equity or debt without regard to these other considerations will not feel satisfactory to them, but, once all these considerations are aired, then a parade of other options can be explored, including, perhaps, continuing to co-own the house for a while and waiting until the children complete high school or some other logical time for them to be moved. Some couples even decide that the children should stay in the house while the parents rotate in and out for a period of time, "bird nesting," until they are in a financial position to sell the house or the children are in an emotional position to be moved. Alternatively, the parents might agree to cooperate on refinancing for a short period of time until the financial dust settles or they may devise some other creative solution that better addresses their needs.

Therefore, it is important to avoid the adversarial, win-lose mindset from the start. That way, the parties feel free to express their real interests, which will set up the discussion for a much more imaginative solution than would have been possible had both sides simply advocated for their own positions.

D. [15.13] Moving Toward Discussion

Once the parties' interests have been identified, the mediator will restate the issues, making it clear that both parties have legitimate interests, and encouraging them to think of solutions that will satisfy both of them. The mediator will also point out the areas where the parties agree, or where their interests align, and will cement any agreements in those areas.

When there are many issues to be considered, the mediator will look for consensus on the most productive approach. Sometimes, it will be better to nail down some predicate issues or small matters to give the parties confidence in the process; other times, the parties will recognize that if they can come to agreement on one big issue, the other issues will simply fall into place. Usually the attorneys will have considerable input in this part of the process because they have probably been negotiating already and will have a good sense of what will work best.

E. [15.14] Generating Options

The mediator will continue to encourage the parties to venture away from their positions and consider other options that will satisfy their interests. This will usually look like a classic brainstorming session, with the mediator encouraging the parties to generate several options, without judging the feasibility. While the mediator acts as a scribe to memorialize the options the parties generate, initially he/she may need to make suggestions in order to engage the parties in the exercise.

The attorneys can be invaluable in this part of the process. The attorneys need to understand that they will be especially helpful if they come up with options other than the positions they have previously advocated. This is an opportunity for the attorneys to think really creatively and be positive participants in the process. Most attorneys who routinely practice in divorce cases have seen many ways that people resolve their conflicts and can bring those suggestions into the mix, helping the parties see that there really are no cookie-cutter solutions, but rather, that every family and every situation is different. Once the parties know that they have other possibilities, they feel less trapped and scared, and can work toward finding solutions that work for them.

If handled in the spirit of collaboration, the answers often arise from the very process of brainstorming. As the parties consider more and more options, they are likely to approach a solution, perhaps by combining or editing some of the options from the brainstorming exercise. In many cases, there does not need to be any further negotiation; the parties simply agree on one of the options.

F. [15.15] Discussion and Negotiation

1. [15.16] Reviewing the Options

Once there are some options on the table, the mediator will start working with the parties to negotiate a settlement. Throughout this process, the mediator will continue to encourage the parties to look for other options, to consider if any of the existing options could be modified to be acceptable to everyone, or if any of the existing options could be combined to arrive at a settlement.

Overall, the mediator will be focused on how the various options address the parties' interests or how any of the options could be changed to meet the parties' interests. It often becomes clear during the negotiation process that the parties have other interests that have not been previously heard, and this may inspire other options. Therefore, the mediator will continue to ask the parties what they really need and want and will explore how the options may meet those needs.

2. [15.17] Emphasizing Communication

While there is a large value to having the parties in mediation express their emotions, most mediators will make it clear that mediation is not therapy. As there is no hope for a better past, most mediators will encourage the parties to concentrate their focus on looking for solutions that are proactive and forward-thinking in an attempt to find a different model for the family. Often, even the most agreeable parties backslide into anger or frustration, and this manifests itself as blame or the desire for punishment or retribution. The mediator will encourage the parties to learn a better way of communicating with each other in a cooperative, mutually respectful way.

3. [15.18] Approaching the Problem

Sometimes, it is helpful to unbundle the issues even more, looking at pieces of each problem, to see if it can be solved in a building-block approach. For example, most of the blocks in the child support calculation can raise issues; if the parties can negotiate agreements on most of the blocks, then the final number is likely to emerge.

Other times, it may work better to package a few, somewhat interrelated problems together to arrive at a more global answer. Thus, even if the parties have negotiated a tentative child support calculation that number would need to be adjusted if there is a maintenance award because these two numbers usually are not negotiated in isolation. Further, as part of figuring out a total amount for child support and maintenance, the parties should pay attention to any tax considerations or other financial needs of the parties and adjust the amounts accordingly. Clearly, in this type of case, a piecemeal approach probably would not work as well.

Often, especially early in divorce cases, the parties are overwhelmed by the multitude of decisions that they need to make. These parties may be served better by temporary agreements, allowing them to put a band-aid on the problems until they are more prepared to negotiate a final agreement. Most cases will have some sort of *pendente lite* agreements, and these should be encouraged in mediation to give the parties some more information about how they can solve their problems by allowing them to "try on" solutions to see if they will work.

In many cases, if the parties can agree on a process, then they can resolve the details of the questions themselves. For example, they may decide to hire consultants, appraisers, tax advisers or other professionals to help them make decisions. If they can agree on the professional, often they will be able to agree on the professional's advice as well.

4. [15.19] Reality Testing

The mediator will try to ensure that the parties understand the facts of the case so that they can make reasonable decisions. In the emotional setting of these negotiations, people often lose sight of the reality of their situation. For example, the mediator can point out to them that, if they were overspending to maintain a wonderful lifestyle when they were together, such that they come into the divorce deeply in debt, then they will have a difficult time maintaining that same lifestyle when they are apart. Just hearing this sort of clear statement of the facts from someone outside the dispute can help the parties look more realistically at their situation.

The mediator will help the parties look at the advantages and disadvantages of each of the options, considering their particular interests. At some point, in most mediations, this will involve some discussion of the probable outcomes in court, often in separate caucus meetings with each party and his or her attorney. The attorneys should expect that the mediator will ask them, usually in the presence of

their client in caucus, what they believe is their best and worst possible outcome in court. Often, attorneys report that, even though they have had these discussions in their office, the client has never previously paid attention. There is something about being given this information in the presence of the mediator that encourages the client to listen. The mediator will be sure that the client fully understands the ramifications of going to court.

There is currently some concern about the extent of reality testing from the mediator. According to the new *Mediation Guidelines*:

> Consistent with the standards of impartiality and preserving party self-determination…a mediator may point out possible outcomes of the case and discuss merits of a claim or defense. A mediator should not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.

§ 3(17) (b) Comment (c). Certainly, the parties need to know what they can expect in court. However, the mediator will probably be somewhat circumspect about this, encouraging the parties to discuss the likely outcome in court with their attorneys.

5. [15.20] Caucus

In most mediations, each of the parties will spend some time in separate caucus sessions with the mediator. This, of course, is standard practice in personal injury mediations, since the parties usually do not know each other, and there is really no reason to keep them together. However, for family law cases in which the parties will have to communicate in the future, one of the great advantages to mediation is that it can help the parties learn a better way of communicating with each other so that they can resolve future problems without having to consult attorneys or go to court. Therefore, many family mediators will keep the parties together far longer than is routine in other kinds of mediations (possibly for the entire session) and encourage the solutions to come from the synergy that joint sessions can create.

Nonetheless, it is sometimes necessary to separate the parties so that they can privately discuss the ramifications of the various options. Sometimes, the mediator will move the parties into caucus because one or both of them are so emotional that continuing in joint session would not be productive. It may be that the attorney will be aware of this before the mediator; if so, the attorney should ask the mediator for a caucus. In caucus, the mediator will work with each of the parties, making sure that they have a complete understanding of the negotiation, and often challenging the parties to consider their alternatives. The attorney should be cautious of requesting a caucus too soon as it may interrupt the flow of the process.

These private sessions may be lengthy, depending on the complexity of the issues and the parties' emotional states. While mediators try to be sensitive to

the amount of time they are spending in caucus with each side, the attorneys need to be patient if the mediator takes a long time in caucus. The attorneys should recognize that the mediator is using the time as efficiently as possible and reassure their clients that separate sessions are often lengthy.

Even if the parties have been in caucus for some time, many mediators will bring them back into joint session when the caucus is no longer needed. As noted, this provides the parties more time for joint problem solving.

G. [15.21] The Agreement

Most mediations end with an agreement to some, if not all, of the issues. Once the parties have reached an agreement, it is reduced to writing, reviewed and revised (by clients and attorneys), and finally completed by each party and attorney signing the agreement. Every mediator will handle this process differently. Some mediators will simply write down a bullet-point list of the agreed items, and everyone signs and dates it. Some mediators will draft a complete settlement agreement for the parties, inserting all of the boilerplate language that the local bar uses for these documents. There are a variety of other approaches to handling the agreement.

On occasion, the parties will leave mediation with an unwritten settlement, leaving it to the attorneys to draft a written agreement and flesh out the details. This is a very risky proposition, since there is always some element of buyers' remorse, and the attorneys are unlikely to agree on the language without some controversy. Thus, for cases in which the attorneys are going to be responsible for the agreement, it is a good practice to at least agree in writing that the parties will return to mediation if they cannot agree on the language of the agreement.

Most attorneys will have the final agreement approved by the court and entered into the record in the case. However, another advantage of mediation is that it may provide some measure of privacy if the parties do not want all of the details of their agreement in the public record.

H. [15.22] Enforcing the Agreement

Generally, parties who have resolved their cases in mediation are less likely to return to court. Many agreements contain a requirement that any questions about the matters covered by the agreement be addressed in an additional mediation before filing motions or other actions about the agreement in court. However, if there are future disagreements, the final mediated agreement is enforceable as a contract.

I. [15.23] Conclusion

Mediation is becoming the norm for divorce cases. Good practice requires attorneys to understand the mediation process so that their clients can reap the full potential of mediation. By encouraging their clients to participate in mediation

and embrace mediation concepts, attorneys are respecting their clients' desire for self-determination and peace.

III. [15.24] Collaborative Law

A. [15.25] Overview

Many matrimonial attorneys would agree that "family court is where they shoot the survivors."[1]

The expectations that the parties brought to their original relationship survive the ending of their marriage. Those expectations powerfully influence not only the parties' post-divorce expectations of each other, but also the reactions of others, such as relatives, friends, and the courts, to the terms of their divorce.[2]

Our clients' divorce expectations are frequently unrealistic or simply misguided. Parties sometimes approach divorce believing that it is a means to sever all ties with a former spouse or a mechanism for exacting suitable revenge, but, especially when children are involved, such expectations are either pure folly or are likely to do irreparable damage to the parties or their children.

A marriage relationship does not "end." Rather, it is *transformed* through the process of divorce. The parties will always have a history together. Hopefully they will have good memories to counterbalance the bad ones of their time together. If they have children together, they are going to be connected to one another, for better or for worse, throughout the children's lives. They will be running into each other for years to come for parenting-time exchanges, religious occasions, holidays, health emergencies, awards ceremonies, graduations, weddings, and births of grandchildren, to name just a few such inevitable encounters. Because their relationship is going to transform instead of simply cease to exist, the parties' interests would be well served to work toward a resolution that will shape their post-divorce relationship into the best possible form. The result will either be an embittered wound or a healthy, transformed relationship.

Litigation is sufficient for ending legal relationships between parties, but it is ill-suited to craft harmonious post-divorce relationships. Litigation all too frequently exacerbates the negative feelings between the parties and serves to deepen the emotional rift between them.

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1 Retired California Court of Appeals Justice Donald M. Kning, addressing the *"New Ways of Helping Children and Families Through Divorce"* conference sponsored by the Judith Allerstein Center for the Family in Transition and the University of California, Santa Cruz; Quali Lodge, Carmel Valley, CA (Nov. 21, 1998).

2 Excerpted from a book review by David A. Hoffman of AFTERMARRIAGE: THE MYTH OF DIVORCE – THE UNSPOKEN MARRIAGE AGREEMENTS AND THEIR IMPACT ON DIVORCE by Anita W. Robboy (Alpha Books, 2002).

> "In short, we have here two hostile people whose behavior fits the mold of countless persons involved in matrimonial proceedings who are rational except toward each other."[3]

One does not have to be an expert in "therapeutic jurisprudence" to understand that litigation can do irreparable damage to family dynamics.

> "An economist, despairing that any rational standard can in fact be articulated, seriously argued that custody should be determined in most cases by flipping a coin – because the right result would be achieved as often in that fashion and much more efficiently."[4]

In some situations, reconciliation is the ideal outcome for parties contemplating divorce. Obviously there are exceptions to this statement such as when there have been instances of domestic violence and abuse. Some people who consult a divorce attorney are likely only in need of marriage counseling or financial advice, but, once a lawyer is retained, litigation is usually the outcome and becomes the death knell for a potentially salvageable relationship. Once litigation begins, the chances for reconciliation narrow significantly.

In Spiritual Divorce,[5] Debbie Ford urges people to use divorce as a growing experience and a catalyst for a spiritual awakening. In divorce litigation, clients tend to lose control of the process and they can be relegated to a role akin to being a passenger on a roller coaster. Such a passive role thwarts the chances for emotional and spiritual growth because the parties feel that they have no control over their own destines.

Family law practitioners recognize the truth in the first sentence of Leo Nikolaevich Tolstoy's masterpiece, Anna Karenina: "All happy families are like one another; each unhappy family is unhappy in its own way."[6] Divorcing families have unique problems, and every family has its own needs. While a family court will determine the legal rights and responsibilities of the parties, it does so in a uniform, legalistic fashion, which often falls short of meeting the needs of the parties and their children. Even if a judge had the time, how could he or she ever fully understand a particular family unit as well as the spouses?

Given litigation's shortcomings, matrimonial attorneys have recognized the need for a viable alternative to judicial determination of divorce proceedings. One alternative is Collaborative Law and it may eventually become the standard for modern divorce.

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3 Judge Stanley Gartenstein, Family Court, City of New York.

4 Legal and Mental Health Perspectives on Child Custody Law: A Deskbook for Judges. *Doctrinal Standards for Judicial Determinations of Custody*, § 2:3, p. 14 (1998).

5 Debbie Ford, Spiritual Divorce: Divorce as a Catalyst for an Extraordinary Life. HarperCollins. 2001.

6 Anita Wyznski Robboy, Aftermarriage: The Myth of Divorce. 2002. Alpha Publishing. Page 6.

Collaborative Law is a dispute resolution model in which both parties to the dispute retain separate, specially-trained lawyers whose advocacy goal is to help the parties settle their dispute. If settlement cannot be achieved, or either party begins motion practice, the collaborative process terminates and both attorneys are disqualified from any further involvement in the case.

The underlying "power" of Collaborative Law is identical to the driving force of any negotiation – if a party's needs are not met, he or she will escalate to the next level. In its simplest pathline, Collaborative Law eliminates discovery, motion practice and trial. It does not eliminate legitimate advocacy; however, it does tend to reform litigators.

Collaborative Law is more challenging than litigation in the sense that a lawyer aims to convince the client, the other spouse and that spouse's attorney of the legitimacy and appropriateness of a proposed course of action. Under the Collaborative Law model, parties wishing to divorce must retain attorneys trained in the collaborative process. Training is provided to attorneys who meet certain prerequisites by their collaborative law panel. In Kentucky, training usually lasts two days and consists of both theory and experiential role playing.

Compliance with this model is enforced by an agreement, commonly referred to as a "Big 'C' Agreement." While the form may vary, there are essential provisions which distinguish the "Big 'C' Agreement" from a "little 'c' agreement." The most critical components mandate that neither of the attorneys will initiate motion practice and, if one does, both attorneys are disqualified from further representation. If there is no disqualification clause, then there is no "Big 'C' Agreement."

B. [15.26] History

Collaborative Family Law was created in the early 1990s primarily in response to the destructive impact of divorce litigation on divorcing families.[7]

1. [15.27] The Minnesota Movement

In the early 1990's, Minnesota lawyer Stu Webb found himself completely exasperated by the practice of family law. He was disgusted with the lack of professional courtesy between lawyers and was convinced that traditional litigation was not helping his clients.[8] It became clear to Webb that "the courthouse was not the optimal forum to resolve family disputes and restructure family relationships."[9] He quit litigating in the traditional sense and resolved never to go to court again. To this end, Webb would only agree to represent clients in their efforts to craft

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7 Larry Hance, *Collaborative Family Law: Why Aren't Those Lawyers Going to Court?*

8 Elaine McArdle, *Divorce Without Bloodshed – The 'Collaborative Law' Movement Is Making Life Better for Family Lawyers and Their Clients*, 2000 Law. Wkly. U.S.A. 314.

9 Pauline Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation*. ABA. 2001. P. xiii (hereinafter Tesler).

settlement agreements, with the explicit understanding that Webb would withdraw if an agreement could not be worked out and the client elected to go to court. From this approach to practicing family law, Collaborative Law was born.

In the past Webb had observed that the positive energy created in settlement conferences with opposing counsel and clients "encouraged the development of creative settlement alternatives. In that context, everyone contributed to a final settlement that satisfied all concerned – and everyone left the conference feeling high energy and with good feelings… The lawyers in such cases developed a degree of trust that might make future dealings between them more productive."

Webb sent out word to other attorneys in the Minneapolis area who might be interested in practicing this new method. As Webb puts it, "the response was gratifying and collaborative law became a reality." Word spread, "by attraction rather than promotion," and a team approach was developed that added neutral financial specialists and mental health coaches. As of 2008, Collaborative Family Law was being practiced in at least 40 states (including Kentucky), Canada, Austria, Australia, Ireland, Northern Ireland and Britain with about 8,000 to 9,000 practioners.[10]

2. [15.28] Medicine Hat, Alberta, Canada

An excellent example of a thriving Collaborative Law Practice is the one in Medicine Hat, Alberta, Canada. <http://www.collaborativepractice.ca/>.To quote Janis Pritchard, a member of the collaborative group: "We are a small city of 50,000 people. We have had an active Collaborative Group here since August 2000. All but 2 or 3 of the lawyers who do much family law are members of our group. We have all had training in the Collaborative Process (Chip Rose), in Mediation and in Interest Based Negotiation Skills.

We have effectively removed family law from our court system. There are only a few files left that appear on our court lists and they are mostly one lawyer in town who has not joined our group. That lawyer is losing market share and is now looking at getting the training and joining our group…" <http://cuttingedgelaw.com/page/collaborative-law-medicine-hat-alberta>.

Soon, groups began forming throughout the U.S. Today, there are hundreds of collaborative law panels, including three in Kentucky and Collaborative Law is significantly more entrenched in certain Canadian provinces than in others and the United States.

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[10] *Family Law in the Twenty First Century,* Journal of the American Academy of Matrimonial Lawyers, Vol. 21, 2008; Stuart Webb, Collaborative Law: A Practioner's Perspective on It's History and Current Practice, pages 155-57.

3. [15.29] Northern Kentucky Collaborative Group, Inc.

The first Kentucky group to be trained and organized was founded in the tri-county area of Northern Kentucky in early 2002. Attorney Ruth Jackson had been a member of the collaborative group in Cincinnati, Ohio for some time after being trained by Collaborative pioneer Chip Rose. She was instrumental in developing local interest in this process, and in 2002 a group of 25 attorneys completed the first Kentucky training session, including some from outside the immediate area (including the author of this section of the chapter). The current contact for the group is Attorney Timothy B. Theissen (see below) who confirms that since 2002 176 cases have begun collaboratively of which about 10 are currently active, 11 have had the couples reconcile, and the remaining (132) have been successfully completed and settled in the collaborative process. The remaining 23 (13%) have been terminated from the collaborative process.

Northern Kentucky Collaborative Group Contact:
Timothy B. Theissen, Esq.
Strauss Troy, LPA
50 East RiverCenter Boulevard
Covington, KY 41011
T: 513.621.8900 | Direct: 513.768.9711
Fax: 513.629.9444
tbtheissen@strausstroy.com

4. [15.30] Kentucky Collaborative Family Law Network, Inc. (Louisville area)

The second Kentucky group was formed in Louisville in 2002. In the Spring of 2005, the Louisville group leapt forward to adopt the more complete model called "multi-disciplinary collaboration," which involves lawyers, mental health professionals, divorce coaches, and financial consultants, according to similar written collaborative agreements as found in the lawyers-only model.[11]

There are 55 members of the 2011-2012 panel. The president is:

William L. Hoge, III, Esq.
Suite 506, Legal Arts Building
200 South 7th Street
Louisville, Kentucky 40202-2721
502-583-2005
BillHoge@usa.net

[11] Panels may differ on requirements for potential trainees, including number of years in practice and extent of practice concentration on Family Law. The reader should contact the appropriate panel to ascertain its requirements.

C. [15.31] The Paradigm Shift

Over the past decade, traditional adversarial litigation has been tempered by creative new concepts for dispute resolution. The family law arena is no exception to this trend and was arguably in the most desperate need for a fresh approach to dispute resolution. It is consistently maintained by the bench that an enormous percentage of domestic relations cases are resolved by ADR.

Overburdened family court dockets, legislative budget cuts and a new breed of client compels the family law bar to adapt. Due to an influx of information from the Internet and other mediums, as well as a general dissatisfaction with the delivery of legal services, not to mention the expense of litigation, today's client will no longer tolerate the entrenched "slash and burn" litigation model and its attendant costs.

Consumer dissatisfaction has manifested itself in a marked increase in *pro se* actions, which may or may not serve the parties' best interests and certainly do not alleviate the burden on the courts. In any event, the public simply will not pay for an inefficient process which, in their view, only serves to line lawyers' pockets. Lawyer jokes and consumer ill-will need no documentation in this presentation. The profession is challenged to get on the steamroller of progress or become part of the road.

In many jurisdictions, lawyers are unbundling their services to meet modern client demands.[12] For example, *pro se* litigants may choose to use a lawyer only for consultation on the potential tax consequences of their proposed property division.

The paradigm shift required of the collaborative lawyer refers to the change of consciousness needed to transition between the adversarial and collaborative mind-sets. This paradigm shift "requires the lawyer to become aware of unconscious adversarial habits of speech, as well as automatic adversarial thought forms, reactions and behaviors."[13]

In one training session attended by the author, the instructor asked whether the lawyer trainees experienced any client dissatisfaction with their services in family law cases. Next, the instructor inquired about whether the participating attorneys had any substantial uncollectible accounts receivable. Finally, the trainees were asked whether any clients had ever complained that the litigation process was not worth the money. The group unanimously answered all three questions in the affirmative, leaving little doubt that universal problems exist with the *status quo*.

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[12] In several jurisdictions, family courts are experimenting with self-service kiosks or internet assistance to *pro se* litigants in uncontested, no-fault divorces. In some instances, litigants can fill out petitions, file initial paperwork and even calculate child support obligations.

[13] TESLER at 78.

1. [15.32] Purpose

a. [15.33] Litigation Represents Failure of Intention and Imagination and Basically Offers One Clear Service: Finality

The collaborative process permits the parties to be limited only by their creativity, imagination, and willingness to work in everyone's best interests – particularly those of the children involved – to craft an amicable resolution to the dissolution of the marriage.

Collaborative Law pioneer Chip Rose is quoted as saying: "The failure of Collaborative Law is only due to the lawyer's imagination." In other words, for collaborative lawyers, "impasse is simply the moment when we roll up the sleeves and get to work."[14] Collaborative training teaches lawyers creative problem solving techniques. An example of one technique for breaking through an impasse is found in the following:

Chip Rose's "Drop Dead Questions"

1. What are your choices or options?
2. What are the consequences of that option?
3. How does that move you closer to your goals (in response to a statement, accusation, or characterization)?
4. What would be the most effective thing to do next?
5. What could we do at this point that would be most helpful to you right now?

There are many other techniques which can be learned during Collaborative Law training.

b. [15.34] No Longer a "Zero-Sum" Game

Many of the country's collaborative bar groups use the slogan "Divorce with Dignity" because Collaborative Law is designed to empower the individual parties more fully.

Traditionally, during an initial client interview, family law practitioners tend to review substantive rights with a prospective client. "How much property will I get?" "What about my mother's china?" From a collaborative standpoint, the initial client interview should be focused on explaining the procedure and the available processes which may be most suited to resolve the dispute:

> **Litigation** – A judicial *controversy*. A *contest* in a court of justice for the purpose of *enforcing* a right.[15]

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[14] *Id.*

[15] Black's Online Law Dictionary available at: <www.blackslawdictionary.com>.

> **Arbitration** – The investigation and determination of a matter or matters of difference between contending parties, by one or more *unofficial persons*, *chosen by the parties*....[16]
>
> **Mediation** – the act of a third person who interferes between two contending parties with a view *to reconcile them or persuade them to adjust or settle their dispute*.[17]
>
> **Collaborative** – to work *jointly with others or together* especially in an intellectual endeavor….[18]
>
> **Simple Four-Way Settlement Conference** – A meeting between the two clients and their respective attorneys to work out the dissolution details.
>
> **Simple Two-Way Settlement Agreement** – A meeting of the parties and their respective agreement reduced to writing.

c. [15.35] Facilitating "Win-Win"

The main purpose and overriding goal for collaborative lawyers is to facilitate a "win-win" settlement. Ideally, the synergy of four pro-active, creative participants results in an added-value resolution. The collaborative law process is intended to find solutions to meet the legitimate needs of both parties, and is committed to crafting synergistic and creative solutions.

By identifying the client's objectives, by closely examining those aspects as well as the underlying motivations, both the attorney and client can differentiate between wants, desires, interests, and needs which will culminate in the distillation of legitimate goals for resolution. After thorough analysis, these goals may be presented in the most reasonable manner: "finding modes of reaching the identified goals that are consistent with the other party's legitimate interest will provide the best chance for win-win settlement."[19] The structured, pre-approved agenda for four-way meetings require much effort, but are designed to avoid the hot emotions often present in traditional litigation. The rule is, "No surprises."

2. [15.36] Experiential Training

Reading and studying this section, or any other materials on Collaborative Law, will not adequately prepare an attorney to handle a case collaboratively. Experiential training[20] is absolutely essential to the collaborative training process. The lawyer has to learn a completely new skill set in order to represent his or

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16 *Id.*

17 *Id.*

18 Merriam-Webster Dictionary.

19 *Id.*

20 It is important to note that Kentucky law forbids certification or specialties in a particular practice area. *See* SCR 7.40.

her client effectively in a collaborative divorce. Two lawyers, untrained in the collaborative process, have very little chance of successfully resolving a divorce case collaboratively. Training includes extensive role-playing with experienced collaborative professionals. The participants actually feel their attitudes change as the mediator-type guidance is applied to their experiential role. A great many of the mediation techniques are transferrable to the skill set for collaborative practice.

Trained collaborative attorneys usually become part of the collaborative law panel in their geographic area. As a panel member, the attorney agrees to work only with other trained attorneys when handling a collaborative case. The panel operates as a "self cleaning oven" in that it maintains the integrity of the collaborative process and excludes attorneys from participation if they abuse the spirit of the process or are not playing according to the discipline's rules. A lawyer who feigns to be practicing collaboratively will be identified pretty quickly.

Practitioners should be forewarned that much of the training seems counterintuitive and engaging in the process requires a leap of faith. One Collaborative Family Law trainer humorously recognizes that, after the first day of training, trainees will be absolutely convinced that the process would never work for them, fearing issues such as breaching the duty of zealous advocacy, dishonesty of the parties, and the loss of business income under the collaborative model. The second day, the trainees wonder why one would not practice every case collaboratively, if possible.

Those experiencing such trepidation would be well advised to consider the words of two notable practitioners:

> *"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough."*[21]

> *"I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burned into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul."*[22]

Clearly, the benefits of settlement over litigation have been universally and historically recognized.

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21 Abraham Lincoln.

22 Mahatma Gandhi, from his book, The Story of My Experiments with the Truth.

3. [15.37] Clients' Emotions

Any experienced family law practitioner knows clients' emotions push them around in the process, often making them people they would not otherwise be. The expression "Criminal law is bad people pretending they are good, and family law is good people acting their worst" is a well-known but unfortunate truism. The simile of comparing the death of a marriage and the death of a loved one is accurate on all accounts.

Elizabeth Kubler-Ross, M.D., expressed the cycle of death, which is like divorce, in five distinct stages:[23]

Denial and Isolation

Anger

Bargaining

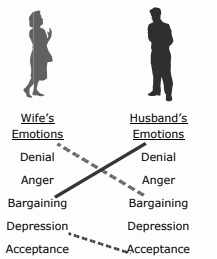
Depression

Acceptance

How often have you heard, "I can't believe he wants a divorce"? We have open caskets at funerals to help family and friends begin the process of grief. Their loved one is dead. The marriage is dead. Funeral directors will tell you the bereaved regularly say, "Why me?" Dr. Ross describes these feelings as anger, rage, envy and resentment and acceptance. Reflection will allow the reader to see how these stages unfold in the emotions of their clients.

M. Scott Peck, M.D., in his book FURTHER ALONG THE ROAD LESS TRAVELED, points out how the American public believes they should never have pain. They demand Prozac if they feel overwhelmed with anger or depression. Lawyers recognize Dr. Peck's opening line in THE ROAD LESS TRAVELED: "Life is difficult." This absolute truth applies to anyone except a genuine sociopath when it comes to divorce. Unfortunately, the raging emotions of divorce are completely different for every couple and for every individual.

The husband may well be at the stage of "acceptance" as he is running off with his secretary while the wife is trapped cycling back and forth between "denial" and "anger."



[23] Elisabeth Kübler Ross, ON DEATH AND DYING, Scribner Classics, 1997.

The collaborative process not only recognizes this reality, but demands that practitioners deal most adroitly with the grief reality. Dr. Peck talks about "cheap forgiveness" when a person says they have forgiven someone, but the truth is revealed in their actions. Collaborative lawyers are trained to help clients sublimate their anger and move on through the process.

4. [15.38] Four Dimensions of the Paradigm Shift and the Retooling Process

During training, it is necessary for lawyers to make a paradigm shift. In essence, they must unlearn a host of habits and perceptions and allow themselves to approach training with a "beginners' state of mind."[24] Positional gamesmanship and powerplays are not considered desirable attributes of the trained collaborative practitioner.

a. [15.39] Retooling Yourself

Most litigators are trained to think like gladiators. How often have you heard litigation likened to war? During collaborative training, the attorney's role as gladiator is defused and transformed into a creative, interests-based negotiator and expert conflicts manager. The goal of the collaborative lawyer is completing the divorce transition with integrity and mutual satisfaction.[25]

The lawyer must be retooled to view emotions and feelings as an important part of the process, as opposed to a distraction. Forgiveness must be viewed as a strength, not as a weakness. Solutions are "added value," not "win-lose."

b. [15.40] Retooling Your Client

This aspect of the paradigm shift is focused on "becoming aware of habitual behaviors and beliefs that come into play when working with a client, and retooling those behaviors and beliefs so that they will serve, not thwart, collaborative representation."[26] In other words, this aspect of the paradigm shift is all about the relationship between attorneys and clients.

In the collaborative process, the role of the client is elevated, and the relationship between attorney and client is more synergistic, emotive, and intense. The attorney is required to utilize new skills, such as active listening and open-ended questioning. The attorneys must also encourage compassion, enlightened self-interest, and respect for all participants.

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[24] Tesler at 36.
[25] *Id.*
[26] *Id.*

c. [15.41] Retooling Other Players

The third dimension of the paradigm shift relates to the lawyers' relationships with counsel (use of the term "opposing counsel" is discouraged in Collaborative Law), as well as with consultants, experts, and other third parties. There is a wonderful metaphor in which each lawyer is the guide on a white water raft. Their job is to safely get their clients to the end of the journey. It may be a rough ride, but the still pool at the end of the trip is a satisfying place.

d. [15.42] Retooling Negotiations

The shift in negotiation styles required for Collaborative Law is a move to option-generating negotiation rather than traditional positional bargaining. Interest-based problem solving is central to collaborative negotiation.[27]

Traditional negotiation strategies must be altered, and focus must shift to the participants and understanding their interests, gathering all of the information necessary to make good decisions and understanding the nuances of the information gathered. Then the parties and counsel must work on generating options for settlement, evaluating the consequences of those options, and reaching a settlement based upon the articulated interests of the parties.

Additionally, negotiations in collaborative cases must focus on interests and needs, rather than rights. Interest-based bargaining requires considerable communication and exploration with the client before an issue is put on the table in a four-way conference.[28]

D. [15.43] Stages of Collaborative Representation

1. [15.44] Client Intake and Case Evaluation

During the initial client consultation, the lawyer and client must determine whether the case is suitable for handling collaboratively. As a rule, you should always remember to do the following when you are getting to know your client:

- Ask about the history leading to the separation;
- Try to determine where the client/spouse are in the grief and recovery process;
- Show concern about and ask how the children are doing; and
- Get to know the family history of dispute resolution.

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[27] Sherri Goren Slovin, *Negotiation and the Attorney in the Collaborative Process*, THE COLLABORATIVE REVIEW, Vol. 6; Issue 2 (Summer, 2004) at 1.

[28] TESLER at 83.

To be sure, there are clients that actually want combative litigation. It is during this stage of the process where the attorney should be alert for certain red flags that would disqualify the client for seeking a collaborative divorce. For example, when you hear the client's story, be sure to screen for violence and the capacity to participate effectively in the collaborative process. Some of the disqualifiers you should watch for are:

- Mental illness/personality disorders
- Substance abuse
- Completely unrealistic goals
- Profound mistrust
- Denial
- Overly dependent
- Refusal to make immediate support arrangements
- Reluctance to disclose
- The "bully"
- The "victim"
- The overly vindictive/furious client

When discussing the Collaborative Process (if this is honestly your preference), discuss how it is different from the court model by emphasizing the following:

- Control over the outcome
- Allows for more continuity
- Allows for direct communication
- Provides time for both participants to become aware of finances
- Provides a safe place to work through issues
- Does not rely on a court schedule

If after discussing and evaluating all the procedural possibilities – litigation, mediation, arbitration, four-way negotiation and the collaborative process – your client wishes to utilize the collaborative process, the first step is to ascertain whether his or her spouse is already represented by counsel. *See* Appendix A at Section [15.168] of this chapter for illustrative materials for clients on the subject of collaborative law. *See* Appendix B – Non-Adversarial Resolutions and Creative Approaches to Family Resolutions at Section [15.169] of this chapter.

2. [15.45] Commencing the Collaborative Process

a. [15.46] Contacting Counterparts[29]

If the other spouse is not represented by counsel, the lawyer can contact the spouse directly by letter, explaining the collaborative process and providing a list of all trained collaborative lawyers in the area. Or the attorney can charge the client with conveying this information to his or her spouse in order to avoid any ethical questions associated with contacting unrepresented parties. Obviously, the lawyer should take care not to use language which exerts pressure or which may be construed as offering legal advice to the unrepresented spouse. *See* Appendix C – Sample Letter to Respondent Suggesting Possibility of Collaboration at Section [15.170] of this chapter.

If the other spouse is represented by another trained collaborative lawyer, the attorney should contact that counsel and arrange the negotiation and execution of the Collaborative Participation Agreement. Sometimes the other spouse's lawyer will conclude he or she does not want to proceed collaboratively. Even so, the cooperative atmosphere can be quite salutary.

If the other attorney is not trained in Collaborative Law, counsel should be contacted by letter or by phone expressing the desire of one spouse to engage in the collaborative process and requesting counsel to explain the collaborative process to his or her client and consider referring the matter to a trained collaborative lawyer. There is no means for compelling an unwilling party to use the collaborative process, and there never will be. However, some jurisdictions now place an affirmative duty on counsel to advise clients of ADR options.[30]

3. [15.47] Collaborative Participation Agreement

Once both parties are represented by trained collaborative attorneys, the first step is to secure an executed Collaborative Participation Agreement. *All of Collaborative Law's authority rests on the voluntary, informed written consent of the participants.*

As soon as the determination to handle the case collaboratively has been made, counsel should get the Collaborative Participation Agreement executed. The form of the agreement is standardized so little or no negotiation should be required with respect to the terms and provision. The standard Collaborative Participation Agreement form is included as Appendix E to this chapter. Standardization means not re-creating the wheel each time and does not result in uninformed agreement by the parties.

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[29] Terminology is very important in collaborative cases. Terms like "opposing counsel" are preferably avoided.

[30] TESLER at 58.

Practitioners should take note of several essential provisions and must be absolutely certain that the parties understand, agree, and are willing to abide by the terms of the agreement.

In Kentucky, the parties often agree to file a petition and response, as well as an agreed motion to make the Collaborative Participation Agreement an official order of the court and to put the litigation of the case into abeyance. Further motion practice or other court action is expressly forbidden, and, in some jurisdictions, even the threat of court action will justify terminating the agreement and the collaborative process. *See* Appendix D – Agreed Order at Section [15.171] of this chapter.

The parties and their attorney specifically agree that if either party terminates the collaborative process, both attorneys must withdraw. This is the power of the collaborative process. If collaboration fails, the case must be transitioned to new two attorneys to handle the litigation. Many Collaborative Participation Agreements prevent either party from seeking any type of judicial relief or taking court action within 30 days from the termination of the collaborative process.

The parties agree to exchange information in good faith and to forego the formal discovery process. Parties are obligated by agreement to "make full disclosure of all relevant information and documents needed to resolve the dispute."[31] This does not mean that the parties or counsel cannot insist on all the verification and disclosure necessary to satisfy any concerns for the lawyers' standard of care. The practitioner has every single tool to meet his or her duty of care which would exist in litigation. If an unprincipled party is determined to defraud the court, litigation has no better tools to prevent such fraud than are available in Collaborative Law.

The agreement also documents that the primary forum of the collaborative process is the four-way meeting. Accordingly, the parties agree to cooperate and participate in the formulation, discussion, and resolution of all issues together in the presence of their attorneys. *See* Appendix E and F – IACP Collaborative Participation Agreement Guidelines; Collaborative Family Law Agreement at Sections [15.172] and [15.173] of this chapter.

4. [15.48] Initial Client and Attorney Meetings

It is vital to the process that the client be fully aware and accepting of his or her role and responsibilities in the collaborative process. Clients must know that they will be held accountable for their actions and conduct during four-way conferences.

Prior to the first four-way conference, counsel should spend as much time as needed exploring and determining the client's interests and goals. The client should also understand his or her substantive rights. It is very important to the process that the client develop realistic expectations so that the parties "enter the

[31] Hance at 3.

collaborative process with expectations as to the range of likely resolutions which overlap" to some degree.[32]

The client should also fully understand the attorney's role in the collaborative process, as well as the roles of the other participants. Since the dynamics in the collaborative process may differ from the client's expectation and his or her attorney's conventional role, the client must be prepared for the realities of the collaborative process, particularly openness and honesty. For instance, the client should be prepared for the possibility that, from time to time, counsel may agree with the other party. Clients should also be able to view the other spouse's attorney as a team member rather than an opponent.

Clients should be instructed on positive, facilitative communication techniques and be forestalled from dwelling on painful issues or dredging up the past. The client must be prepared to control his or her emotions and know when to take a "time out" or break from a conference for a private caucus with counsel.

The all-important first four-way meeting between attorneys and parties is always preceded by the initial lawyer-lawyer meeting which sets the agenda for the first four-way conference. This face-to-face meeting with the other collaborative parties' respective counsel should be held as quicky as possible to facilitate a smooth commencement of the process. It should be a goal to stick to the agenda. As before, the rule is "No surprises."

5. [15.49] Four-Way Conferencing

After initial meetings with collaborative counsel, the typical process is to start the case with a four-way conference with the parties and attorneys. At this initial meeting, the parties will establish a schedule, coordinate information gathering, and discuss preliminary issues pertaining to children and finances.[33] The parties may also be able to agree at this meeting on other types of collaborative professionals who will be used. This multi-disciplinary model encourages immediate utilization of the entire team. *See* Appendix G – Agenda for the First Four-Way Meeting at Section [15.174] of this chapter.

It is advisable for one of the attorneys to take the minutes at the conference. These should reflect the participants' discussions and the resolution of any issues. After each meeting, the minutes may be summarized in a memorandum and distributed the other spouse's counsel.

At the first substantive four-way conference, it is important that the lawyers review the collaborative process fundamentals in the presence of both parties. Although both parties have been briefed separately, experience has shown that this public and ceremonial reiteration of the process is invaluable in setting the stage

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[32] *Id.*

[33] Catherine Ann Conner and Margaret L. Anderson, Collaborative Practice Materials: A Resource Manual for Collaborative Professional and Clients, page 6.

for negotiation and fostering a commitment to the spirit of the process among the parties. Failures are often traced to not having the parties "buy-in" at this stage.

After each conference, the client should be "debriefed" by counsel to ascertain his or her perceptions and to identify any new issues or shift in priorities which may have arisen as a result of the four-way conference.[34]

Next, counsel will typically confer with each other in a "post-meeting" to share their perceptions and suggest improvements. Both positive and negative points should be discussed, and any collateral conflicts should be resolved between counsel if possible.

Generally, conferences should not exceed 2-3 hours. A collaborative case will require between 2 and 10 four-way conferences, depending on the complexity of the case.[35] Obviously, sophisticated cases lend themselves to more creatively crafted agreements, and these are the cases which require more sessions. *See* Appendix H to this chapter for Guidelines for the Effective Attorney Team in a Collaborative Four-Way at Section [15.175] of this chapter.

There have been discussions about creating a budget-case collaborative model in which the parties agree upon their attorneys' expense and must conclude the case within this budget. However, this is just an example of how lawyers are searching for creative solutions.

6. [15.50] Settlement

Once all the issues have been resolved, there is a final four-way conference or closing. At this meeting, all the necessary documents are executed, all funds are transferred, and property is exchanged. The attorneys will generally review all the settlement points and tie up any loose ends. However, this final meeting is often very important to the clients on an emotional level, providing finality and closure at the end of the process.[36]

E. [15.51] Multi-Disciplinary Models

The multi-disciplinary model is obviously a much more sophisticated process than an attorneys-only model. Collaborative Law practiced in Louisville follows the multi-disciplinary model.

In many collaborative cases, the needs of the parties may best be met by creating a team of professionals to provide assistance in the divorce transition. The most commonly used third parties are mental health professionals, divorce coaches, neutral appraisers, and financial consultants. These professionals agree to work collaboratively to gather and share all information needed to resolve disputes.

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34 TESLER at 64.
35 *Id.* at 66.
36 *Id.* at 116.

Finally, the child specialist is one of the unique, wonderful personnel additions who ensures the well-being of any marriage's most important assets: the parties' children.

As the Louisville multi-disciplinary training was just completed, the complexity of this unique multi-disciplinary approach is still new to Kentucky. Even so, it is the norm in some jurisdictions. The International Association of Collaborative Professionals[37] reported that 400 out of its database of 5,000 cases were denominated as "multi-disciplinary." The Louisville group believes the future is bright for this more holistic approach.

1. [15.52] Mental Health Professionals

Mental health professionals can better resolve issues involving children, especially when the parties are volatile. In the past, collaborative lawyers have used general child psychologists and counselors to assist in collaborative cases. With the increase in demand for collaborative representation, groups of specially trained collaborative mental health professionals have been formed and have become associated with many collaborative law panels. The Louisville group has a number of very involved mental health professionals.

2. [15.53] Child Specialist

The Child Specialist has evolved to become a potentially essential part of the Collaborative Professional Team concerning of the child's or children's involvement in the divorce process. The Child Specialist usually provides direction and aid to the divorcing parents regarding their parenting plan while working as a neutral party and addressing the emotional needs and psychological state of each child.[38]

Theirs is also to provide insight into how the child (or children) are coping with the divorce and to offer options for time share and logistics in their best interest.[39]

3. [15.54] Divorce Coaching

One of the most unique elements in the multi-disciplinary approach is found in the rather ephemeral entity known as the divorce coach. Most divorce coaches have a mental health background and are used at the outset of a collaborative divorce as an emotional support system for the client. Divorce coaches come from various career paths that are skilled in working with client negotiations such as social workers, therapists, and mediators. (It is important to note that the role of a coach and a therapist [dual relationship] is incompatible.) Seasoned practioners

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37 <http://www.collaborativepractice.com>.

38 Susan Boyan, *Child Specialists Interdisciplinary Collaborative Family Law Training*, Training Materials, 2005.

39 Catherine Ann Conner and Margaret L. Anderson, Collaborative Practice Materials: A Resource Manual for Collaborative Professional and Clients.

agree this component may well be the single most important tool in the Collaborative Lawyers toolbox.

Susan Boyan, a licensed Marriage and Family Therapist from Atlanta, Georgia who has pioneered Divorce Coaching, describes the role on the website <cooperativepartenting.com>:

> "…Since a divorce is 80% emotional and 20% legal, a divorce coach can make a tremendous difference in helping the settle a divorce. The divorce coach may work with the divorcing parent to assist them with their grief or their resistance to negotiations. The goal is to provide support to the adult while also helping to prepare them for the four-way negotiations and helping to prepare them for the future as a single adult. Divorce coaching may continue post divorce, if the issues they are addressing are related to the divorce process. Some parents may not need the services of a coach and sometimes both parents will have their own if needed. The coach communicates as part of the team to increase overall effectiveness. In some cases the coach may work as a neutral with both parents and the team. In this case, they may attend and even manage the four or five way meetings."[40]

Since the lawyer has neither the time nor the expertise to counsel the client on the complex emotional aspects of divorce, the divorce coach is seen as an effective and economical component of the divorce transition and healing process. The divorce coach does not provide therapy for any long-term issues; the coach's sole function is to facilitate the parties' forward motion through the separation process. The Louisville panel now uses one coach for both parties.

4. [15.55] Neutral Appraisers

The parties' ability to agree on a mutually acceptable neutral appraiser to value different types of property is invaluable to the collaborative process. The Louisville group has real estate, personal property, and equipment appraisers as well as business appraisers who are involved in these processes.

5. [15.56] Financial Consultants

A major component of any divorce is the financial separation of the parties' lives and estates. To that extent, a divorce is very similar to a business dissolution. Each party must look to their own financial stability in negotiating the division of property and income. Each party will have his or her own measure of contribution to the growth of the enterprise, and will therefore have their own perception of what is a fair distribution of marital assets.

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[40] *See* <cooperativeparenting.com>.

This is where the role of the financial consultant comes into play. The role of the financial consultant is to act as a neutral counselor who works with both spouses in gathering and assembling all their financial information. The financial counselor then provides information about the couple or family to the other team members to help them with their work.[41]

Financial planners who have been specifically trained in the collaborative process, as well as in divorce finance, are important components to the process.[42] Traditionally, financial experts such as CPAs, business valuators, and pension valuators have been used in collaborative divorces to provide the parties and their attorneys with requested information necessary to support the proposed settlement.[43] However, a new breed of financial expert has recently emerged. The Certified Divorce Specialist ("CDS") and Certified Divorce Financial Analyst ("CDFA") offer their services to divorcing couples so that they may "plan more effectively from a financial perspective and better understand the affordability and potential outcome of their settlement."[44] Almost universally, this expert is absolutely neutral. To avoid any conflict of interest, the financial consultant should NOT be in any position to sell a financial product to either party and should not be connected to any outside financial institution.

This author has been particularly pleased with results obtained from charging a neutral financial evaluator with making his or her appraisal of the closely-held business based on a couple of different standards (fair market value, fair value, extrinsic value, etc.), and making a clear picture of the various considerations from both sides of the fence. More than once, the court-appointed appraiser who comes back with an appraisal one party thinks is off the wall and totally unaffordable has caused the unfortunate sale of the family business when settlement reaches an impasse.

These collaborative financial professionals (also known as divorce planners) encourage the divorcing spouses to work as a team to resolve financial issues. The issues they deal with include "the complex process of divvying up retirement accounts and stock options, calculating alimony payments, and deciding whether it makes financial sense to keep the home."[45] Creativity is promoted and clients generally feel empowered by this approach. They are more likely to be able to resolve their differences amicably rather than destroying each other emotionally and financially by waging a "battle of the experts." Collaborative Law greatly

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41 Robert D. Bordett, Collaborative Family Law Financial Consultant, Section VI, *Interdisciplinary Collaborative Family Law Training,* Training Materials, 2005.

42 Cathy Daigle, *Engaging the Collaborative Professional in Collaborative Practice*, The Collaborative Review Vol. 6; Issue 2 (Summer, 2004) at 8.

43 Cathy L. Daigle, *Divorce Financial Planners Assist the Family, Assist the Attorneys, Assist the Process,* The Financial Piece. Page 1 (hereinafter Daigle II].

44 Daigle II at 1.

45 Rachel Emma Silverman, *New Breed of Specialist Helps Couples to Unwind Marriages*, The Wall Street Journal, online edition. <www.online.wsj.com>. February 12, 2003.

promotes "added value" in matters such as tax planning, which is not an option available to the trial court.

F. [15.57] Shift in Relationship Dynamics

1. [15.58] Attorney/Attorney

Under the traditional litigation model, attorneys approach a case with a view to adjudication; settlement is achieved after weighing the costs associated with proceeding and the risks associated with different adjudication outcome possibilities. This model breeds threats and aggressive positioning, which erode meaningful communication between the parties. The combative atmosphere created by traditional litigation offers only fear as a settlement incentive.

Positioning, rather than settlement, is the objective from the outset of the parties to litigation. By the time settlement becomes the focus, both parties have usually incurred substantial legal fees and have depleted their emotional reserves. Settlement on the courthouse steps is, by its nature, broad, and can overlook important details.

The Collaborative Participation Agreement changes the "attorney versus attorney" dynamic by obliging counsel to act as problem solvers rather than combatants. The focus never leaves settlement during the collaborative process, thereby exponentially increasing the likelihood of reaching a mutually beneficial settlement agreement.

2. [15.59] Attorney/Client

Collaborative Law fosters an extremely close relationship between the attorney and client. Intimacy and trust are required to identify the client's true needs after discarding unproductive emotional issues. "Peeling the Onion" in this manner is essential to be able to generate settlement options which successfully resolve a dispute collaboratively.[46]

G. [15.60] Pros and Cons

Collaborative	Litigation
You and your spouse control the process and make final decisions	Judge controls the process and makes final decisions

[46] TESLER at 83.

You and your spouse pledge mutual respect and openness	Court process is based on an adversarial system
Costs are manageable, usually less expensive than litigation; team model is financially efficient in use of experts	Costs are unpredictable and can escalate rapidly including frequency of post-judgment litigation
You and your spouse create the timetable	Judge sets the timetable; often delays given crowded court
Jointly retained specialists provide information and guidance helping you and your spouse develop informed, mutually beneficial solutions	Separate experts are hired to support the litigants' positions, often at great expense to each
Your lawyers work toward a mutually created settlement	Lawyers fight to win, but someone loses
The process, discussion and negotiation details are kept private	Dispute becomes a matter of public record and, sometimes, media attention
Team of Collaborative Practice specialists educate and assist you and your spouse on how to effectively communicate with each other	No process designed to facilitate communication
Voluntary	Mandatory if no agreement
You and your spouse communicate directly with the assistance of members of your team	You and your spouse negotiate through your lawyers
Outside court	In court[47]

1. [15.61] Costs

Money's never mentioned
When speaking of romance
But say the word "divorce"
And you're talking high finance.[48]

While there is no guarantee that the collaborative process will be less expensive in a given case, the nature of the process suggests cost-saving efficiencies.

[47] Graphic a portion of *Resolving Disputes Respectully* <collaborativepractice.com>; IACP Divorce Knowledge Kit <http://www.collaborativepractice.com/kit/CP-KnowledgeKit.pdf>.

[48] Charles Ghigna (a.k.a. "Father Goose"); poet, children's author and nationally syndicated writer of the humorous daily newspaper feature *Snickers*.

First, discovery is simplified. Additionally, there is no motion practice or court appearances to drive up legal fees. Moreover, since experts and consultants are mutually agreed upon, duplicative costs are avoided. Comparative cost analyses suggest that in most cases Collaborative Law is the less expensive alternative. *See* Appendix I – Comparison of Modes of Dispute Resolution at Section [15.176] of this chapter from COLLABORATIVE PRACTICE MATERIALS – A RESOURCE MANUAL FOR COLLABORATIVE PROFESSIONALS AND CLIENTS by Catherine Ann Conner and Margaret L. Anderson (2004).

2. [15.62] Suitability

The collaborative approach works best for parties who wish to settle without going to court and are willing to commit to negotiating in good faith and working toward a mutually acceptable resolution. There is no critical need for some kind of unrealistic trust, but collaborative law is not suitable for those parties wanting to use the court system for retribution.

3. [15.63] Preserves Relationships and Lessens Emotional Toll

Former spouses usually have relationships which continue after their marriage ends. As co-parents, or through their respective families and circles of friends, it may be necessary for ex-spouses to interact with one another indefinitely. The myth of divorce is that all will be different as soon as the divorce is final.

By its nature, litigation will divide the parties, often leaving emotional scars which will inhibit positive day-to-day interaction between the parties to a divorce. Children are too frequently thrust in the middle of the litigation, involuntarily drafted to ferry messages back and forth between the parents, conscripted as spies against the other parent, coerced to testify against or in favor of one parent, or used as pawns in negotiations.

The collaborative approach greatly lessens the negative impact of divorce on children and creates an environment wherein the relationships between the parties are more likely to be preserved (if not improved) as a function of the process.

4. [15.64] Challenging and Rewarding

a. [15.65] Client Satisfaction

Here we stand,
confronted by
insurmountable
opportunities.[49]

[49] Pogo Possum, legendary American comic strip character created by Walt Kelly.

Numerous aspects of Collaborative Law are satisfying to clients. Cost and time savings are surely appreciated, as are privacy protections. Perhaps most importantly, the process tends to empower the clients more than any other dispute resolution model. Clients report that they feel a sense of security and control throughout the collaborative process. Clients generally get more personal attention during the collaborative process and they are provided a forum in which to communicate. These intrinsic benefits are deeply appreciated by the client, who, too often, feels alienated and unsure throughout the course of traditional litigation.

b. [15.66] Public View of Lawyers

> *The search for meaning does not require us to throw out analytic reasoning, but it does suggest embodying logic with heart and passion.*[50]
>
> *The way we spend our days is the way we spend our lives.*[51]

What would normally be called "opposing parties" often thank their spouse's counsel for helping everyone find the best solution. The litigation process, on the other hand, never engenders fondness for the spouse's attorney. In some jurisdictions, family law attorneys perceived to be committing "dirty tricks" are the lowest order of an already maligned profession.

H. [15.67] Ethical Considerations

1. [15.68] Duty of Zealous Representation

A critic of the collaborative approach might claim that, by engaging in the process, the lawyer does not fulfill his or her duty of zealous representation. However, there is nothing inherent to the practice of Collaborative Law which hinders or even discourages zealous advocacy. In fact, by pursuing a course that meets the client's enlightened self-interest while discouraging positions and courses of actions based on anger and other negative emotions, the attorney often acts as the client's "moral agent," a role which commentators widely agree is wholly consistent with the duty of zealous advocacy.[52]

2. [15.69] Limited Purpose Retention

The concern with the limited purpose retention aspect of collaborative representation is based on an attorney's duty to provide full and complete legal advice and counsel to his or her clients.[53] Although no opinions to date address this issue, Pauline Tesler (a well known San Francisco collaborative attorney) reasons that

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50 Alan Briskin, THE STIRRING OF THE SOUL IN THE WORKPLACE, (San Francisco: Berrett-Koehler, 1998).
51 Annie Dillard.
52 TESLER at 162.
53 *Id.*

the judicial preference, and oftentimes mandate, for ADR overrides any potential ethical problems associated with the limited retention aspect of Collaborative Law. Moreover, at least one state has adopted statutory provisions specifically authorizing the use of Collaborative Law in divorce cases.[54] Two states – North Carolina and Texas – have already passed legislation concerning Collaborative Family Law.[55]

3. [15.70] KBA E-425

In 2005, the Kentucky Bar Association issued an Ethics Opinion (KBA E-425) in regard to Collaborative Law in which they stated that the Rules of Professional Conduct in the Adversarial Process also apply to the Collaborative Law Process. This would include:

(1) SCR 3.130 (1.1) Competence

(2) SCR 3.130 (1.2) Scope of Representation and Allocation of Authority Between Client and Lawyer

(3) SCR 3.130 (1.3) Diligence

(4) SCR 3.130 (1.4) Communication

(5) SCR 3.130 (1.6) Confidentiality of Information

(6) SCR 3.130 (1.16) Declining or Terminating Representation

(7) SCR 3.130 (2.1) Advisor

(8) SCR 3.130 (5.6) Restrictions on Rights to Practice

(9) SCR 3.130 (8.3) Reporting Professional Misconduct

In an article on Collaborative Law, Attorney Sheila Gutterman writes:

> "Attorneys have an ethical obligation to competently and diligently represent the client. Collaborative family law does not change that. The collaborative family law process does necessitate consideration of the financial and emotional needs of both spouses, the children, and the family as a whole in working toward settlement, but the collaborative lawyer is expected.to represent his or her client with the same due diligence owed in any proceeding. Due diligence includes considering with the client what is in the client's best interests, which includes the well being of children, family peace, and economic stability. If the collaborative family law process is not in the client's best interests, the attorney is charged to advise the client to choose a different system, tailored to his or her needs…"[56]

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54 *Id.* at 163 (citing Texas Family Code; Sec. 6.630 and Sec. 153.0072).

55 *See* N.C. Gen. Stat. § 50, art. 4; Tex. Fam. §§ 6.603, 153.0072.

56 Sheila M. Gutterman, *Collaborative Family Law – Part II*, 30 Colo. Law 57 (2001).

Specific issues addressed in the opinion were the following:

- The lawyer has a heightened obligation to communicate with the client regarding the representation and the special implications of collaborative law process.

  > "The duty to communicate is particularly important because the collaborative process is dramatically different from the adversarial process, with which most clients are familiar. The decision as to whether to use the collaborative process is a critical one for the client – it involves both the objectives of the representation and the means by which they are to be accomplished and it affects the relationship between the lawyer and the client…."[57]

- The client is required to voluntarily disclose all relevant information.

  > "…the civil discovery rules provide for compelled disclosure of relevant facts and the standing orders in many family courts require the exchange of extensive financial data... There is nothing to prevent parties from voluntarily agreeing to full disclosure, as 'long as the client fully appreciates the implications of such an agreement…"[58]

- The Lawyer may withdraw if the client fails to negotiate in good faith or make the required disclosures.[59]

- Lawyers are prohibited to continue representation if the parties fail to reach an agreement in the collaborative process.[60]

As in any other legal process lawyers are bound to attorney/client confidentiality as well as making their client's best interests a priority.

4. [15.71] International Academy of Collaborative Professionals

The International Academy of Collaborative Professionals offers ethical guidelines for practitioners, trainers and neutral roles. For example:

> Neutral Roles
>
> a. A Collaborative practitioner who serves on a Collaborative case in a neutral role shall adhere to that role, and shall not engage in any continuing client relationship that would

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57 KBA E-425.

58 *Id.*

59 *Id.*

60 *Id.*

compromise the Collaborative practitioner's neutrality. Working with either or both client(s) or with their child(ren) outside of the Collaborative process is inconsistent with that neutral role.

b. A Collaborative practitioner serving as a neutral financial specialist in a Collaborative case shall not have an ongoing business relationship with a Collaborative client during or after the completion of the Collaborative case, but may assist the clients in completing the tasks specifically assigned to them by the clients' written, final agreement. Such assistance may not include the sale of financial products or other services.

c. A Collaborative practitioner serving as a child specialist may assist the family in divorce related matters for the child(ren.) Such assistance may not include becoming the child(ren)'s therapist.

d. A Collaborative practitioner serving as a neutral coach may assist the family in divorce related matters. Such assistance may not include acting as a therapist for one or both parties.

Coaches/Child Care Specialists

a. A Collaborative practitioner who serves in the role of coach on a Collaborative case shall not function as a therapist to the Collaborative practitioner's client after the case has ended. Coaches should remain available to continue to help the clients/family address specific divorce issues after the divorce is final. A therapist for a client shall not serve in the role of coach or child specialist on a Collaborative case involving a client with whom the therapist has acted in a therapeutic role.

b. A Collaborative practitioner serving as a child specialist shall inform the child about the child specialist's role and the limits of confidentiality as appropriate, taking into account the child's age and level of maturity.[61]

I. [15.72] What Shape is the Elephant? The Challenge of Educating the Attorneys and the Public

There is an ancient fable from India that has been adopted by Jainism, Sufism, Buddhism and Hinduism where six or seven blind men argue over the shape of an elephant. Each man insists the elephant is the shape of whatever they can

[61] *See ICAP Standards Ethics and Principle*; available at: <http://www.collaborativepractice.com/_t.asp?M=8&MS=5&T=Ethics>.

grasp with their hands. Each man has a different perception of the elephant's shape even defending their arguments to the point of violence until they decide to pool their knowledge and work together to understand the actual shape of the elephant.

While the fable has evolved over time to become a classic allegory about collaboration, education and enlightenment, it is an appropriate metaphor of how collaborative law is evolving as a legal mechanism as well as articulating the difficult task of educating other attorneys and the public.

One of the biggest challenges in Collaborative Family Law is exactly how to let the public know that an alternative to adversarial divorce exists and, if they choose, they can have divorce without drama, or – as most Collaborative Practitioners prefer to call it – "Divorce With Dignity." Again, turning to the example in Medicine Hat, Canada, Janis Pritchard writes:

> "What we are doing is spreading throughout our province, but most quickly in the more rural areas. I and another senior lawyer from our group, David Carter, have done some training and assisting groups to get started. We trained 25 lawyers in our neighboring province, Regina, Saskatchewan (about 200,000 people) they are now asking to train at least one more group of 24 lawyers. The Collaborative Process is spreading quickly in Saskatchewan as well. We are training other groups of lawyers in a number of other smaller centres in Alberta in the near future."
>
> "We are finding the Collaborative Process growing most quickly in smaller centres as we organize critical mass when we start our groups and then have common training and therefore, common skills and procedures. We are passing along our Medicine Hat model, where we share common information and handouts to clients, common procedures, documents and even a common final contract that incorporates the terms of each successful collaboration. We have had very few failures (only 2 that I know of) and some of us are doing just about 100% Collaborative files. We get along better as a bar and everyone's skill level from senior to junior has increased. We collected statistics for our first 14 months of operation and now government and our judiciary is very interested in what we are doing."[62]

In the Medicine Hat model the tipping point for the public and the attorneys started with training and the delivery system was, essentially, word of mouth.

1. [15.73] Training

Timothy Theissen of the Northern Kentucky Collaborative also confirms that his and other attorney's interest was piqued at a training session in 2002 that

[62] <http://cuttingedgelaw.com/page/collaborative-law-medicine-hat-alberta>.

consisted of 25 lawyers. The training was followed by several meetings where a collaborative model was assembled. Since then the group has grown steadily. In practically every community where collaborative law has taken hold and thrived, it began with training sessions.

2. [15.74] Intake Process

Most interest and education for the public appears to be taking place during the face to face encounter in the intake process. In the intake process the attorney can determine if the collaborative process is an appropriate course of action. As was cited earlier on in *Intake and Client Evaluation* at Section [15.44] the attorney can screen to see if the case is appropriate for Collaborative Divorce and can provide handouts and other materials for the client to review at their leisure.

3. [15.75] Websites

A website is absolutely essential if you expect to garner any interest in your Collaborative Law practice. Several websites regarding Collaborative Law have sprung up over the past decade. A sampling of those, including those in Kentucky are:

- <http://www.collaborativepractice.com>
- <http://www.kycollaborative.com/>
- <http://www.nkydivorce.com/>
- <http://www.collaborativelaw.com/>
- <http://www.nocourtdivorce.com/>

4. [15.76] Other Ways of Raising the Public Interest

a. [15.77] Billboards

Timothy Theissen of the Northern Kentucky Collaborative noted that when his group was able to advertise on billboards, the website traffic for the collaborative increased 30% to 50%.

b. [15.78] Newspapers and Magazines

It can be very powerful to have newspaper or magazine articles about your collaborative group. Stu Webb suggests having an eye-catching title such as "Lawyers Not Going to Court?![63]

[63] Ky. Collaborative Family Network Basic Collaborative Training, page 31

c. [15.79] TV and Radio Talk Shows

Local TV and radio can host lawyers either for information about the practice or, especially if they are on radio, call in shows where people can call in to ask the attorneys questions.[64]

J. [15.80] Conclusion

In an article on Collaborative Law[65] Louisville Attorney Bonnie Brown writes:

> "The rapid and global growth of collaborative practice clearly indicates its beneficial properties. Some of us whose licenses were granted in the seventh or eighth decades of the prior century may be representing the now-adult children in their own divorces over whom we litigated in the earlier years of our practice. It is a blessing that we can offer them a healthier alternative than we were able to offer their parents…"

Silver-tongued Daniel Webster once observed that "[m]ost good lawyers live well, work hard, and die poor," which most would agree is a grim reality attendant to the practice of law.

However, there is a solution to the powerless dilemma and the consequential widespread dissatisfaction within our profession. That solution is creativity and it is embodied in the Collaborative Law process.

In Transforming Practices,[66] Stephen Keeva discussed Stu Webb's professional enlightenment:

> Webb's evolution from trial work to a practice in which court battles have no place started with a personal crisis. "In the late '60s, I had a realization that I was totally, absolutely outer directed," he says. "I had no sense of who I was. I felt like a chameleon. It was a terribly scary realization that I had no sense of an inside."
>
> It was out of his search for an "inside" that collaborative law was eventually born. It is a process that blends the principles of mediation with what is called a four-way meeting, which brings lawyers and clients together around a table to try to solve a problem. Webb says he has learned a lot about the role of the "inner lawyer" from friends and acquaintances in the mediation

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64 *See an IACP BLUEPRINT: Considerations for Building a Successful Collaborative Community*, available at: <www.collaborativepractice.com/lib/PDFs/BlueprintFinal.pdf>.

65 Bonnie Brown, *Having Our Collaborative Say, the Kentucky Way,* The Review 144 Jan/Feb 2010.

66 Steven Keeva, Transforming Practices: Finding Joy and Satisfaction in the Legal Life Contemporary Books, an ABA Journal Book, Lincolnwood (Chicago), Illinois, 1999, pp. 157-158.

community, enabling him to drop a lot of the "outer learning" he says he no longer needs.

By developing our "inner lawyer" through innovative practice, we may overcome our powerlessness and become happier lawyers with more satisfied clients.

IV. [15.81] Matrimonial Arbitration

A. [15.82] Overview

Matrimonial arbitration is a process by which divorcing spouses with informed consent agree in writing to submit specified issues related to their marriage and/or parenthood to a neutral third party for adjudication. It is often final and binding, depending on the agreement of the parties, and is always subject to review as far as issues regarding the children are concerned.

In 1990, the American Academy of Matrimonial Lawyers ("AAML") began supporting and providing training for the matrimonial arbitration concept, primarily in response to skyrocketing litigation costs and tortoise-paced trial dockets.[67]

1. [15.83] Emerging Tool for Family Law Cases

On October 1, 1999, North Carolina became the first state to adopt an arbitration statute specifically designed for family law cases [N.C. Gen. Stat. § 50-41(b).]. In 2004, the AAML proposed the Model Family Law Arbitration Act ("Model Act"), portions of which can be found online at: <www.aaml.org/library/publications/21215/model-family-law-arbitration-act/model-family-law-arbitration-act-1-107>. The Model Act was adapted from the North Carolina model.

Kentucky has yet to consider family law arbitration legislation. However, Kentucky has adopted the Uniform Arbitration Act (KRS 417.045 *et seq.*), which provides general default arbitration rules and may be considered in conjunction with the Model Act when drafting arbitration agreement clauses in family law matters. The Model Act may also be used by family law practitioners to establish arbitration procedures.

a. [15.84] Constitutionality Challenged and Challenge Withdrawn

In February of 2010, the Kentucky Court of Appeals ruled that the right of family law arbitration was an improper delegation of judicial duties and powers

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[67] Joan F. Kessler, Allan R. Koritzinsky, and Stephen W. Schlissel, *Arbitrating Family Law Matters*, 2000 Wiley Family Law Update at 317.

to the arbitor; not within the purview of the local rules of court; and the Kentucky Uniform Arbitration Act does not apply to family law cases

In June of 2010, the Kentucky Supreme Court granted a discretionary review, however the appellant passed away before the Supreme Court could render a decision thus making the Appeals court ruling moot. The Supreme Court granted a joint motion to dismiss and the Court of Appeals was ordered not to publish the decision.[68]

b. [15.85] Family Law Arbitration Is Still a Useful and Thriving Course of Action

The fact that the Supreme Court dismissed the ruling because, in this particular instance, it became moot doesn't necessarily mean the questions can't be raised again. Nevertheless, family law arbitration is seen as not only being useful, but even indispensable as an avenue for resolving family law matters.

Family Law Attorney Forrest Kuhn III, addressed a number of these benefits in an article for Louisville Bar Briefs in July of 2010, specifically privacy, efficiency and self-determination, all of which are discussed in this chapter. Mr. Kuhn goes on to address the importance of family law arbitration when he writes:

> "From a policy perspective, divorce arbitration is an important component in the overall family law system. Our current judicial system is under considerable budget constraints and caseloads are high. By allowing parties who have agreed to arbitration to proceed, a family court judge is able to better manage the assigned caseload, which in turn allows more people access to the family court system in a more timely matter. As parties choose to arbitrate complex issues, more time becomes available on a family court's docket…"[69]

2. [15.86] Pre-Divorce

Arbitration is somewhat new to the family law arena, even though it has been the forum of choice in the adversarial labor arena since the mid-1930s. Pre-divorce arbitration occurs when the divorcing parties have one or more issues in dispute but, instead of relying upon the court to adjudicate the outstanding issue(s), the parties turn to a private arbitrator for resolution. In all models, the parties enjoy the luxury of choosing their own decision maker and can ensure a private, confidential setting for the resolution of their dispute.

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68 *See* <http://louisvilledivorce.typepad.com/info/2010/09/family-law-arbitration-appeal-dismissed-court-of-appeals-opinion-ordered-not-published.html>; *Campbell v. Campbell*, 2006-CA-001803-MR and 2006-CA-001827-MR.

69 Forrest Kuhn, *Divorce Arbitration: Should it Stay or Should it Go?* Louisville Bar Briefs, July, 2010, Vol. 10 No. 7, pps 10-11. *See* Appendix J at Section [15.177] of this chapter.

3. [15.87] Post-Divorce

Parties can also agree to arbitrate issues which may arise after the dissolution of the marriage. The author often uses standardized language to that effect in arbitration clauses in settlement agreements.[70]

4. [15.88] Benefits of Arbitration

a. [15.89] Privacy

Arbitration is generally confidential and thus allows parties to avoid airing their "dirty laundry" in a public forum. The parties can insist upon confidentiality language subject to the court's review. Privacy of the proceedings is a decided advantage of arbitration over litigation. Only persons having a direct material interest in the arbitration are allowed to attend hearings. The arbitrator decides and has the power to exclude any witness, other than an essential party or person, during any testimony. Privacy is also extended to arbitrator orders and awards confirmed as judgments.[71]

b. [15.90] Expediency

Family court dockets are so overburdened that it may take years to get a particular case heard, and, when the case is called for trial, it may be interrupted and the issues tried piecemeal. Compared to litigation, arbitration can be relatively quick.[72]

i. [15.91] First on the Docket

Parties choosing arbitration can schedule their matter for hearing based on the parties' and the arbitrator's schedules. They may choose a block of time that will allow for the matter to be presented at one continuous hearing. The parties can agree to a date certain, which will not be bumped by other matters.

ii. [15.92] Customized Deadlines

The parties can control the time frames for dispute resolution, including the times for hearing and award, the length of the hearing, when briefs are filed, etc. The parties can also select procedural guidelines which will govern the time-sensitive aspects of discovery and filing deadlines.

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70 *See* Appendix K at Section [15.178] of this chapter for sample provisions in settlement agreements.

71 George K. Walker, *Family Law Arbitration: Legislation and Trends*, JOURNAL OF THE AM. ACADEMY OF MATRIMONIAL LAWYERS, Vol. 21, p. 560 (2008) (hereinafter WALKER); <www.aaml.org/sites/default/files/MAT211.pdf>.

72 Regina K. Bass, Arthur M. Berman, Barbara K. Runge, Hanley M. Gurwin, *Benefits and Detriments of Arbitration*, ARBITRATION: IN PERSPECTIVE. Pp. 1-29.

c. [15.93] Flexibility

The parties can customize the arbitration agreement, and hence the arbitration, to suit their specific needs, subject to few limitations. Arbitrating one issue left unresolved by mediation (*e.g.*, maintenance amount and duration) is fast becoming a viable alternative.

i. [15.94] Informal

Matrimonial arbitration is generally conducted informally and often with relaxed rules of evidence. The authoritarian, black-robed judge is replaced by a less intimidating decision maker in the form of the arbitrator. This enhances the resolution process' effectiveness.

Instead of the typically cold and sterile courtroom, the parties can choose a friendly and relaxed environment to resolve their dispute. In his article on *Legislation and Trends*, attorney George K. Walker suggests conducting the hearings at a site "conducive to successfully resolving a case…" Dress can be casual and the time for hearings convenient to both parties. This may include evenings or weekends depending on the work schedules of the parties.[73]

d. [15.95] Convenience

i. [15.96] Self-Determination

The parties to an arbitration are benefitted by their ability to pick their judge. They can also select to have their dispute heard and ruled upon by multiple decision makers. The parties can pick their arbitrator based on reputation, credentials or whatever criteria they choose. American Arbitration Association striking procedures may also be used. Parties are more likely to accept a decision when they have a stake in establishing the ground rules and choosing their decision maker.

e. [15.97] Contrast with Mediation

In arbitration, a decision is "rendered" rather than "facilitated" as in mediation. Unlike mediation, the arbitrator exerts control over the parties and limits the communication between them. The arbitrator is responsible for a quality decision, while a mediator remains neutral as to the outcome.

f. [15.98] Not an Exclusive ADR Option

Arbitration can be used in conjunction with other ADR options (mediation or collaborative law) if the parties reach an impasse on one or more points.[74]

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[73] WALKER at 557.

[74] Lynn P. Burleson Tharrington Smith, *HOT TIPS Matrimonial Arbitration*, available at: <www.aaml.org/sites/default/files/AAML HOT TIPS.pdf>.

g. [15.99] Attorney Friendly

North Carolina Attorneys, Lynn Burleson and Tharrington Smith have written that "…arbitration is not only a "client-friendly" process but it is also an "attorney-friendly" process although it is much more similar to litigation than to any other ADR procedure. Attorneys exercise far more control over the discovery and hearing timetable and, therefore, their lives. Arbitration also creates another role for the experienced matrimonial attorney. The attorney-arbitrator, like the attorneys for the litigants, provides a valuable service, presumably at his or her full hourly rate…"[75]

B. [15.100] Model Family Law Arbitration Act of the American Academy of Matrimonial Lawyers

1. [15.101] Purpose and Applicability

The AAML's Model Family Law Arbitration Act (hereinafter the "Model Act") is intended to allow arbitration by agreement between the parties "of all the issues arising from a marital separation or divorce, except for the divorce itself, while preserving a right of modification based on substantial change of circumstances related to alimony, child custody and child support."[76]

The purpose of the Model Act is to provide for arbitration as an "efficient and speedy means of resolving" family law disputes.[77]

2. [15.102] Procedural Provisions

a. [15.103] Jurisdiction

Any court having jurisdiction over the controversy and parties may enforce an agreement to arbitrate.[78] An arbitration agreement that provides for arbitration in the state confers exclusive jurisdiction to enforce an arbitration award rendered pursuant to the Model Act.[79]

i. [15.104] Consolidation

The Model Act provides for consolidation of separate arbitration proceedings by court order when there are multiple arbitration agreements or when more than one arbitration proceeding has been initiated.[80] This rule also applies to agreements and proceedings involving third parties and additional claims, if:

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75 *Id.*
76 Model Family Law Arbitration Act, Sec. 101.
77 AAML Model Act, Sec. 101(a).
78 AAML Model Act, Sec. 126(a).
79 AAML Model Act, Sec. 126(b).
80 AAML Model Act, Sec. 110(a).

(a) the claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

(b) the existence of a common issue of law or fact creates the possibility of conflicting decisions in separate arbitration proceedings; and

(c) prejudice resulting from a failure to consolidate is not outweighed by the rights of or hardship to a party opposing consolidation.

The court may consolidate some or all of the claims being arbitrated and is prohibited from consolidating claims when it would be contrary to the agreement between the parties.

In some cases, the parties may contract out of consolidating certain issues of the arbitration. In considerating consolidation using the Model Act, George K. Walker writes:

> "…consider a married couple who, before marriage, are in a business relationship. If the business agreement(s) has or have arbitration clauses, and the business is a marital estate asset, there is a risk of court-ordered consolidation. Unless family law counsel believes consolidation is preferred, an opt-out clause should be part of a family law arbitration agreement…"

Also, some prenuptial and postnuptial agreements may be arbitrated separate from consolidation provided the parties choose to opt out of consolidation.[81]

b. [15.105] Venue

Application for judicial relief, pursuant to Section 105 of the Model Act, must be made in the county specified by agreement or in the county where the case was arbitrated.[82] For other judicial enforcement, the action may be brought in any county where the opposing party resides or has a place of business. If the opposing party does not reside in or have a place of business in the state, the action may be filed in any county.

c. [15.106] Arbitration Hearing

Unless otherwise agreed, an arbitrator may conduct an arbitration in such a manner as the arbitrator "considers appropriate for a fair and expeditious disposition of the proceeding."[83]

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81 WALKER at 522-533.

82 AAML MODEL ACT, Sec. 127.

83 AAML MODEL ACT, Sec. 115(a).

i. [15.107] Closing

The arbitration hearing is closed after both sides finish presenting their case to the arbitrator, or, if briefs are to be filed, then the hearing is deemed closed on the final date set for receipt of the briefs by the arbitrator. When the hearing is closed, time begins to run for the award deadline. If briefs are filed later than the final date set for receipt, the later date is considered the closing of the hearing.[84]

ii. [15.108] Reopening

The hearing may be reopened by the arbitrator, or either party, any time prior to the issuance of the award. If the reopening will interfere with the arbitrator's ability to issue the award, then the parties must mutually agree in writing to extend the award deadline before the hearing may be reopened.

iii. [15.109] Waiver

The parties may provide by written agreement for waiver of oral hearings. When a party proceeds in an arbitration with knowledge that any rule or requirement of the Model Act has not been followed and does not file a specific written objection, that party shall be deemed to have waived the right to object.

Although many provisions under the Model Act are waivable, one provision that cannot be waived is the right to appeal. "[The right to appeal] ensures that litigants or persons (such as children affected by a custody or support award) have the courthouse open at all levels if they comply with the Act's filing and other provisions and general trial or appellate law. It also assures the continued protection, through review and appeal, that federal or state laws providing for emergency relief may afford."[85]

iv. [15.110] Attendance

The arbitrator, the parties and their counsel attend the arbitration hearing and are responsible for maintaining the privacy of the proceeding unless the parties agree in writing to the contrary. Additionally, any person with a material interest in the proceedings may attend. Otherwise, the arbitrator is given broad discretion in determining the propriety of attendance of other persons at the hearing.

3. [15.111] Discovery

Section 117 of the Model Act governs discovery issues in matrimonial arbitration. As a general rule, "[a]n arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the

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84 Basic Rule 21(b) Family Law Arbitration Act; <http://www.aaml.org/library/publications/21215/model-family-law-arbitration-act/model-family-law-arbitration-act-4-10>.

85 WALKER at 542-543.

needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious and cost effective."[86]

a. [15.112] Documents and Records

Under the Model Act, an arbitrator has the discretion to determine the manner and scope of discovery of documents and records between the parties and may issue subpoenas for the production of documents and records by non-parties.[87] Discovery orders and subpoenas may be enforced by the court if necessary.

b. [15.113] Witnesses and Testimony

The testimony of witnesses may be compelled by subpoena at the arbitrator's discretion. The arbitrator may administer oaths and may choose to allow parties to take depositions and present deposition testimony in lieu of live testimony when appropriate. Compliance with subpoenas is ensured through judicial enforcement, and service is governed by the applicable Rules of Civil Procedure.

4. [15.114] Substantive Provisions

a. [15.115] Model Act Not Intended to Amend Substantive Law

The Model Act is not intended to alter or amend any stated substantive law. However, the Model Act does adopt a "substantial change in circumstances" standard for modifying alimony, post-separation support, child support and child custody.[88]

b. [15.116] Applicable Law

The Model Act adopts the underlying substantive law of any state in which the Act is codified.

c. [15.117] Validity of Agreement to Arbitrate

The Model Act recognizes agreements to arbitrate entered into before, during and after marriage.[89] Such agreements are deemed valid and enforceable "except on a ground that exists at law or equity for revocation of a contract."[90]

The Model Act vests authority in the courts to determine the existence and validity of an arbitration agreement, and in the arbitrator as to whether a condition

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86 AAML Model Act, Sec. 117(b).
87 AAML Model Act, Sec. 117.
88 AAML Model Act, Executive Summary at 2.
89 AAML Model Act, Sec. 106(a).
90 *Id.*

precedent to arbitrability has been fulfilled and whether "a contract containing a valid agreement to arbitrate is enforceable."[91]

However, the Model Act provides that arbitration proceedings may continue despite one party's challenge to the validity or applicability of the arbitration agreement.

d. [15.118] Arbitration Award

Unless otherwise agreed in writing by the parties, the arbitrator's award is due no later than 30 days from the date the hearing was closed.

5. [15.119] Arbitrator

a. [15.120] Selection

If the arbitration agreement dictates the procedure for selecting the arbitrator, then the agreed upon procedure must be followed.[92] However, if the procedure fails, the court may, upon motion by either party, appoint a neutral arbitrator.

The word "neutral" must be emphasized. The Model Act specifically states that "An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral."[93]

b. [15.121] Communications with Arbitrator

Ex parte communications with the arbitrator are prohibited. However, the arbitrator may interview a child privately to decide custody-related issues.

c. [15.122] Immunity

Arbitrators are immune from civil liability when acting as an arbitrator over an arbitration proceeding, to the same extent that a judge would be immune from civil liability when presiding over a judicial proceeding.[94] The Model Act allows an arbitrator to recover attorney fees incurred defending a claim to which the arbitrator is immune.

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91 *Id.* at Sec.(c).

92 AAML Model Act, Sec. 111(a).

93 AAML Model Act § 111 (b); <http://www.aaml.org/library/publications/21215/model-family-law-arbitration-act/model-family-law-arbitration-act-3-10>.

94 AAML Model Act, Sec. 114(a).

d. [15.123] Ethics

The Model Act publishes a suggested form on arbitrator ethics standards. Arbitrators have certain duties spelled out in the Model Act however a clause arbitrator ethics standards may be included in the agreement.[95]

e. [15.124] Competency As Witness

An arbitrator is not competent to testify and may not be compelled to produce any documents, except to establish his or her claim against a party, or in a hearing on a motion to vacate an arbitration award after a *prima facie* case for vacating the award has been made.[96] The Model Act authorizes an award of attorney fees to an arbitrator resisting production or giving testimony.

6. [15.125] Miscellaneous Provisions

a. [15.126] Fees, Costs and Expenses

Attorney fees are considered costs of the arbitration pursuant to the Model Act. Under the Model Act, the parties share equally the cost of arbitration, but the parties are individually responsible for the expenses of any witness they call.

b. [15.127] Release of Documents

Upon a party's written request, the arbitrator must furnish the party with certified copies of any documents from the arbitration proceeding which may be used in judicial proceedings related to the arbitration.

C. [15.128] Timeline For Arbitrating Matrimonial Disputes

1. [15.129] Consultation(s) and Decision to Arbitrate

a. [15.130] Grounds for Arbitration

Arbitration is grounded in contract, so the first determination is whether a client has a contractual right to arbitrate or, if no agreement exists, whether the other party would agree to resolve the dispute through arbitration.

b. [15.131] Selecting an Arbitrator

Divorcing parties often use retired circuit court judges, relying on their experience in adjudicating family law cases. Their choice is often influenced by their attorney's personal knowledge of or past experience before the judges or arbitrators.

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[95] WALKER at 534, 555.

[96] AAML MODEL ACT, Sec. 114(d).

An AAML-certified arbitrator must successfully complete an AAML arbitration training course and be a Fellow of the Academy, which requires a practitioner to concentrate in the area of family law for at least ten years before applying for AAML membership.

Though the AAML awards certificates to all successful candidates, if the candidates are not Academy Fellows, they are not considered to be "AAML certified."

2. [15.132] Commencement and Initiation of Arbitration

a. [15.133] Compelling/Staying Arbitration

When an arbitration agreement exists between the parties, but one party refuses to proceed, the party entitled to arbitration may make a motion compelling arbitration by showing such an agreement exists and alleging the other's refusal to arbitrate.

If an arbitration proceeding has been initiated or threatened, and there is no agreement to arbitrate, a party may make a motion to stay arbitration and have the court determine whether there is a valid agreement to arbitrate.

b. [15.134] Arbitration By Agreement

When there is a valid arbitration agreement, proceedings are commenced when one party gives notice to the other that he or she is invoking the right to arbitrate. Notice may be given in a manner specified in the arbitration agreement, or if unspecified, by registered or certified mail, or in a manner otherwise authorized for the commencement of a civil action. All the notice must contain is a description of the controversy and the remedy sought.

3. [15.135] Pre-Hearing Issues

a. [15.136] Pre-Hearing Conference

A pre-hearing conference is generally conducted by the arbitrator and attended by the attorneys for each side. Parties may or may not attend. The purpose of the pre-hearing conference is to determine and clarify the issues for arbitration, as well as the claims and counterclaims asserted by the parties. Identification of the essential parties, witnesses, hearing attendees, and exhibits occur at the pre-hearing. Deadlines and other issues related to time are considered. The pre-hearing conference should also be used to handle discovery issues and any other matters which would help to streamline the process.

b. [15.137] Pre-Award Rulings

i. [15.138] Procedure

After an arbitrator has been selected, the arbitrator may issue provisional remedies in the same way that a court would do in civil divorce proceedings. The AAML's Model Family Law Arbitration Act ("Model Act") grants the arbitrator such provisional authority when an interim award is "necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy."[97]

ii. [15.139] Judicial Enforcement

If the arbitrator makes a pre-award ruling in favor of a party, that party should request that the arbitrator make the ruling part of a Section 119 Award.[98] If enforcement becomes a problem, the party seeking enforcement may confirm and enforce the pre-award ruling in the same way he or she would with a final arbitration award.

iii. [15.140] Other Provisional Remedies

Prior to the selection or appointment of an arbitrator, the court may make any necessary provisional rulings, that it could and would make if the controversy was the subject of a civil action before the court.[99]

4. [15.141] Arbitration Hearing

At the arbitration hearing, the parties present their case to the arbitrator. Very creative formats and agreements have been adopted and are limited only by the creativity of the lawyers.

a. [15.142] Procedure

The hearing procedure is similar to that of a trial. The arbitrator delivers an opening statement followed by opening statements from the petitioner and respondent, respectively.

b. [15.143] Forum

The forum is generally selected by the parties and is usually a conference room at a neutral location.

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97 AAML Model Act, Sec. 108(b).
98 AAML Model Act, Sec. 118.
99 AAML Model Act, Sec. 108(a).

c. [15.144] Proof and Witnesses

After opening statements, the petitioner presents his or her case by calling witnesses and introducing exhibits. The respondent is given the opportunity to cross-examine the witnesses called by the petitioner. Next, the respondent presents his or her case in the same manner.

However, the format may be varied by agreement or at the discretion of the arbitrator. For example, written briefs may be filed in lieu of oral testimony. The arbitrator may also conduct onsite inspections or engage in independent investigation if agreed to by the parties, or, in rare instances, on the arbitrator's own determination.[100]

d. [15.145] Briefs

Post-hearing briefs are usually submitted at the request of the arbitrator. If requested, the hearing is not deemed closed until the deadline for submittal of the post-hearing briefs.

5. [15.146] Award

Upon conclusion of the hearing, the arbitrator delivers his or her decision in an arbitration award. That award determines the rights and responsibilities of the parties and is, in most cases, final and binding. The award effectively terminates the arbitration proceedings as well as the arbitrator's role and authority.

a. [15.147] Time

The award is rendered after each side has presented his or her case or after post-hearing briefs are filed, if required. The deadline for issuance of the award may be determined by the procedural rules followed in the arbitration or by agreement between the parties.

b. [15.148] Form

An arbitration award is issued in written form in a format similar to a judgment. The award typically summarizes the facts of the case, the arguments presented, the issues to be decided, and the scope of the arbitration agreement. The award also should include the arbitrator's conclusions. The actual "award" directives should be clear and concise and state exactly who gets what or who must do what, as this will be the part a court may be asked to enforce.

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[100] The arbitrator should only make an independent investigation if it is done with the knowledge of the parties and within the scope of the arbitration agreement. Otherwise, the arbitrator is acting *ultra vires* and the award may be jeopardized and/or the arbitrator exposed to liability.

c. [15.149] Settlement

If the parties to an arbitration proceeding reach a settlement before the arbitrator's award has been rendered, the arbitrator may reduce the terms of the settlement to writing in a consent award. A consent award should also allocate costs and expenses and be as enforceable as a regular arbitration award.

6. [15.150] Post-Arbitration Proceedings

a. [15.151] Modification

An arbitration award may be modified on several different grounds. First, an award may be modified if it is clear that an item referred to in the award was misidentified or if there was a miscalculation in the award.[101] A court may also modify an arbitration award if it attempts to decide an issue not submitted for arbitration, presuming the award may be corrected without otherwise affecting the merits of the decision. Finally, if the form of the award is imperfect and the merits of the decision are not affected by the error, a court may modify the arbitration award.

b. [15.152] Vacation

The court may vacate an arbitration award if there was any fraud during the proceedings, or if the arbitrator was not impartial or exceeded his or her authority. An award may also be vacated if the arbitrator unreasonably refused to postpone the hearing or refused to hear material evidence. Finally, an award may be vacated if there was no agreement to arbitrate.

A court can hear motions on vacating an award for child custody or child support on the ground that the award is not in the best interest of the child provided it is filed within 90 days of the movant receives notice of the award or modification or correction of award, unless the motion alleges corruption, fraud or other undue means.[102]

c. [15.153] Confirmation

A motion for confirmation is filed in a court of competent jurisdiction by the party receiving the award. Confirmation is generally mandated upon a party's application, unless the award is vacated, modified, or corrected.

d. [15.154] Enforcement

In order to enforce an arbitration award, a judgment must be entered when the award is confirmed. Once the judgment has been entered, it may be enforced just like any other judgment.

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[101] Barbara L. Burbach, MATRIMONIAL ARBITRATION HANDBOOK. Pp. 8-2.

[102] WALKER at 576.

D. [15.155] Final and Binding Arbitration of Pre-Divorce Matrimonial Disputes

1. [15.156] Property Division

Arbitration decisions concerning property division are most always final and binding, with limited review and appeal rights.[103]

2. [15.157] Spousal Support

This issue is extremely troublesome in some cases, and quite often it keeps an otherwise resolved mediation from settlement. A streamlined, three- or four-hour, one-issue arbitration is simply a great resolution for a perennially difficult issue.

3. [15.158] Child Custody, Visitation and Support

Child custody arbitration decisions are rarely, if ever, final and binding, with special review and trial *de novo* if a decision is deemed "adverse" to the child's best interests. The nature and extent of the rights to appeal are governed by state law.[104]

E. [15.159] Current Developments

1. [15.160] Indiana

In 2005, Indiana passed passed special family law arbitration statutes, though it bears little relationship to the Model Act in terms of language. However it reinforces the Model Act's central rule: that an agreement to arbitrate is valid, irrevocable and enforceable unless parties agree to repudiate the agreement. Although the statute covers all aspects of dissolution of marriage, an agreement to arbitrate must filed with the court. The courts are required to maintain a close watch over the arbitration.

2. [15.161] Georgia

In 2007, Georgia changed its legislation relating to child custody and related matters. Effective January 1, 2008 the parents of a child could agree to binding arbitration on the issue of child custody, visitation, and parenting. The parents may also select their arbiter and decide which issues to resolved in binding arbitration.[105]

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[103] Allan R. Koritzinsky, MATRIMONIAL ARBITRATION HANDBOOK. Pp. 1-35.
[104] *Id.* at 1-36.
[105] WALKER at 594.

3. [15.162] Connecticut

Connecticut has amended its legislation concerning agreements for custody, care, education, visitation, maintenance or support of children or for alimony or disposition of marital property to allow agreement to arbitrate under its general arbitration statutes with the following stipulations:

a) An arbitration may proceed only after the court has made a thorough inquiry and is satisfied that

1. Each party entered into the agreement voluntarily and without coercion

2. Such agreement is fair and equitable

b) Such agreement and an arbitration pursuant to such agreement shall not include child support, visitation and custody.[106]

4. [15.163] Arizona

As part of its family practice rules, Arizona has enacted rule 67(c) allowing parties to arbitrate any and all issues in accordance with the Arizona Arbitration Act or any other law permitting arbitration. Based on a survey conducted by the AAML there has been reported heavy use of Rule 67 for family law arbitration.[107]

5. [15.164] Michigan

In 2004, Michigan enacted the Michigan Domestic Relations Arbitration Act which covers issues related to real property, child custody, child support, parenting time, spousal support, costs, expenses and attorney fees, and other contested matters that could arise in an action for divorce, annulment, separate maintenance, child support, custody or parenting time.[108]

Relatively new legislation and rules related to family law arbitration have also been enacted in Nevada, New Mexico and Pennsylvania. North Carolina has adopted amendments to his family law arbitration statues to reflect the Revised Uniform Arbitration Act. 22 other states and the District of Columbia are either considering family law arbitration legislation or have relatively longstanding and established programs many of which are tied to general alternative dispute resolution.[109]

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106 WALKER at 592.
107 *Id.* at 590-591.
108 *Id.*
109 *Id.* at 589-643.

F. [15.165] Summary

Kentucky has adopted the Model Arbitration Act,[110] governing certain types of arbitrations. To date, the General Assembly has not considered adoption of the MFLAA, but there is growing support and, accordingly, a distinct possibility that Kentucky will adopt legislation governing matrimonial arbitration in the near future. Until then, practitioners may look to the Model Act when drafting arbitration clauses in family law cases.

V. [15.166] Conclusion

Mediation, Collaborative Law and Matrimonial Arbitration are three innovative and highly effective dispute resolution models at different stages of development. As Collaborative Law matures, the process may be modified and if Matrimonial Arbitration continues to grow in popularity, it is likely to be codified in Kentucky. However, as long as practitioners are willing to employ creativity and thoughtfulness, new and exciting alternatives to litigation are sure to continue to emerge, providing benefits to lawyers and clients alike.

[110] KRS 417.045 *et seq.*

VI. [15.167] Appendices

A. [15.168] Appendix A: ABA's Collaborative Law Handbook for Clients

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COLLABORATIVE LAW HANDBOOK FOR CLIENTS

An orientation to the divorce process, the dispute-resolution options available to clients, and the new dispute-resolution option, "***collaborative law***."

1. What are my choices for professional help in my divorce?

All divorces involve decisions and choices. Which professionals will assist you, and how you will utilize their help, are decisions that can powerfully affect whether your divorce moves forward smoothly or not.

Some couples resolve all their divorce issues without any professional assistance at all, and process their own divorce papers themselves through the courts. On the other end of the spectrum, some couples engage in drawn-out courtroom battles that cost dearly in emotional and financial resources and can take considerable time to complete. Most people find their needs fall between these extremes.

Below are the choices for obtaining professional legal services in divorce that are available in most localities today. The list moves from choices involving the least degree of professional intervention, and the most privacy and client control, to choices involving greater professional intervention and the least privacy and control.

Unbundled Legal Assistance: The client in this model acts as a "general contractor" and takes primary responsibility for the divorce, making use of legal counsel on an "as needed" basis for help in resolving specific issues, drafting papers, and so forth. The lawyer doesn't take over responsibility for managing the case.

Mediation: A single neutral person, who may be a lawyer, a mental health professional, or simply someone with an interest in mediation, acts as the mediator for the couple. The mediator helps the couple reach agreement, but does not give individual legal advice, and may or may not prepare the divorce agreement. Few mediators will process the divorce through the court. Retaining your own lawyer for independent legal advice during mediation is generally wise. In some locales the lawyers sit in on the mediation process, and in other locales they remain outside the mediation process. Mediators do not have to have to be licensed professionals in most jurisdictions.

Collaborative Law: Each person retains his or her own trained collaborative lawyer to advise and assist in negotiating an agreement on all issues. All negotiations take place in "four-way" settlement meetings that both clients and both lawyers attend. The lawyers cannot go to court or threaten to go to court. Settlement is the only agenda. If either client goes to court, both collaborative lawyers are disqualified from further participation. Each client has built-in legal advice and advocacy during negotiations, and each lawyer's job includes guiding the client toward reasonable resolutions. The legal advice is an integral part of the process, but all the decisions are made by the clients. The lawyers generally prepare and process all papers required for the divorce.

Conventional Representation: Each person hires a lawyer. The lawyers may be good at settling cases, in which case they work toward that goal at the same time that they prepare the case for the possibility of trial. If the lawyers are not particularly good at, or interested in, settling the case all lawyer efforts are aimed solely at preparing for trial, though a settlement may still result at or near the time of trial. Either way, the pacing and objectives of the legal representation tend to be dictated by what happens in court. Cases handled this way generally involve higher legal fees, and take longer to complete, than collaborative law cases or mediated cases. The risk of a high conflict divorce is higher than with mediation or collaborative law.

Arbitration, Private Judging, and Case Management: In some states, it is possible for clients and their lawyers to choose private judges or arbitrators who will be given the power to make certain decisions for the clients as an alternative to taking the case into the public courts. Case management is an option available from private and some public judges, in which the judge is given the power to manage the procedural stages of pretrial preparation, as well as settlement conferences, by agreement of the clients and their lawyers. These

This is an advertisement under Kentucky law.

options can reduce somewhat the financial cost and delays associated with litigation in the public courts. The financial and emotional costs may still remain high, however, because positions are polarized and the lawyers have no particular commitment to settlement as the preferred goal, and continue to represent the client whether the case settles or goes to trial.

"War": One or both parties is motivated primarily by strong emotion (fear, anger, guilt, etc.) and as a consequence the parties take extreme, black and white positions and look to the courts for revenge or validation. Reasonable accommodations are not made. The attorneys often function as "alter egos" for their clients instead of counseling the clients toward sensible solutions. This is the costliest form of dispute resolution, emotionally and financially. It is always destructive for the children involved. Such cases can drag on for many years. Few clients report satisfaction with the outcome of cases handled this way, regardless of who won.

2. Can you say more about Collaborative Law?

Collaborative law is the newest divorce dispute-resolution model. In collaborative law, both parties to the divorce retain separate, specially trained lawyers whose only job is to help them settle the case. If the lawyers do not succeed in helping the clients resolve the issues, the lawyers are out of a job and can never represent either client against the other again. All participants agree to work together respectfully, honestly, and in good faith to try to find win-win solutions to the legitimate needs of both parties. Four creative minds work together to devise individualized settlement scenarios. No one may go to court, or even threaten to do so, and if that should occur, the collaborative law process terminates and both lawyers are disqualified from any further involvement in the case. Lawyers hired for a collaborative law representation can never under any circumstances go to court for the clients who retained them.

3. Is Collaborative Law only for divorces?

Collaborative lawyers can do everything that a conventional family lawyer does except go to court. They can negotiate non-marital custody agreements, premarital and postnuptial agreements, and agreements terminating gay and lesbian relationships. Collaborative Law can also be used in probate disputes, business partnership dissolutions, employment and commercial disputes—wherever disputing parties want a contained, creative, civilized process that builds in legal counsel and distributes the risk of failure to the lawyers as well as the clients.

4. What is the difference between Collaborative Law and mediation?

In mediation, there is one neutral professional who helps the disputing parties try to settle their case. Mediation can be challenging where the parties are not on a level playing field with one another, because the mediator cannot give either party legal advice, and cannot help either side advocate its position. If one side or the other becomes unreasonable or stubborn, or lacks negotiating skill, or is emotionally distraught, the mediation can become unbalanced, and if the mediator tries to deal with the problem, the mediator may be seen by one side or the other as biased, whether or not that is so. If the mediator does not find a way to deal with the problem, the mediation can break down, or the agreement that results can be unfair. If there are lawyers for the parties at all, they may not be present at the negotiation and their advice may come too late to be helpful. Collaborative Law was designed to deal with these problems, while maintaining the same absolute commitment to settlement as the sole agenda. Each side has legal advice and advocacy built in at all times during the process. Even if one side or the other lacks negotiating skill or financial understanding, or is emotionally upset or angry, the playing field is leveled by the direct participation of the skilled advocates. It is the job of the lawyers to work with their own clients if the clients are being unreasonable, to make sure that the process stays positive and productive.

5. How is Collaborative Law different from the traditional adversarial divorce process?

- In Collaborative law, all participate in an open, honest exchange of information. Neither party takes advantage of the miscalculations or mistakes of the others, but instead identifies and corrects them.
- In Collaborative law, both parties insulate their children from their disputes and, should custody be an issue, they avoid the professional custody evaluation process.
- Both parties in collaborative law use joint accountants, mental health consultants, appraisers, and other consultants, instead of adversarial experts.
- In collaborative law, a respectful, creative effort to meet the legitimate needs of both spouses replaces tactical bargaining backed by threats of litigation.
- In collaborative law, the lawyers must guide the process to settlement or withdraw from further participation, unlike adversarial lawyers, who remain involved whether the case settles or is tried.
- In collaborative law, there is parity of payment to each lawyers so that neither party's representation is disadvantaged vis-a-vis the other by lack of funds, a frequent problem in adversarial litigation.

6. What kind of information and documents are available in the collaborative law negotiations?

Both sides sign a binding agreement to disclose all documents and information that relate to the issues, early and fully and voluntarily. "Hide the ball" and stonewalling are not permitted. Both lawyers stake their professional integrity on ensuring full, early, voluntary disclosure of necessary information.

7. What happens if one side or the other does play "hide the ball," or is dishonest in some way, or misuses the Collaborative Law process to take advantage of the other party?

That can happen. There are no guarantees that one's rights will be protected if a participant in the collaborative law process acts in bad faith. There also are no guarantees in conventional legal representation. What is different about collaborative law is that the collaborative agreement requires a lawyer to withdraw upon becoming aware his/her client is being less than fully honest, or participating in the process in bad faith.

For instance, if documents are altered or withheld, or if a client is deliberately delaying matters for economic or other gain, the lawyers have promised in advance that they will withdraw and will not continue to represent the client. The same is true if the client fails to keep agreements made during the course of negotiations, for instance an agreement to consult a vocational counselor, or an agreement to engage in joint parenting counseling.

8. How do I know whether it is safe for me to work in the Collaborative Law process?

The collaborative law process does not guarantee you that every asset or every dollar of income will be disclosed, any more than the conventional litigation process can guarantee you that. In the end, a dishonest person who works very hard to conceal money can sometimes succeed, because the time and expense involved in investigating concealed assets can be high, and the results uncertain. However, far greater efforts to track down concealed assets and income can be expected in conventional litigation than in collaborative law, which relies upon voluntary disclosure.

You are generally the best judge of your spouse or partner's basic honesty. If s/he would lie on an income tax return, he or she is probably not a good candidate for a Collaborative Law divorce, because the necessary honesty would be lacking. But if you have confidence in his or her basic honesty, then the process may be a good choice for you. The choice ultimately is yours.

9. Is Collaborative Law the best choice for me?

It isn't for every client (or every lawyer), but it is worth considering if some or all of these are true for you:

(a) You want a civilized, respectful resolution of the issues.
(b) You would like to keep open the possibility of friendship with your partner down the road.
(c) You and your partner will be co-parenting children together and you want the best co-parenting relationship possible.
(d) You want to protect your children from the harm associated with litigated dispute resolution between parents.
(e) You and your partner have a circle of friends or extended family in common that you both want to remain connected to.
(f) You have ethical or spiritual beliefs that place high value on taking personal responsibility for handling conflicts with integrity.
(g) You value privacy in your personal affairs and do not want details of your problems to be available in the public court record.
(h) You value control and autonomous decision making and do not want to hand over decisions about restructuring your financial and/or child-rearing arrangements to a stranger (i.e., a judge).
(I) You recognize the restricted range of outcomes and "rough justice" generally available in the public court system, and want a more creative and individualized range of choices available to you and your spouse or partner for resolving your issues.
(j) You place as much or more value on the relationships that will exist in your restructured family situation as you place on obtaining the maximum possible amount of money for yourself.
(k) You understand that conflict resolution with integrity involves not only achieving your own goals but finding a way to achieve the reasonable goals of the other person.
(l) You and your spouse will commit your intelligence and energy toward creative problem solving rather than toward recriminations or revenge—fixing the problem rather than fixing blame.

10. My lawyer says she settles most of her cases. How is collaborative law different from what she does when she settles cases in a conventional law practice?

Any experienced collaborative lawyer will tell you that there is a big difference between a settlement that is negotiated during the conventional litigation process, and a settlement that takes place in the context of an agreement that there will be no court proceedings or even the threat of court. Most conventional family law cases settle figuratively, if not literally, "on the courthouse steps." By that time, a great deal of money has been spent, and a great deal of emotional damage can have been caused. The settlements are reached under conditions of considerable tension and anxiety, and both "buyer's remorse" and "seller's remorse" are common. Moreover, the settlements are reached in the shadow of trial, and are generally shaped largely by what the lawyers believe the judge in the case is likely to do.

Nothing could be more different from what happens in a typical collaborative law settlement. The process is geared from day one to make it possible for creative, respectful collective problem solving to happen. It is quicker, less costly, more creative, more individualized, less stressful, and overall more satisfying in its results than what occurs in most conventional settlement negotiations.

11. Why is collaborative law such an effective settlement process?

Because the collaborative lawyers have a completely different state of mind about what their job is than traditional lawyers generally bring to their work. We call it a "paradigm shift." Instead of being dedicated to getting the largest possible piece of the pie for their own

client, no matter the human or financial cost, collaborative lawyers are dedicated to helping their clients achieve their highest intentions for themselves in their post-divorce restructured families.

Collaborative lawyers do not act as a hired guns, nor do they take advantage of mistakes inadvertently made by the other side, nor do they threaten, or insult, or focus on the negative either in their own clients or on the other side. They expect and encourage the highest good-faith problem-solving behavior from their own clients and themselves, and they stake their own professional integrity on delivering that, in any collaborative representation they participate in.

Collaborative lawyers trust one another. They still owe a primary allegiance and duty to their own clients, within all mandates of professional responsibility, but they know that the only way they can serve the true best interests of their clients is to behave with, and demand, the highest integrity from themselves, their clients, and the other participants in the collaborative process.

Collaborative Law offers a greater potential for creative problem solving than does either mediation or litigation, in that only collaborative law puts two lawyers in the same room pulling in the same direction with both clients to solve the same list of problems. Lawyers excel at solving problems, but in conventional litigation they generally pull in opposite directions. No matter how good the lawyers may be for their own clients, they cannot succeed as Collaborative Lawyers unless they also can find solutions to the other party's problems that both clients find satisfactory. This is the special characteristic of collaborative law that is found in no other dispute resolution process.

12. What if my spouse and I can reach agreement on almost everything, but there is one point on which we are stuck. Would we have to lose our Collaborative Lawyers and go to court?

In that situation it is possible, if everyone agrees (both lawyers and both clients), to submit just that one issue for decision by an arbitrator or private judge. We do this with important limitations and safeguards built in, so that the integrity of the collaborative law process is not undermined. Everyone must agree that the good faith atmosphere of the collaborative law process would not be damaged by submitting the issue for third party decision, and everyone must agree on the issue and on who will be the decision maker.

13. What if my spouse or partner chooses a lawyer who doesn't know about Collaborative Law?

Collaborative lawyers have different views about this. Some will "sign on" to a collaborative representation with any lawyer who is willing to give it a try. Others believe that is unwise and will not do that.

Trust between the lawyers is essential for the collaborative law process to work at its best. Unless the lawyers can rely on one another's representations about full disclosure, for example, there can be insufficient protection against dishonesty by a party. If your lawyer lacks confidence that the other lawyer will withdraw from representing a dishonest client, it might be unwise to sign on to a formal collaborative law process (involving disqualification of both lawyers from representation in court if the collaborative law process fails).

Similarly, collaborative law demands special skills from the lawyers—skills in guiding negotiations, and in managing conflict. Lawyers need to study and practice to learn these new skills, which are quite different from the skills offered by conventional adversarial lawyers. Without them, a lawyer would have a hard time working effectively in a collaborative law negotiation.

And some lawyers might even collude with their clients to misuse the collaborative law process, for delay, or to get an unfair edge in negotiations. For these reasons, some lawyers hesitate to sign on to a formal collaborative law representation with a lawyer inexperienced in this model. That doesn't mean your lawyer could not work cordially or cooperatively with that lawyer, but caution is advised in signing the formal agreements that are the heart of collaborative law where there is no track record of mutual trust between the lawyers. You and your spouse will get the best results by retaining two lawyers who both can show that they have committed to learning how to practice collaborative law by obtaining training as well as experience in this new way of helping clients through divorce.

14. Why is it so important to sign on formally to the official Collaborative Law Agreement? Why can't you work collaboratively with the other lawyer but still go to court if the process doesn't work?

The special power that Collaborative Law has to spark creative conflict resolution seems to happen only when the lawyers and the clients are all pulling together in the same direction, to solve the same problems in the same way. If the lawyers can still consider unilateral resort to the courts as a fallback option, their thought processes do not become transformed; their creativity is actually crippled by the availability of court and conventional trials. Only when everyone knows that it is up to the four of them and only the four of them to think their way to a solution, or else the process fails and the lawyers are out of the picture, does the special "hypercreativity" of collaborative law get triggered. The moment when each person realizes that solving both clients' problems is the responsibility of all four participants is the moment when the magic can happen.

Collaborative law is not just two lawyers who like each other, or who agree to "behave nicely." It is a special technique that demands special talents and procedures in order to work as promised.

Any effort by parties and their lawyers to resolve disputes cooperatively and outside court is to be encouraged, but only collaborative law is collaborative law.

15. How do I find a collaborative lawyer?

You can check the yellow pages and contact your local bar association to see if there are listings of collaborative lawyers in your area. You can contact the

International Academy of Collaborative Professionals (web site: www.collabgroup.com) to inquire about collaborative lawyers near you. Find the best collaborative practitioner that you can; interview several, and ask for resumes. Ask how many collaborative cases the lawyer has handled and how many of them terminated without agreements. Ask what training the lawyer has in Collaborative Law, alternate dispute resolution, and conflict management.

16. How do I enlist my spouse in the process?

Talk with your spouse, and see whether there is a shared commitment to collaborative, win-win conflict resolution. Share materials with your spouse such as this handbook and articles that discuss collaborative law. Encourage your spouse to select counsel who has experience and training in collaborative law and who works effectively with your own lawyer: lawyers who trust one another are an excellent predictor of success in dispute resolution.

17. How long will my divorce take if I use collaborative law?

The collaborative law process is flexible and can expand or contract to meet your specific needs. Most people require from three to seven of the four-way negotiating meetings to resolve all issues, though some divorces take less and some take more. These meetings can be spaced with long intervals between, or close together, depending on the particular needs of the clients. Once the issues are resolved, the lawyers will complete the paperwork for the divorce. Time limits and requirements for divorce vary from state to state; ask your lawyer.

18. How expensive is collaborative law?

Collaborative lawyers generally charge by the hour as do conventional family lawyers. Rates vary from locale to locale and according to the experience of the lawyer.

No one can predict exactly what you will pay for this kind of representation because every case is different. Your issues may be simple or complex; you and your partner may have already reached agreement on most, or none, of your issues. You may be very precise or very casual in your approach to problems. You and your partner may be at very different emotional stages in coming to terms with separating from one another. What can be said with confidence is that no other kind of professional conflict resolution assistance is consistently as efficient or economical as collaborative law for as broad a range of clients. While the cost of your own fees cannot be predicted accurately, a rule of thumb is that collaborative law representation will cost from one tenth to one twentieth as much as being represented conventionally by a lawyer who takes issues in your case to court.

19. Isn't mediation cheaper because only one neutral, instead of two lawyers, has to be paid?

No, mediation is not usually cheaper. Because there is nobody in a mediation negotiation whose job it is to help the client refine issues and participate with maximum effectiveness in the process, mediation can become stalled more easily than collaborative law does. Mediations can take longer, and can involve more wheel-spinning, than collaborative law negotiations. They also can be at greater risk for falling apart entirely, since the mediator must remain neutral and cannot work privately with the more disturbed client to get past impasses. In either event, the resulting inefficiencies can be costly.

Also, most mediators strongly urge that independent lawyers for each party review and approve the mediated agreement. If the lawyers have not been a part of the negotiations, the lawyers may be unhappy with the results and a new phase of negotiations or even litigation may result. If the lawyers do participate, then three professionals are being paid in the mediation.

Lawyers who do both mediation and collaborative law typically see collaborative law as the model that offers greatest promise of successful outcome for the broadest range of divorcing couples. Of course, if two calm and reasonable people whose issues are not complex go to a mediator, they can usually achieve agreement efficiently and often at low cost. Generally, it is only after the fact that we know that a couple was well-suited for mediation. Strong feelings arise unexpectedly; issues become more complicated than anyone anticipated. Collaborative law can usually deal with these predictable happenings more readily than can mediation.

Many people genuinely believe that they will have a very quick and simple divorce negotiation, but life can be surprising. Many people prefer to have a process in place from the start that is well-equipped to deal with unexpected problems rather than to have to terminate a mediation and start over with litigation counsel.

20. How does the cost of collaborative law compare with the cost of litigation?

Litigation is, quite simply, the most expensive way of resolving a dispute. By way of illustration, it is common for litigated divorces to begin with a motion for temporary support. The result is exactly that — a temporary order, not any final resolution of any issues. It is not uncommon for a single temporary support motion to cost as much or more in lawyers' fees and costs as it costs for an entire collaborative law representation.

B. [15.169] Appendix B: Non Adversarial Resolutions and Creative Approaches to Family Resolutions

When Families Dissolve…

Collaborative Family Law Offers Non-Adversarial Resolutions

And a Creative Approach to Family Resolutions

What is Collaborative Family Law?
Collaborative Family Law is a joint intellectual effort of the parties, with assistance and advice from their attorneys, to resolve their own family law disputes without resorting to traditional litigation in the courtroom.

Why Choose Collaborative Family Law?
The benefits of collaborative family law are numerous. The approach is cooperative not combative. The parties make a full and complete disclosure of all information necessary for each other to suggest creative solutions to their own unique problems. Clients are encouraged to make their own decision instead of entrusting their fate to others. It is faster, more predictable, less expensive and less emotionally taxing than traditional litigation. It is the most sensible and humane way to divorce because it promotes the interests of the parties and their children.

What Attorneys Practice Collaborative Family Law?
The collaborative family attorney is one experienced in the practice of family law and specifically trained in the art and technique of solving family law disputes collaboratively. Practicing attorneys treat the parties and one another courteously as members of a settlement team. These attorneys are committed to the integrity of the family collaborative law process by upholding principles of full and complete disclosure of information necessary to resolve disputes fairly. It is within that framework of honesty and integrity that attorneys advocate on behalf of their clients.

How Does It Work?
With the collaborative approach, both parties and their attorneys enter into a commitment agreement to the process. The attorneys are involved early in the process to facilitate full disclosure by both parties and to use reasoning and analysis to generate fair and just options for a positive settlement. The goal is to minimize adversity in the process and reach an equitable solution without court.

What If The Process Fails?
If the process fails for any reason both attorneys must withdraw from the case. The attorneys will then assist their clients in the quick and efficient transition to other counsel. The collaborative attorneys has no financial interest in promoting litigation.

What Kind of Problems Can Be Solved Collaboratively?
- Separation and divorce
- Non-marital relationship breakup
- Custody arrangements and parenting issues
- Guardianship
- Spousal and child support
- Division of assets and debts
- Modification of existing orders

Key Benefits:
- Avoid court battles
- Focus on the children
- Client is empowered by the process
- Saves time and money
- Cooperative team approach
- Informal conference settings
- Creative problem solving
- It benefits everyone
- It works—the collaborative law process works if problem solving is more important than fighting and both parties want to reach fair and just solutions.

Couples and Families in Counseling

Couples facing separation or divorce are often unaware of the options available to them. As a professional you may wish to inform your clients who are dealing with family issues about collaborative family law. The collaborative process offers a non-adversarial approach that can resolve family issues without the courts having to decide. This collaborative process reduces tensions and animosity between couples, which benefits the children in the relationship.

Attorneys who practice Collaborative Family Law are experienced family law attorneys and must receive additional, special training.

C. [15.170] Appendix C: Sample Letter to Respondent Suggesting Possibility of Collaboration

Mr. _____
_____
_____

RE: _____ v. _____
_____, Jefferson Circuit Court, Family Division 4 Civil Action
_____

Dear Mr. _____:

This firm has been retained to represent the interests of your wife in an action for dissolution of your marriage. Enclosed you will find a copy of the Petition for Dissolution of Marriage which was recently filed in Jefferson Family Court. Official service of this Petition by Certified Mail has been initiated through the Clerk of the Jefferson Family Court.

You will have **TWENTY (20) DAYS** from the date you are served with the enclosed Petition within which to file your Response or risk being found in default.

We fully recognize domestic legal matters can be most distressing; however, it is possible to attempt to resolve disputed issues without expensive litigation. Of course, if we are unable to settle disputed issues, both parties can expend significant monies in litigation.

YOU HAVE AN ABSOLUTE RIGHT TO LEGAL COUNSEL and we urge you to obtain a lawyer as he or she may well appreciate a factual or legal issue which you feel is unfair or not feasible. If you fail to obtain legal counsel, you may well be permanently bound by your decisions.

Again, it is highly recommended you immediately retain counsel. Please have your attorney contact us immediately if you wish to contain the costs of preparation for pending matters. We are prepared to promptly resolve this matter so that the parties can get on with their lives should you wish to proceed without expensive litigation.

If you are interested in proceeding **collaboratively** in resolving this matter, attached is some basic information on the Collaborative Law process as well as a list of Louisville attorneys who have been specifically trained to work in this field.

If you choose to proceed *without the benefit of legal counsel*, you must first bear in mind that we cannot and do not represent you in this matter; we represent your wife.

Very truly yours,

William L. Hoge, III

WLH:lmm

Enclosures: Petition for Dissolution of Marriage and Summons Collaborative Family Law brochure and list of Louisville attorneys trained in the process

CC: _____

D. [15.171] Appendix D: Agreed Order

No. 05-CI-500000 JEFFERSON FAMILY COURT
DIVISION 0

JOHN DOE PETITIONER

VS. **AGREED ORDER**

MARY DOE RESPONDENT

*** *** ***

COME THE PARTIES, by counsel, and upon agreement of the parties and upon a Collaborative Family Law Participation Agreement being signed, the parties agree that no further litigation shall proceed unless under the terms of the Agreement attached hereto. Further, the parties agree that the filing of this Agreed Order shall be deemed the Respondent's appearance in these proceedings and the parties acknowledges that there is no need for a responsive pleading at this time.

_____

JUDGE
JEFFERSON CIRCUIT COURT
FAMILY DIVISION 0

DATE: _____

HAVE SEEN AND AGREE:

_____

John Q. Lawyer
123 Main Street
Anywhere, Kentucky 40000
Phone: (502) 000-0000
Counsel for Petitioner John Doe

HAVE SEEN AND AGREE:

_____

Mary R. Barrister
987 Broadway
Anytown, Kentucky 11111
Phone (502) 000-0001
Counsel for Respondent Mary Doe

E. [15.172] Appendix E: IACP Collaborative Participation Agreement Guidelines

Table of Contents

The Participation Agreements signed by clients are contracts. IACP has provided two Model Participation Agreements as a general guide for legal drafting. One model agreement is intended for use in jurisdictions which have enacted the Uniform Collaborative Law Act. The other is for use in jurisdictions which have not enacted the Uniform Collaborative Law Act. Both versions of the Model Participation Agreements are accompanied by Guides which should be used to further elaborate on the intent and agreement of the parties in entering into a Collaborative process. These forms must be modified to meet all the applicable laws, regulations and ethics provisions in each city, state, province or country as applicable. These forms are not a substitute for independent legal judgment. IACP does not make any warranties about the forms provided, and use of a form does not create an Attorney-Client relationship with IACP. IACP's Model Participation Agreements are intended for use only by trained Collaborative professionals and may not be sold or licensed.

Model Collaborative Participation Agreement

(For use under the Uniform Collaborative Law Act)

The undersigned parties, _____ and _____, hereby agree that it is
NAME OF PARTY NAME OF PARTY

their intention to resolve through a collaborative law process under the Uniform Collaborative Law Act

the following collaborative matter(s):

[List the nature and scope of each matter that the parties will attempt to resolve.]
[Add additional provisions not inconsistent with the Uniform Collaborative Law Act that the parties agree to include.]

In the collaborative law process hereunder _____ will be represented by
NAME OF PARTY

_____ , and _____ will be represented by _____.
NAME OF LAWYER NAME OF PARTY NAME OF LAWYER

_____ _____
SIGNATURE OF PARTY DATE OF SIGNATURE

_____ _____
SIGNATURE OF PARTY DATE OF SIGNATURE

I, _____, confirm that I will represent _____ in the collaborative
NAME OF LAWYER NAME OF PARTY

law process hereunder.

_____ _____
SIGNATURE OF LAWYER DATE OF SIGNATURE

I, _____, confirm that I will represent _____ in the collaborative
NAME OF LAWYER NAME OF PARTY

law process hereunder.

_____ _____
SIGNATURE OF LAWYER DATE OF SIGNATURE

Guide to the Collaborative Participation Agreement

(For use under the Uniform Collaborative Law Act)

INTRODUCTION

This GUIDE is intended to assist in the use of the accompanying model Collaborative Participation Agreement. The section references are to the Uniform Collaborative Law Act (Act) approved by the Uniform Law Commission.

LAWYER'S OBLIGATIONS PRIOR TO PROSPECTIVE PARTY'S SIGNING AGREEMENT

Before a prospective party to a collaborative law participation agreement signs the agreement, the Act requires the lawyer to:

(1) assess with the prospective party whether a collaborative law process is appropriate for attempting to resolve the matter(s) at issue [Section 14(1)and(2)];

(2) advise the prospective party that participation in a collaborative law process is voluntary and that any party has the right unilaterally to terminate the process with or without cause [Section 14(3)(B)];

(3) advise the prospective party that the collaborative law process will terminate if after signing an agreement a party initiates a proceeding in a court or other tribunal [Section 14(3)(A)];

(4) advise the prospective party that except in limited circumstances the lawyer will be disqualified from representing the party in any subsequent proceeding related to a collaborative matter covered by the agreement [Section 14(3)(C)].

The Act also requires that the lawyer make reasonable inquiry into whether the prospective party has a history of a coercive or violent relationship with another prospective party. If the lawyer reasonably believes that to be the case, the lawyer may not begin the collaborative process unless the prospective party so requests and the lawyer reasonably believes the safety of the party can be protected during the process [Section 15].

REQUIRED PROVISIONS OF THE AGREEMENT

The Act lists in Section 4 the minimum requirements for a collaborative law participation agreement to be valid. Section 4(a)(1) and (2) require the agreement to be in a signed "record" (which is defined in Section 2(12) and which will customarily be a writing). Section 4 also lists several required provisions of the agreement. It is critical that these required provisions be included in the agreement. An agreement that fails to meet the requirements of Section 4 is not a valid collaborative law participation agreement under the Act, creating the risk that important substantive provisions of the Act will be held inapplicable if they come into issue in later proceedings (e.g., the disqualification rules of Section 9 and the privilege rules of Section 17).

The agreement must "state the parties' intention to resolve a collaborative matter through a collaborative process under this [act]" [Section 4(a)(3)]. Individual enacting states would substitute the appropriate statutory sections of that state for the bracketed word "act". The purpose of this requirement of the collaborative law participation agreement is to insure that the parties are making a deliberate decision to opt into a collaborative law process under the Act, and to differentiate a collaborative law process under the Act from other types of cooperative or collaborative behavior or dispute resolution involving parties and lawyers.

Guide to the Collaborative Participation Agreement (...continued)
(For use under the Uniform Collaborative Law Act)

The agreement must describe the nature and scope of the collaborative matter. [Section 4(a)(4)] It is important that this description be specific since it circumscribes the lawyer disqualification provision of Section 9, which applies to proceedings "related to the collaborative matter." The description of the "matter" is also central to the privilege provisions of Section 17, which apply to collaborative law communications. A "collaborative law communication" is defined in Section 2(1) as a statement made for purposes of conducting a "collaborative law process", which is defined in Section 2(3) as a procedure intended to resolve a "matter" without intervention by a tribunal.

Also important to the lawyer disqualification provision of Section 9 is the identification of the collaborative lawyer who represents each party, which is a required provision under Section 4(a)(5). Each collaborative lawyer must sign a statement confirming the lawyer representation of a party in the collaborative law process. [Section 4(a)(6)]

ADDITIONAL PROVISIONS OF THE AGREEMENT

Section 4(b) of the Act provides that the parties may include in a collaborative law participation agreement additional provisions not inconsistent with the Act.Thus collaborative lawyers may continue to include any provisions that they have customarily used in their participation agreements, so long as they are not inconsistent with the Act.

The Act explicitly refers to a number of additional provisions that the parties may wish (but are not required) to include in their collaborative law participation agreement. The following sections of the Act include such references.

(1) Section 16 provides that communications made in the collaborative law process are confidential to the extent agreed by the parties. The Act (in Section 17) creates evidentiary privilege for collaborative law communications but leaves it to the parties to reach by agreement any broader confidentiality limits they wish to establish. In case of breach, such confidentiality agreements would be enforceable by usual contract remedies (not by the Act).

(2) Section 19(f) provides that the privileges under Section 17 do not apply if the parties have agreed in advance in a signed record (usually a writing) that all or part of a collaborative law process is not privileged. Such an opt out agreement of the parties will not apply to collaborative law communications made by nonparty participants (e.g., experts) unless they received actual notice of the agreement before the communications were made.

(3) Section 12 provides that during the collaborative law process, on request of another party, a party shall make disclosure of information related to the collaborative matter. However, the section permits the parties to define the scope of disclosure, which could be done by an additional agreement in the collaborative law participation agreement.

(4) Section 5(i) provides that a collaborative law participation agreement may provide methods of concluding a collaborative law process additional to those methods specified in Section 5(c) (resolution of all or part of the collaborative law matter; termination).

(5) Sections 10(b)(2) and 11(b)(1) contemplate that a collaborative law participation agreement may provide that, in the case of a low income party or a government entity party, after a collaborative law process concludes, another lawyer in a law firm with which a collaborative lawyer is associated may continue to represent the party in a matter related to the collaborative matter. Such an agreement, among other requirements, is necessary in order that the exceptions to the disqualification of lawyers in an associated firm which are provided in Sections 10(b) and 11(b), shall apply.

Guide to the Collaborative Participation Agreement (...continued)
(For use under the Uniform Collaborative Law Act)

As noted above, the Uniform Collaborative Law Act requires only a limited number of provisions to be included in the collaborative law participation agreement. Important consequences of entering into the agreement are provided by substantive law provisions of the Act. A prime example is Section 9, which provides the disqualification requirement for collaborative lawyers, which is a fundamental defining characteristic of collaborative law. A substantive law provision of the Act (e.g., lawyer disqualification) may, if the parties wish, also be included as a provision of the collaborative law participation agreement so long as it is not inconsistent with the substantive law provision.

The parties are also free to supplement the required provisions under the Act with any additional provisions that meet their particular needs and circumstances, so long as they are not inconsistent with the Act. [Section 4(b)] Collaborative parties and their lawyers today cover a wide range of topics in their participation agreements. Discussed below are a sampling of some of the subjects that are often addressed by provisions in participation agreements.

Goals

Many participation agreements identify goals of the collaborative process, such as avoiding litigation and the likely negative economic, social and emotional consequences therefrom. Collaborative parties sometimes identify values they intend to employ in pursuing their goals, including honesty, cooperation, integrity, dignity and respect for the other parties.

Commitment

The Act requires the parties to state in the collaborative law participation agreement their intention to resolve the matters at issue through a collaborative process. The parties' commitment is often elaborated near the end of participation agreements by a statement to the effect that the parties understand the terms of the agreement and commit themselves to using the process to resolve their differences fairly and equitably.

Collaborative Process

It is common practice for participation agreements to describe the structure of meetings that will be utilized in the collaborative process. Joint face-to-face meetings are commonly provided for, but participation agreements sometimes include alternative venues, such as conference calls or video conferencing, in appropriate circumstances.

The participation agreement might describe the interest-based negotiation process by which goals and issues are identified, facts are gathered, options are developed and analyzed, and agreements are negotiated. Also included might be negotiation principles, such as agreements to negotiate in good faith, to take reasonable positions, to be willing to compromise, to refrain from using threats of litigation, and the like.

Communications

To promote effective communications, the participation agreement might state that communications should be respectful and constructive. To promote resolution of the issues acceptable to both parties, the agreement might state that each party is encouraged to speak freely and to express his or her needs and desires. Participation agreements sometimes include "ground rules" that apply to discussions between the parties outside of joint meetings, such as prohibiting unannounced telephone calls or surprise visits.

Guide to the Collaborative Participation Agreement (...continued)
(For use under the Uniform Collaborative Law Act)

Children

When children are involved, participation agreements often include agreements by the parties to attempt to reach amicable solutions that promote the children's best interests and to refrain from inappropriately discussing legal issues in the presence of or with their children.

Lawyers' Role and Fees

To clarify the role of lawyers, participation agreements sometimes state that the respective lawyers are employed by and represent only the party who retained them. The agreement may also describe the basic functions of lawyers in the collaborative process, such as advising and assisting client in gathering and understanding relevant documents, informing client of the applicable law, assisting client in preparing for collaborative meetings, facilitating interest-based negotiations. While each party will have a separate contract with his or her lawyer regarding fees, sometimes the participation agreement contains an agreement by the parties to make funds available to pay both lawyers.

Role of Professionals

Participation agreements sometimes include a statement of the role of professionals who may be called on to assist in the collaborative process. These might include financial professionals, coaches, mental health professionals, child specialists, mediators or experts in other fields. In such cases the participation agreement may reference separate agreements or other arrangements made by the parties for the services of such professionals.

Under the Act a professional who assists in the collaborative law process is called a "nonparty participant." The Act does not require nonparty participants to confirm their participation by a signed statement in the collaborative law participation agreement. If the parties and their lawyers think it desirable, professionals could confirm their participation by a signed statement, in much the same manner as the lawyers are required by the Act to confirm their representation of the parties.

Neutral Experts

Frequently the parties and their lawyers prefer that experts participating in the collaborative process be jointly hired and neutral. The participation agreement may specify that experts are to be jointly retained unless otherwise agreed by the parties. Such agreements will customarily provide that reports, recommendations and other documents generated by the neutral experts shall be shared with all the parties and their lawyers. The participation agreement might also state whether the experts' communications and work product will be subject to a confidentiality agreement of the parties.

Preservation of Status Quo

Participation agreements often include a commitment that neither party will unilaterally make significant changes regarding finances, insurance or children. Examples of such agreements are provisions that neither party will unilaterally dispose of property, change beneficiaries on a life insurance policy, alter other insurance provisions, move the children or incur additional debts for which the other party may be responsible.

Withdrawal by Collaborative Lawyer for Abuse of Process

Participation agreements sometimes provide that a lawyer may withdraw if his or her client withholds relevant information, misrepresents important facts, or otherwise acts in a way that could result in an abuse of the collaborative

process. Such a provision does not obviate applicable ethics standards, such as rules that require confidential lawyer-client communications to be protected and withdrawal of representation to be done in such a way as to avoid prejudicing a client's interests.

Discharge or Withdrawal of Collaborative Lawyer / Moratorium on Conclusion of Collaborative Process

The Act provides that the collaborative process is not terminated upon a lawyer's discharge or withdrawal if, within 30 days, a successor collaborative lawyer is retained and the collaborative law participation agreement is amended accordingly.[Section 5(g)] Parties may wish to provide in the participation agreement what may and may not be done during the 30 day period. For example, the parties might agree to maintain the status quo, to refrain from commencing any court action (other than in emergency circumstances), or to maintain the agreements already reached unless explicitly rejected by a party.

Cautions

Participation agreements commonly include cautionary statements to try to insure that the parties understand the collaborative process. Cautions might include statements that there are no guaranteed results from the collaborative process; that each party is expected to participate actively in the process by asserting his or her interests and considering the interests of the other party; and that while the process is designed to assist in communication and in reaching an amicable settlement, it will not necessarily eliminate the underlying issues between the parties.

Model Collaborative Participation Agreement

(For use in jurisdictions that have not adopted the Act)

Commitment

The undersigned parties, _____ and _____, hereby agree that it is
NAME OF PARTY NAME OF PARTY

their intention to resolve through a collaborative process, without the intervention of a court or other tribunal, the following matter(s):

[List the nature and scope of each matter that the parties will attempt to resolve.]

Beginning and Concluding the Collaborative Process

The parties agree that the collaborative process under this collaborative participation agreement begins when the parties sign this agreement and that it concludes (1) upon resolution of the collaborative matter(s) as evidenced by a signed writing, or (2) upon termination of the collaborative process.

The parties agree that a party may request a court or other tribunal to approve a resolution of all or part the collaborative matters, as evidenced by a signed writing. It is agreed that such a request, if made with the consent of the parties, does not conclude the collaborative process.

Termination of Collaborative Process

The parties agree that participation in the collaborative process is voluntary and that any party has the unilateral right to terminate the process, with or without cause, at any time. Termination of the collaborative process occurs (1) when a party gives written notice to other parties that the process is ended, or (2) when a party begins a judicial or other adjudicative proceeding related to a collaborative matter without the agreement of all parties, or (3) when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

Notwithstanding the previous provision, the parties agree that the collaborative process continues if not later than 30 days after a discharge or withdrawal of a collaborative lawyer, the unrepresented party engages a successor collaborative lawyer and the parties consent in writing to continue the process and amend this agreement to identify the successor collaborative lawyer and the successor collaborative lawyer confirms in writing his or her representation of a party in the collaborative process.

Model Collaborative Participation Agreement (...continued)
(For use in jurisdictions that have not adopted the Act)

Disclosure of Information

The parties agree that during the collaborative process the parties shall make timely, full, candid, and informal disclosure of information related to the collaborative matter(s) without formal discovery. The parties further agree that they shall promptly update information that has materially changed.

Lawyer Disqualification

The parties agree that a collaborative lawyer who represented a party under this collaborative process, or any lawyer in a law firm with which a collaborative lawyer is associated, shall be disqualified from representing a party in a court or other proceeding related to the collaborative matter(s) under this collaborative process. The parties agree that they will not engage for such purpose a collaborative lawyer under this collaborative process, or any lawyer in a law firm with which a collaborative lawyer is associated.

Notwithstanding the collaborative lawyer disqualification provision, the parties agree that a collaborative lawyer, or a lawyer in a law firm with which the collaborative lawyer is associated, may represent a party to request a tribunal to approve an agreement resulting from the collaborative process, or to seek or defend an emergency order to protect the health, safety, welfare or interest of a party, if a successor lawyer is not immediately available to represent that person. However, when that party is represented by a successor lawyer, or when reasonable measures are taken to protect the health, safety, welfare or interest of that party, the collaborative lawyer disqualification provision shall apply.

Collaborative Communications

The parties agree that in any court or other proceeding they will not request, subpoena or summons a collaborative lawyer, a collaborative party, or a nonparty participant in the collaborative process to make disclosure or to testify as a witness regarding a communication made during the collaborative process, unless during the proceeding the agreement under this paragraph is expressly waived by all parties in writing. In the case of communications by a nonparty participant in the collaborative process, the waiver of the agreement under this paragraph shall be effective only if the nonparty participant also expressly agrees to the waiver. A nonparty participant is a person, other than a party and the party's collaborative lawyer, that participates in the collaborative law process, including any person retained by the parties for professional services during the collaborative process or any person who is present at a collaborative process session.

Additional Provisions

[Add additional provisions not inconsistent with the provisions hereunder that the parties agree to include in the agreement.]

Model Collaborative Participation Agreement (...continued)
(For use in jurisdictions that have not adopted the Act)

In the collaborative law process hereunder _____ will be represented by
NAME OF PARTY

_____, and _____ will be represented by _____.
NAME OF LAWYER NAME OF PARTY NAME OF LAWYER

_____ _____
SIGNATURE OF PARTY DATE OF SIGNATURE

_____ _____
SIGNATURE OF PARTY DATE OF SIGNATURE

I, _____, confirm that I will represent _____ in the collaborative
NAME OF LAWYER NAME OF PARTY

process hereunder.

_____ _____
SIGNATURE OF LAWYER DATE OF SIGNATURE

I, _____, confirm that I will represent _____ in the collaborative
NAME OF LAWYER NAME OF PARTY

process hereunder.

_____ _____
SIGNATURE OF LAWYER DATE OF SIGNATURE

Guide to the Collaborative Participation Agreement

(For use in jurisdictions that have not adopted the Act)

INTRODUCTION

This GUIDE is intended to assist in the use of the accompanying model Collaborative Participation Agreement (AGREEMENT) in jurisdictions that have not adopted the Uniform Collaborative Law Act (Act). Although the Act itself will not be applicable, an agreement based on the carefully considered provisions of the Act might be a useful model for Collaborative practitioners in jurisdictions that have not adopted the Act.

Under the Act the required provisions of a collaborative participation agreement are few in number. However, important consequences of entering into a collaborative participation agreement as defined in the Act are provided as substantive law provisions and do not depend on the agreement of the parties. Since the model AGREEMENT is intended for use in jurisdictions that have not adopted the Act, these substantive law provisions of the Act are included in the AGREEMENT as agreements of the parties. The evidentiary privileges for collaborative communications established by the Act, however, are dependent on legislative action and cannot be created by agreement. One of the principal arguments in support of the Act (or other statutory provisions establishing evidentiary privileges) is that the evidentiary privileges promote candor in the collaborative process and thereby increase its chances of success in resolving the issues.

INFORMED CONSENT

Before parties enter into a collaborative participation agreement it is important that they understand the distinctive features of the collaborative process and consider whether it is appropriate for them in attempting to resolve their issues. The Act requires the lawyers to make certain disclosures about the collaborative process and to discuss its appropriateness with prospective parties to a collaborative participation agreement. Although the Act will not be in force in jurisdictions in which the model AGREEMENT under discussion is intended for use, the Act's requirements (summarized below) are a useful guide to good practices designed to insure that there is informed consent by parties about to enter into a collaborative process.

Before a prospective party signs a collaborative participation agreement the lawyer should:

(1) provide the prospective party with information about the benefits and risks of a collaborative process as compared with other issue resolution alternatives, and assess with the prospective party the appropriateness of a collaborative process for resolving the prospective party's issues;
(2) advise the prospective party that the AGREEMENT provides that participation in a collaborative process is voluntary and that any party has the right unilaterally to terminate the process with or without cause;
(3) advise the prospective party that the AGREEMENT provides that collaborative process will terminate if after signing the agreement a party initiates a proceeding in a court or other tribunal;
(4) advise the prospective party that the AGREEMENT provides that the lawyer, or any lawyer in a law firm with which the collaborative lawyer is associated, will be disqualified from representing the party in any subsequent proceeding related to a collaborative matter covered by the AGREEMENT.

The lawyer should also make reasonable inquiry into whether the prospective party has a history of a coercive or violent relationship with another prospective party. If the lawyer reasonably believes that there is such a history, the lawyer should not begin the collaborative process unless the prospective party so requests and the lawyer reasonably believes that the safety of the party can be protected during the process.

Guide to the Collaborative Participation Agreement (...continued)
(For use in jurisdictions that have not adopted the Act)

PROVISIONS OF THE AGREEMENT

Included in the AGREEMENT are both provisions that the Act requires to be in the collaborative participation agreement and provisions that the Act states as substantive law, not dependent on the agreement of the parties.

The following features of the AGREEMENT track the required provisions under the ACT:

Signed writing

The AGREEMENT is in a writing signed by the parties. The collaborative lawyers are not parties and should not join in the AGREEMENT as parties. By simply confirming their representation of the parties, as the AGREEMENT directs, the collaborative lawyers avoid questions about their professional obligations to their clients which have sometimes arisen when they have signed a collaborative participation agreement as parties.

Commitment

The AGREEMENT states the parties' intention to attempt to resolve the matters at issue through a collaborative process. By agreeing to use a collaborative process to attempt to resolve their differences, the parties are committing to try to avoid adversarial legal proceedings.

The AGREEMENT directs that the nature and scope of each matter at issue be described. It is important that this description be specific since it will circumscribe the lawyer disqualification provision of the AGREEMENT, which is applicable to subsequent proceedings "related to the collaborative matter(s)". The description of the matter(s) will also be important to the scope of an agreement that communications related to collaborative matter(s) made during the collaborative law process will not be offered in evidence in any proceeding, as well as to the scope of any agreement that such communications shall be confidential.

Identification of collaborative lawyers

The AGREEMENT identifies the collaborative lawyers who will represent the parties in the collaborative process. This provision is important for purposes of the application of the lawyer disqualification provision.

Confirmation of representation by collaborative lawyers

The AGREEMENT directs each collaborative lawyer to sign a statement confirming that he or she is representing a party (designated by name) in the collaborative process.

The AGREEMENT tracks important substantive law provisions which under the ACT do not depend on the agreement of the parties. Remedies that may be available for breach of these agreements are the usual remedies for breach of contract, including damages and the equitable remedy of specific performance. Resort to remedies for breach of contract will not be likely in the case of agreements relating to the conduct of the collaborative process, such as agreements concerning how conferences are to be conducted and the disclosure of information. If a party is concerned that such agreements are not being complied with, the party is free to terminate the collaborative law process, which may be the most effective deterrent to breach of the agreements. In the case of agreements relating to the conduct of the parties following conclusion of the collaborative process, however, contract remedies may be the only recourse, but may not be as efficacious as the substantive law provisions of the Act. (See discussion below of agreements regarding collaborative lawyer disqualification and agreements about the offer of evidence regarding collaborative communications in a court or other proceeding.)

Guide to the Collaborative Participation Agreement (...continued)
(For use in jurisdictions that have not adopted the Act)

The following provisions of the AGREEMENT track important substantive law provisions of the Act that do not depend on the agreement of the parties:

Beginning and concluding the collaborative process

The AGREEMENT includes an agreement by the parties that the collaborative process begins when the parties sign the AGREEMENT and concludes upon resolution of the collaborative matter(s), evidenced by a signed writing, or upon termination. This provision is included in the Act as a matter of substantive law and is designed to make it administratively easy for parties and tribunals to determine when a collaborative process begins and ends. Establishing with certainty the beginning and ending of a collaborative process is important for purposes of application of agreements for confidentiality of communications made during the collaborative process, and agreements not to seek disclosure or testimony regarding such communications in a court or other proceeding related to the collaborative matter(s).

The requirement of a signed writing to define the conclusion of the collaborative process allows parties to consent to have court orders entered resolving a portion of the matters without concluding the collaborative process for resolution of the remaining matters. For example, presenting uncontested settlement agreements to the court for approval in divorce proceedings would not conclude the collaborative process, and thus an agreement to keep collaborative communications confidential, or an agreement not to offer collaborative communications in evidence in any proceeding, would continue to cover communications made while additional matters are negotiated. The term "signed writing" is broad and would include a letter stating that that the process is concluded sent to all parties after a judgment is entered and all of the necessary follow-up to finalize the matters is concluded.

The parties, if they wish, may provide in their collaborative participation agreement additional methods of concluding a collaborative process. The Act so provides as a matter of substantive law.

Termination of the collaborative law process

The AGREEMENT provides that the parties agree that participation in the collaborative law process is voluntary and that a party may unilaterally terminate the process, with or without cause, at any time. The right to terminate is one of the fundamental defining characteristics of collaborative law, and it is provided in the Act as a matter of substantive law that does not depend upon agreement of the parties. In jurisdictions that have not adopted the Act, the right to terminate must be expressly agreed to in the collaborative law participation agreement.

The AGREEMENT states three ways in which termination of the collaborative law process may occur. These methods of termination are included as substantive law provisions in the Act but, again, must be provided by way of agreement in jurisdictions that have not adopted the Act.

The AGREEMENT allows for continuation of the collaborative process even if a party and a collaborative lawyer terminate their lawyer-client relationship, if a successor collaborative lawyer is engaged within 30 days under conditions and with documentation which indicate that the parties want the collaboration to continue.

Disclosure of Information

The AGREEMENT provides that the parties shall make timely, full, candid disclosure of information related to the collaborative matter(s), without formal discovery. Voluntary informal disclosure of information related to the matters at issue is a defining characteristic of collaborative law and is included as a substantive law provision of the Act.

The parties may, if they wish, limit or otherwise define the scope of required disclosure in their collaborative participation agreement. The Act so provides as a matter of substantive law.

Guide to the Collaborative Participation Agreement (...continued)
(For use in jurisdictions that have not adopted the Act)

Lawyer Disqualification

The requirement that a collaborative lawyer is disqualified from representing a collaborative party after the collaborative process concludes is a fundamental defining characteristic of collaborative law. In the Act the lawyer disqualification is stated as a matter of substantive law. In a jurisdiction that has not adopted the Act or otherwise enacted the disqualification requirement by statute, collaborative lawyer disqualification must be established by agreement. In case of breach the party relying on the lawyer disqualification agreement will be limited to the remedy of damages unless the court, in its discretion, will specifically enforce the disqualification agreement.

In the AGREEMENT, as in the Act, the lawyer disqualification provision is extended (so-called "imputed disqualification") to lawyers in a law firm with which the collaborative lawyer is associated. The Act allows the parties in the collaborative law participation agreement to modify the imputed disqualification for lawyers in a law firm which represents low income clients without a fee. If the parties to the AGREEMENT wish to include such a modification of the lawyer disqualification provision, they should do so in advance by an explicit provision in the AGREEMENT. In drafting the provision collaborative lawyers may find it helpful to refer to the Act's provision designed to isolate the collaborative lawyer from participation in the proceeding in which a member of that lawyer's law firm is representing the collaborative party.

In the AGREEMENT, as in the Act, exceptions to the lawyer disqualification provision are made that allow a collaborative lawyer (or a lawyer in a law firm with which the collaborative lawyer is associated) to continue to represent a party to (1) seek or defend an emergency order to protect the health, safety, welfare or interest of a party and (2) to request a tribunal to approve an agreement resulting from the collaborative law process. Because the AGREEMENT provides that requesting a tribunal to approve a resolution of all or part of the collaborative matters does not conclude the collaborative law process, the latter exception to the lawyer disqualification provision is necessary to allow the collaborative lawyer to continue to represent the party in that proceeding.

Collaborative Communications (Communications made during the Collaborative Process)

The Act creates evidentiary privileges against disclosure of collaborative law communications in legal proceedings. Protection of confidentiality of communications is central to collaborative law, since parties may otherwise be fearful that what they say or do during collaborative sessions may be used to their detriment in later judicial proceedings. Without protection of confidentiality, parties (as well as collaborative lawyers and nonparty participants such as professional experts) may be reluctant to speak frankly and to freely exchange information during the collaborative process.

The evidentiary privileges for collaborative law communications established by the Act are dependent on legislative action and cannot be created by agreement. As an alternative, the AGREEMENT attempts to protect the confidentiality of collaborative communications by agreement. It includes a provision that in any proceedings related to the collaborative matter(s) the parties agree that they will not require disclosure of, or offer as evidence, communications made during the collaborative process. To the extent that a court or other tribunal is willing to treat the parties as bound by this provision of their agreement, the effect is similar to that of an evidentiary privilege. However, in some situations, such as litigation between persons who were not parties to the collaborative process, a collaborative party may be called to testify as to collaborative communications and may not be allowed to refuse to testify on the ground of the agreement between the collaborative parties.

The AGREEMENT provides that during a proceeding related to the collaborative matter(s), the parties may waive their agreement not to require disclosure of, or offer in evidence, communications made during the collaborative process.

Guide to the Collaborative Participation Agreement (...continued)
(For use in jurisdictions that have not adopted the Act)

This provision is equivalent to the waiver of privilege provision of the Act. In the case of communications by nonparty participants in the collaborative process the AGREEMENT, like the Act, provides that the waiver must also be expressly agreed to by the nonparty participant. Requiring waiver by nonparties as to their own communications is designed to facilitate the candid participation by experts and others who might be reluctant to take part in the collaborative process if they are subject to being called as witnesses in later proceedings.

If one party seeks to call his or her collaborative lawyer as a witness in later proceedings between the parties, it is likely that the other party would see this as a possible disadvantage and would refuse to waive the agreement on this subject. Some commentators have suggested that in some states it might be a violation of the Rules of Ethics for a lawyer to refuse to testify contrary to the wishes of his or her client who, together with the other collaborative party, has waived the agreement not to offer the testimony of the collaborative lawyer. In states in which it would not be a violation of the Rules of Ethics, collaborative lawyers may wish to include a waiver provision regarding their collaborative communications similar to that regarding collaborative communications of nonparty participants. Such a provision could be added at the end of the Collaborative Communications paragraph in the AGREEMENT, as follows: "In the case of communications by a collaborative lawyer in the collaborative process, the waiver of the agreement under this paragraph shall be effective only if the collaborative lawyer also expressly agrees to the waiver."

ADDITIONAL PROVISIONS

The Act recognizes that after enactment of the Act collaborative lawyers will probably wish to continue to use in their collaborative law participation agreements provisions that they have customarily included. Thus the Act expressly provides that parties may include in a collaborative law participation agreement additional provisions not inconsistent with the Act.

Parties in jurisdictions that have not adopted the Act are free, of course, to include any provisions they wish. Collaborative lawyers who choose to utilize the model AGREEMENT, will want to avoid creating questions of interpretation by insuring that any additional provisions included are not inconsistent with provisions of the AGREEMENT.

Collaborative parties and their lawyers today cover a wide range of topics in their participation agreements. Discussed below are a sampling of some of the subjects that are often addressed in provisions included in collaborative participation agreements.

Goals

Many participation agreements identify goals of the collaborative process, such as avoiding litigation and the likely negative economic, social and emotional consequences therefrom. Collaborative parties sometimes identify values they intend to employ in pursing their goals, including honesty, cooperation, integrity, dignity and respect for the other parties.

Commitment

The AGREEMENT states the parties' intention to attempt to resolve the matters at issue through a collaborative process. This commitment is often elaborated near the end of the participation agreement by a statement to the effect that the parties understand the terms of the agreement and commit themselves to using the process to resolve their differences fairly and equitably.

Guide to the Collaborative Participation Agreement (...continued)
(For use in jurisdictions that have not adopted the Act)

Collaborative process

It is common practice for participation agreements to describe the structure of meetings that will be utilized in the collaborative process. Joint face-to-face meetings are commonly provided for, but participation agreements sometimes include alternative venues, such as conference calls or video conferencing, in appropriate circumstances.

The participation agreement might describe the interest-based negotiation process by which goals and issues are identified, facts are gathered, options are developed and analyzed, and agreements are negotiated. Also included might be negotiation principles, such as agreements to negotiate in good faith, to take reasonable positions, to be willing to compromise, to refrain from using threats of litigation, and the like.

Communications

To promote effective communication, the participation agreement might state that communications should be respectful and constructive. To promote resolution of the issues acceptable to both parties, the agreement might state that each party is encouraged to speak freely and to express his or her needs and desires. Participation agreements sometimes include "ground rules" that apply to discussions between the parties outside of joint meetings, such as prohibiting unannounced telephone calls or surprise visits.

Confidentiality of Collaborative Communications

It is sometimes agreed by the parties that communications related to collaborative matters made during the collaborative process are confidential and may not be disclosed to third parties. It should be noted that such an agreement is different from the evidentiary agreement included in the AGREEMENT (and the evidentiary privilege in the Act), which apply to attempts to introduce collaborative law communications in evidence in a court or other proceeding. Those provisions do not apply to discussion of collaborative communications with third parties, which the parties may wish to limit by a separate confidentiality agreement. In case of breach, such confidentiality agreements would be enforceable by usual contract remedies.

Children

When children are involved, participation agreements often include agreements by the parties to attempt to reach amicable solutions that promote the children's best interests and to refrain from inappropriately discussing legal issues in the presence of or with their children.

Lawyers' Roles and Fees

To clarify the role of lawyers, participation agreements sometimes state that the respective lawyers are employed by and represent only the party who retained them. The agreement may also describe the basic function of lawyers in the collaborative process, such as advising and assisting client in gathering and understanding relevant documents, informing client of the applicable law, assisting client in preparing for collaborative meetings, facilitating interest-based negotiations. While each party will have a separate contract with his or her lawyer regarding fees, sometimes the participation agreement contains an agreement by the parties to make funds available to pay both lawyers.

Role of Professionals

Participation agreements sometimes include a statement of the role of professionals who may be called on to assist in the collaborative process. These might include financial professionals, coaches, mental health professionals, child specialists, mediators or experts in other fields. In such cases the participation agreement may reference separate

agreements or other arrangements made by the parties for the services of such professionals. Under the Act a professional who assists in the collaborative process is called a "nonparty participant." The Act does not require nonparty participants to confirm their participation by a signed statement in the collaborative law participation agreement. In the AGREEMENT, if the parties and their lawyers think it desirable, professionals could confirm their participation by a signed statement, in much the same manner as the lawyers confirm their representation of the parties.

Neutral Experts

Frequently the parties and their lawyers prefer that experts participating in the collaborative process be jointly hired and neutral.

The participation agreement may specify that experts are to be jointly retained unless the parties otherwise agreed. Such agreements will customarily provide that reports, recommendations and other documents generated by the neutral experts shall be shared with all parties and their lawyers. The participation agreement may also state whether the experts' communications and work product will be subject to a confidentiality agreement of the parties and/or to an agreement by the parties not to offer communications in evidence in a court or other proceeding.

Preservation of Status Quo

Participation agreements often include a commitment that neither party will unilaterally make significant changes regarding finances, insurance, or children. Examples of such agreements are provisions that neither party will unilaterally dispose of property, change beneficiaries on a life insurance policy, alter other insurance provisions, move the children or incur additional debts for which the other party may be responsible.

Withdrawal by Collaborative Lawyer for Abuse of Process

Participation agreements sometimes provide that a lawyer may withdraw if his or her client withholds relevant information, misrepresents important facts, or otherwise acts in a way that could result in an abuse of the collaborative process. Such a provision does not obviate applicable ethics rules, such as rules that require the confidentiality of lawyer-client communications be protected and that withdrawal of representation be done in such a way as to avoid prejudicing a client's interests.

Discharge or Withdrawal of Collaborative Lawyer / Moratorium on Conclusion of Collaborative Process

Both the Act and the AGREEMENT provide that the collaborative process is not terminated upon a lawyer's discharge or withdrawal if, within 30 days, a successor collaborative lawyer is retained and the participation agreement is amended accordingly. Parties may wish to provide in the participation agreement what may and may not be done during the 30 day period. For example, the parties might agree to maintain the status quo, to refrain from commencing any court action (other than in emergency circumstances), or to maintain any agreements already reached unless explicitly rejected by a party.

Cautions

Participation agreements commonly include cautionary statements to try to insure that the parties understand the collaborative process. Cautions might include statements that there are no guaranteed results from the collaborative process; that each party is expected to participate actively in the process by asserting his or her interests and considering the interests of the other party; and that while the process is designed to assist in communication and in reaching an amicable settlement, it will not necessarily eliminate the underlying issues between the parties.

F. [15.173] Appendix F: Collaborative Family Law Participation Agreement

COLLABORATIVE FAMILY LAW PARTICIPATION AGREEMENT

I. INTRODUCTION

The essence of collaborative law is the shared belief of the participants that it is in the best interest of parties and their family to commit themselves to resolving their differences with minimal conflict or proactively eliminate such conflict if possible by addressing in advance issues that may arise. References to Court in this agreement do not apply to transactions, such as prenuptial agreements and postnuptial agreements. Therefore, the undersigned seek to adopt a conflict resolution process that does not rely on adversarial negotiations or Court imposed resolution. The process does rely, however, on an atmosphere of honesty, cooperation, integrity and professionalism.

One of the major goals in adopting the collaborative law process is to maximize settlement options for the benefit of all parties and minimize, if not eliminate, the negative economic, social and emotional consequences of protracted litigation for the participants and their families. Both parties' objective is to form, continue, or dissolve their marriage in the most amicable way possible. Both parties assert that it is in their own best interest and that of the children to have family peace and to secure economic stability to the extent possible. The parties have retained collaborative lawyers to assist them in reaching this goal, and represent them in conformance therewith.

II. NO COURT INTERVENTION

By electing to treat this family law case as a collaborative law matter, we, as parties and attorneys, are committing ourselves to resolving this matter without adversarial negotiations or Court intervention. The parties and attorneys agree to give complete, full, honest and open disclosure of all relevant information, whether requested or not, and to engage in informal discussions and conferences for the purpose of reaching a settlement of all issues. All attorneys, accountants, therapists, appraisers and other consultants retained by the parties will be directed to work cooperatively to resolve issues without resort to litigation.

III. LIMITATIONS OF COLLABORATIVE LAW PROCESS

In electing the collaborative law process, we understand there is no guarantee of success. We further understand we cannot eliminate concerns about the disharmony, distrust, and irreconcilable differences which may lead to conflict or have led to a current conflict. While we are intent on striving to reach a cooperative and open solution, success will ultimately depend on our own commitment to making the process work.

It is consistent with the collaborative law process that the parties act in their own best interest. Cooperation does not mean that a party must put the interests of the other ahead of his or her own (except where it is strategically advantageous to do so).

Neither party nor their lawyer will use a Court during the collaborative law process unless it is mutually agreed.

IV. PARTICIPATION WITH INTEGRITY

As participants in the collaborative law process, we are concerned about protecting the privacy, respect and dignity of all involved, including the parties, attorneys and consultants.

Each participant shall uphold a high standard of integrity, and specifically shall not take advantage of inconsistencies or miscalculations of the other, but shall disclose them and seek to have them corrected. Prior to engaging in any attempts to resolve this matter on a collaborative law basis, the parties' attorneys will have completed a minimum of an initial program of collaborative law training.

V. COMMUNICATION

All of those involved in the collaborative process will make every effort at communication which is respectful and constructive, trying at all times to focus on the economic and parenting issues and the constructive resolution of these issues. Settlement discussions will typically take place during meetings with counsel present or if by agreement the parties discuss matters outside the presence of counsel, discussions will not be in the presence of the parties' children. Specifically, the parties agree that settlement discussion in the presence of the children will only take place by mutual agreement or with the advice of a child specialist.

VI. EXPERTS AND CONSULTANTS

In selecting outside help, the parties are encouraged to retain joint experts or consultants for the express purpose of minimizing expenses of the process. Selection of a joint expert or consultant shall not obligate the parties to accept the report or opinion of that expert. Each party may retain separate or additional experts as desired in developing information relevant to reaching agreement. In the event a party retains a separate expert, any such expert or consultant shall be directed to follow the spirit and direction of the principles in this Agreement. If desirable, the parties may request the experts and consultants to collaborate with one another, meet and confer, and where appropriate, render joint statements or opinions on the issues in dispute.

In resolving issues about sharing the enjoyment and responsibility of any minor children of the parties, the parties, attorneys and, where appropriate, therapists shall make every reasonable effort to reach amicable solutions that promote the best interests of the children. If necessary, the parties agree to act quickly to mediate and resolve all differences related to the children in a manner that will promote a caring, loving and involved relationship between the children and each parent.

Unless the parties otherwise agree, if the parties select and retain a joint expert to assist in the collaborative law process, neither party may retain such expert, nor may such expert participate, in the unfortunate event of any subsequent litigation between the parties.

VII. NEGOTIATION IN GOOD FAITH

The parties are encouraged to discuss and explore the interests they have in achieving a mutually agreeable settlement. Each is encouraged to speak freely and express his or her needs, desires, and options without criticism or judgment by the other. Although the parties should be informed by their attorneys and consultants about, and may discuss with each other, the negotiation or litigation alternatives and the result they might attain, neither party will use the threat to withdraw from the process or to go to Court as a means of achieving a desired outcome or forcing a settlement.

No formal discovery procedure will be used unless specifically agreed to by the parties. The parties acknowledge that by using informal discovery, they are giving up certain investigative procedures and methods that would be available to them in the litigation process. They give up these measures with a specific understanding that both parties have made full and fair disclosure of all assets, income, debts and other information necessary for a principled and complete settlement. Participation in the collaborative law process, and the settlement reached, is based upon the assumption that both parties have acted in good faith and have provided complete and accurate information to the best of their ability. On request the parties will be required to sign a sworn statement making full and fair disclosure of their income, assets and debts. Either party shall execute any reasonable release requested by the other for information.

In the event a party or attorney deems it necessary or unavoidable that contested, unilateral pleadings be filed with a Court, each attorney identified herein, and each attorney's firm, will be disqualified from continuing to provide representation to such attorney's client or receive compensation for work performed on behalf of such client in this matter.

VIII. ENFORCEABILITY OF AGREEMENTS

In the event that either party requires a temporary agreement for any purpose, the agreement will be put in writing and signed by the parties and their lawyers. If either party withdraws from the collaborative process, the written agreement may be presented to a Court as a basis for an Order, which the Court may make retroactive to the date of the written agreement. Similarly, once a final agreement is signed, if a party should refuse to honor it, the final agreement may be presented to a Court in any subsequent action. In any settlement agreement reached during the collaborative law process, the attorneys and the parties may wish to recite the material facts upon which the settlement is based.

IX. DISQUALIFICATION BY COURT INTERVENTION FOR DISSOLUTIONS OF MARRIAGE

Unless otherwise agreed, prior to reaching final agreement on all issues, no further proceedings or motions will be filed except by agreement of the parties or upon resolution of the case. Neither party, nor the party's lawyer, will use a Court during the collaborative law process unless it is mutually agreed. For example, where a Court order is necessary to maintain the status quo, the parties may seek such relief in Court notwithstanding the continuation of the collaborative law process.

The parties understand that their collaborative attorney's representation is limited to the collaborative law process. Thus, while each attorney is the advisor of his or her client and serves as the client's representative, counselor, advocate and negotiator, the parties mutually agree that they will not authorize their attorneys to represent them or appear as counsel for them with respect to this matter in any Court or on any Court filing other than a prenuptial agreement, postnuptial agreement, mutually filed Petition for Dissolution of Marriage or Legal Separation, or as mutually agreed.

In the event a party or attorney deems it necessary or unavoidable that contested, unilateral pleadings be filed with a Court, each attorney identified herein and each attorney's firm, will be disqualified from continuing to provide representation to such attorney's client or receive compensation for work performed on behalf of such client in this matter. Neither attorney shall assist the client or new counsel in any way in the litigation or to help posture the case for same.

X. RIGHTS AND OBLIGATIONS PENDING SETTLEMENT

Although the parties have agreed to work outside the judicial system, the parties agree that:

1. Neither party may dispose of any assets except (i) for the necessities of life or for the necessary generation of income or preservation of assets, (ii) by an agreement in writing, or (iii) to retain counsel to carry on or contest this proceeding;

2. Neither party may harass the other party;

3. All currently available insurance coverage must be maintained and continued without change in coverage or beneficiary designation;

4. Neither party shall permanently remove the children from the jurisdiction of the Court (County) without the consent of the other;

5. Neither party shall incur debts for which the other is liable, except for necessities or in the ordinary course of business;

6. Each party will notify the other in advance of any extraordinary expenditure required to maintain the necessities of life or generate income;

7. Violation of any of these provisions may result in sanctions by the Court.

XI. POST-DECREE

The parties and their lawyers acknowledge that this Agreement terminates upon the execution of a prenuptial or postnuptial agreement or upon entry of the decree of dissolution of marriage or decree of legal separation. The parties may choose to sign another collaborative agreement for post-decree matters.

XII. CONFIDENTIALITY

Unless otherwise agreed by the parties, and except as provided in Section VIII, no statement, comment, or disclosure made by any party or attorney during the collaborative law process shall be disclosed to any Court for any purpose. This rule is not intended to preclude the admissibility of information that is properly obtained through discovery in any subsequent litigation. During the collaborative process, no material information shall be withheld from the opposing party. Should such information be withheld, the attorney aware of same shall be required to invoke the withdrawal provisions below.

Signature of Counsel _____

Printed Name of Counsel _____

Counsel for _____

Street Address _____

City, State & Zip _____

Telephone _____

_____

Bonnie M. Brown
Attorney at Law
Counsel for _____
1260 Meidinger Tower
462 South Fourth Street
Louisville, KY 40202
Telephone (502) 589-4600

COLLABORATIVE FAMILY LAW PARTICIPATION AGREEMENT
PROS AND CONS

COLLABORATIVE PROCESS

- Client's/Children's needs advocated ___
- Process through meetings with parties, counsel, experts ___
- Temporary Concerns can be addressed at first meeting ___
- Parties, counsel, experts drive timing of meetings, events ___
- Informal Discovery ___
- Sharing Experts Encouraged ___
- Communications informal/confidential; Agreements Public Record ___
- If settlement impossible, attorneys disqualified to continue representation ___
- No Guarantee of Results or Success ___
- In settlement discussions, party with information expected to disclose. May not take advantage of other party's error and must advise ___

ADVERSARIAL PROCESS

- Client's/Children's needs advocated ___
- Process through hearings, arms-length communication ___
- Temporary Concerns normally require Court Order or Agreement ___
- Court dockets, Rules drive timing of hearings, events ___
- Formal Discovery under Oath, unless waived ___
- May have 2-3 experts – one for each party and one Court appointed ___
- Pleadings public record; Communications between opposing parties and counsel generally not privileged ___
- If settlement impossible, attorneys may continue to represent parties ___
- No Guarantee of Results or Success ___

Litigation
- Rules of Civil Procedure Apply ___
- Rules of Evidence Apply ___

Negotiation
- In settlement discussions, parties expected to request information he/she wants
- Expected to take advantage of other party's error or failure to ask the right question ___

Cooperation
- May waive formal discovery ___
- May choose to share experts ___

Mediation
- Trained neutral helps parties decide issues ___
- Communication generally confidential ___

Arbitration
- Private Judge decides issues based on evidence ___
- Appeal may be waived by contract ___

G. [15.174] Appendix G: Agenda for the First Four-Way Meeting

Doe v. Doe

AGENDA
FOR FIRST FOUR-WAY MEETING

1. Introductions
2. Collaborative Law Participation Agreement
   a. Hallmarks of Collaborative Law
      i. Principled negotiations
      ii. Open and full exchange of information
      iii. No court intervention
   b. Sign agreement
   c. Schedule at least three more four-way collaborative law sessions.
      i. _____, 2004 at ___: ___A.M./P.M. in _____'s office
      ii. _____, 2004 at ___: ___A.M./P.M. in _____'s office
      iii. _____, 2004 at ___: ___A.M./P.M. in _____'s office
3. Negotiation Model
4. Goals and Objectives
5. Financial Issues:
   a. Notebooks
   b. To Do List
6. Parenting Issues
   a. Joint education
   b. Parenting education class
   c. To Do List
7. Temporary Issues
   a. _____
   b. _____
8. Homework:
   a. Summary of To Do items
   b. Confirm next sessions
9. Debrief
   a. Attorney-Client
   b. Attorney-Attorney

H. [15.175] Appendix H: Guidelines for the Effective Attorney Team in a Collaborative Four-Way

GUIDELINES FOR THE EFFECTIVE ATTORNEY TEAM
IN A COLLABORATIVE FOUR-WAY

Based on
"Practice Guidelines for Co-Mediation:
Making Certain that 'Two Heads are Better than One'"
Mediation Quarterly, Volume 13, No. 3, Spring 1996

A. OBJECTIVES:

1. Attorneys operate in synch with one another.
2. Attorneys have same vision of collaborative process and its goals.
3. Attorneys have a plan that maximizes the strengths of the team to increase their capacity to respond to challenges.

B. ADVANTAGES OF EFFECTIVE TEAM:

1. Enhances expertise, insights and listening capacity of the attorneys.
2. Increases the team's patience and perseverance by sharing the burden of being on the line.
3. Provides a model to the parties of effective communication, cooperation and interaction.
4. Makes the process more efficient by a division of tasks.
5. Creates training, learning and enrichment opportunities for the attorneys, who will benefit from working with each other.

C. POSSIBLE PITFALLS:

1. Conflict and competition between the attorneys.
2. Can be time-consuming, as the attorneys may have to negotiate about their roles and tasks.
3. Parties may try to divide and conquer.
4. Attorneys may be unduly constrained out of fear of stepping on each other's toes.

D. GUIDELINES FOR THE EFFECTIVE ATTORNEY TEAM:

1. Discuss their views of the goals of the collaborative process, both for each session and overall, and compatible approaches and strategies for achieving these goals.
2. Assign leadership roles for different segments of each session.
3. Strategically use the seating arrangements to maximize opportunities for success.
4. Assign specific tasks to each attorney to make the session as efficient and productive as possible.
5. Use the opening statement to set the right tone for the session.
6. Adopt the principle of non-competition between the attorneys.
7. Have a fall-back or fail-safe plan if the session is not working.
8. Be flexible. Alter plans, such as division of responsibility, lead assignments, etc., based on new developments in the session.
9. Debrief after each session:
   a. Invite comments about individual and team strengths and areas for improvement.
   b. Plan for the next session.
10. Support each other. Mistakes will be made by experienced and inexperienced collaborative attorneys alike. The goal is to recover from the mistakes smoothly and quickly.

GROUND RULES FOR THE CLIENT FOR THE COLLABORATIVE FAMILY LAW PROCESS

1. Attack the problem and concerns at hand. Do not attack each other.

2. Avoid positions; rather, express yourself in terms of needs and interests and the outcomes you would like to realize.

3. Work for what you believe is the most constructive and acceptable agreement for both of you and your family.

4. During the 4-way meetings with your lawyer (at which both lawyers and both clients are present), remember the following:

   (a) Do not interrupt when the other party or their lawyer is speaking. You will have a full and equal opportunity to speak on every issue presented for discussion.

   (b) Do not use language that blames or finds fault with the other. Use non-inflammatory words. Be respectful of others.

   (c) Speak for yourself; make "*I*" statements. Use each other's first name and avoid "he" or "she".

   (d) If you share a complaint, raise it as your concern and follow it up with a constructive suggestion as to how it might be resolved.

   (e) If something is not working for you, please tell your lawyer so your concern can be addressed.

   (f) Listen carefully and try to understand what the other is saying without being judgmental about the person or the message.

   (g) Talk with your lawyer about anything you do not understand. Your lawyer can clarify issues for you.

5. Be willing to commit the time required to meet regularly. Be prepared for each meeting.

6. Be patient . . . Delays in the process can happen with everyone acting in good faith.

I. [15.176] Appendix I: Comparison of Modes of Dispute Resolution

COMPARISON OF MODES OF DISPUTE RESOLUTION		
Collaborative (Costs vary for each case. Cost for each meeting is $800 to $1,000 per party, including prep, debriefing, minutes)	**Litigation** (with estimated costs for each side)	**Litigation Timeline** (times are listed from start of case)
Retain Professionals Determine Team Composition Clients retain attorneys and coaches Preparation for 1st 4 way	*Retain Attorneys* Initial case planning and information gathering ($2,000 to $10,000 or more)	1-3 months
Establish the Framework Review Process and The Help List Commitment to Process Sign Agreements Share each person's interests and needs		
Temporary Arrangements Agree on interim financial and parenting arrangements, which can be retroactive and without prejudice	*Order to Show Cause* Re: Support, Custody, Use of property, Restraining Orders ($2,000 to $5,000 each time)	2 months until end of case
Gather Information Determine additional team members Determine information and documents to gather Assign responsibility for gathering Continue to share each person's interests, needs and options	*Formal and Informal Discovery* Interrogatories, depositions, Demand for Documents, Subpenas, Joint or separate expert evaluations Disclosure Forms ($1,500 to $5,000 each time)	3 months to 3 years
Evaluate for choices and limitations created by Parties Real World Law	*Analyze legal outcome* *Settlement proposals and counter-proposals and/or settlement meetings* ($1,000 to $3,000 or more)	6 months to 3 years
Reaching agreement Brainstorm settlement options Evaluate for consequences Negotiate to resolution	*Trial* Trial setting pleadings ($1,500) Expert disclosures and depositions ($1,000 to $5,000 or more) Judicial settlement conference ($1,000 to $3,000) Trial brief ($1,000 to $2,500) Prepare witnesses ($750 to $2,500) Trial ($2,000 per day) Post trial pleadings and motions ($500 to $5,000)	1 year to 4 years
Completion Marital Settlement Agreement Court required pleadings Signing documents and Closing		
Review Review parenting & financial arrangements, as needed	*Post-separation motions* Modify or enforce custody or support Enforce property division ($2,000-$5,000 or more each time)	Until child 18
Total: $5,000 to $25,000	Total: $15,000-$50,000 and up	Indefinite

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J. [15.177] Appendix J: Divorce Arbitration, Should it Stay or Should it Go?

Divorce Arbitration: Should it Stay or Should it Go?

Forrest S. Kuhn III

Arbitration is a process of resolving disputes that predates our formal court system and was utilized in ancient Egypt, Greece and Rome according to some historians. In the western world, arbitration has been a feature of dispute resolution in the common law traceable back to at least the 14th century, if not before.

In ancient times, two people entangled in a dispute would seek out a person known and trusted by both parties to resolve the conflict. The more familiar this individual was to the parties, the more confidence the parties had in the individual's decision.

In modern times, parties in conflict who utilize arbitration seek out an arbitrator who is impartial, neutral and disinterested. These characteristics allow the parties to have more confidence in the arbitrator's decision. Moreover, these characteristics are frequently embodied in an arbitrator's code of ethics and require an arbitrator to disclose any information that may affect the arbitrator's impartiality.

Today, arbitration is part of the alternative dispute resolution movement, the aim of which is to develop substitutes for parties to resolve disputes outside of the civil justice system. Yet, arbitration does not fall outside of the law. Rather, parties who choose to arbitrate select the applicable law to govern the arbitration process, though many of the procedural requirements are more relaxed than the formal court system.

Over the past century, the use of arbitration has grown considerably and is now a standard alternative to litigation in many fields of legal practice including, commercial, construction, labor and employment, consumer, health and family law.

In response to this growing movement, Kentucky adopted the Uniform Arbitration Act (UAA) in 1984 to provide procedural uniformity to the arbitration process and to ensure the coexistence of arbitration with the civil justice system. With few exceptions, any written agreement to arbitrate any existing controversy is valid, enforceable and irrevocable under the UAA.

However, in the recently decided case of *Campbell v. Campbell*, the Kentucky Court of Appeals barred parties to domestic relations disputes from utilizing arbitration. The appellate court held divorce arbitration is an unconstitutional delegation of a family court judge's judicial duties and power to an arbitrator.

The Court of Appeals also held divorce was not a "controversy" as contemplated by the General Assembly under the UAA. The appellate court noted that divorce arbitration destroys the purpose of moving from domestic relations commissioners to a family court system in which a division of the circuit court was created to allow one judge to preside over all matters involving a particular family.

Finally, the appellate court found divorce arbitration creates a class system whereby more affluent parties can expedite their proceedings, whereas parties of lesser income must languish in the formal court system.

While the appellate court raises some valid criticisms of the divorce arbitration process in the family court system, it appears to be attempting to view an elephant through a microscope. The appellate court largely ignores the benefits of arbitration in divorce cases and misconstrues the benefits it does consider. Moreover, the appellate court appears to presume that any procedural errors found in the case decided are prevalent in all divorce arbitration cases.

Divorce arbitration has been a part of the alternative dispute resolution process in family law for decades. Parties in a divorce choose arbitration for a number of reasons, the first of which is privacy. Divorce is a time when sensitive issues can be raised. Divorce arbitration awards and proceedings are not made public. Simply by offering this level of privacy, parties to a divorce can more openly discuss sensitive issues and share discovery, which allows the process of resolution to move more quickly and efficiently.

Divorce arbitration can be more efficient than formal family court proceedings. As previously mentioned, arbitration proceedings tend to have more relaxed procedural requirements, which can allow the proceeding to move more quickly. For some divorcing couples, this is a significant benefit.

In addition, the parties do not have to wait in line on a family court's docket. The arbitrator can spend as much or as little time as required on the case and can schedule hearings to occur at times more convenient to the parties' schedules. This has an added benefit of reducing the disruptiveness and anxiety brought on by marital litigation.

Divorce arbitration is typically utilized to determine property division between the parties. As such, a significant benefit of arbitration is the ability for the parties to choose their arbitrator.

Some property division involves complex valuation issues that require a high level of specialized skill and expertise. An unfortunate reality in the family court system is that not all judges have these specialized skills sets. By choosing an arbitrator whose skills and expertise match the needs of the parties, complex issues can be resolved more fairly and efficiently.

Moreover, the Basic Rules for Arbitrating Family Law Disputes require an arbitrator to have the level of competency required by a case before agreeing to arbitrate the case. The American Academy of Matrimonial Lawyers (AAML) has trained a number of highly skilled family law practitioners in Kentucky as arbitrators.

From a policy perspective, divorce arbitration is an important component in the overall family law system. Our current judicial system is under considerable budget constraints and caseloads are high. By allowing parties who have agreed to arbitration to proceed, a family court judge is able to better manage the assigned caseload, which in turn allows more people access to the family court system in a more timely matter. As parties choose to arbitrate complex issues, more time becomes available on a family court's docket.

Certainly, divorce arbitration is not without its criticisms. For example, not all cases are resolved quickly. Because the procedural requirements are more relaxed, it is easier for one party to misbehave without repercussions, which can cause a case to drag out over a longer period of time.

In addition, arbitrators have been criticized for having runaway fees and, if one party refuses to cooperate, cases can drag out creating higher costs.

Arbitrators have more discretionary and decision making power than family court judges. If an error of law occurs, it can be more difficult to appeal, as the grounds for appeal are statutorily limited.

However, the Court of Appeals' reasoning regarding the creation of a class system in the family court is misapplied. The appellate court compares mediation, which is mandatory for all dissolution cases, with arbitration, which is not mandatory and is chosen by the parties by agreement. Because mediation is mandatory, a sliding scale fee is applied to ensure all parties can afford to pay a mediator.

However, no such fee adjustment exists in arbitration because it is voluntary. Certainly, some parties may choose not to arbitrate because of its cost, but many parties choose arbitration because it is more likely to cost less than formal court proceedings.

The Court of Appeals ignores the asymmetry of its comparison and chooses to consider only the hourly fee of the arbitrator in the decided case instead of the overall cost/benefit analysis. The appellate court does appear to contemplate that the parties voluntarily agreed to pay the arbitrator, that the arbitrator may have possessed a high level of expertise necessary to hear the particular issues, or that if the parties were not receiving a benefit of overall cost savings, time savings or some other value they would likely have not agreed to arbitration.

In determining the divorce arbitration proceedings were an unconstitutional delegation

of judicial power and duty, the Court of Appeals takes particular issue with the family court judge "mechanically entering" the award with no independent review and without the ability for the parties to object. The appellate court also finds cause for alarm due to the use of contempt sanctions by the arbitrator, which the family court judge also entered without review or minimal due process.

The appellate court found the arbitration agreement impermissibly allowed the parties to appeal on the merits which runs counter to the limited grounds for appeal of an arbitration award under the UAA. However, all of these proceedings were governed by the arbitration agreement and subsequent order permitting arbitration. The appellate court did not find that the arbitrator, parties or the family court failed to follow the arbitration agreement or order, but merely appeared to find that their agreement and order to arbitrate was flawed.

So, the question is presented whether this is a case of public and private judges running amok, or a case of a poorly drafted agreement and order in which the parties and the appellate court stepped over the line.

If the latter applies, then the Court of Appeals is removing an entire method of dispute resolution from family law for the mistakes of a very few. If the former, then the question is whether arbitration can in any way coexist with the family court system.

Fortunately, discretionary review has been sought in this case with the Kentucky Supreme Court. It is this author's hope the Court will reverse the Court of Appeals' decision and provide more guidance to practitioners and the family court on the appropriate procedural requirements for divorce arbitration. Should the Court affirm the appellate court's decision, perhaps it is time for legislative action.

The AAML has drafted a Model Family Law Arbitration Act. The Act is based on the UAA with added provisions to ensure the best interest of the child is being protected by the court; that procedural requirements are followed, including judicial review and the ability for parties to object to awards; and, that the powers of the arbitrator are more clearly enumerated.

Another option would be for the Jefferson Family Court to pass additional local court rules in which arbitration's role with the family court is more clearly defined to ensure no improper delegation of power occurs and that procedural uniformity is maintained.

In the meantime, many Kentucky couples seeking the benefits of divorce arbitration are denied this option.

Forrest S. Kuhn III recently received his J.D. from the University of Louisville Brandeis School of Law and plans to sit for the bar exam this month.

Editors Note

The author wishes to thank William Hoge and Professor Ariana Levinson for their comments in writing this article. ■

Bidding for Recovery

An Interview with Master Commissioner Albers

Charles E. Ricketts Jr.

The office of the Master Commissioner of the Jefferson Circuit Court has been greatly affected by the current economic downturn. Daniel T. Albers became the Master Commissioner when the sitting circuit court judges appointed him to the position in January 2006.

Although Albers will soon be stepping down as Master Commissioner, he was kind enough to recently sit down with me to discuss some of the challenges that will face his successor.

The Commissioner's office is funded by the fees generated from cases it handles. All excess fees go to the Administrative Office of the Courts. Albers explained that the responsibilities of his office include default collections, reviews of service of process, garnishment challenges and special referrals by circuit judges for fact-finding in non-jury issues.

At present, 95 percent of the work performed by this office involves foreclosures. The significant increase in foreclosures came on with the onset of the economic downturn in 2005.

According to Albers, the volume of foreclosures has increased over 100 percent since his appointment in 2006. Even more challenging for his office is that his staff size has not increased over that time.

To learn more about the foreclosure process and the pending sales in Jefferson County, please visit *www.jcomm.org*.

To understand the main challenges that the Commissioner's office faces daily, it is imperative to understand the foreclosure process.

The Commissioner's office takes control of a foreclosure case after a motion for judgment is requested. This motion can be for a default judgment or summary judgment, and in many cases the motion is a combination of both due to the presence of multiple lien holders involved with any given property.

Once in the Commissioner's control, the motion is first reviewed to determine its validity. One key factor of this initial process is whether the plaintiff is the correct party in interest. Every so often, the Commissioner will find that the plaintiff is not the true holder of the note and mortgage. Usually, the confusion is created by the multiple assignments that might occur.

After the motion is determined to be valid, the Commissioner's office recommends to the referring judge that judgment be entered. In all other jurisdictions, the Commissioner's office would then schedule the sale after judgment is entered. However, in Jefferson County, due to the high volume of sales, the plaintiff's attorney has the responsibility to schedule the sale.

Auctions are usually held in the courtroom on the first floor of the Old Jail Building every other Tuesday of each month. For a while, the number of private bidders had "dried up" leaving the majority of the bidders to be the foreclosing banks.

However, more recently, and maybe in light of some economic progress, the number of private bidders has begun to slightly increase. There are 26 sale dates currently scheduled for this year with an estimated 5,200 total sales for the year, raising a total of around $200 million from sales.

According to Albers, there are some areas where local attorneys can help to minimize his staff's workload. For example, he stated that major law firms have already been helping by streamlining the pleadings. Along those lines, electronic case files would be a tremendous help in moving the foreclosure process along.

During the life of a foreclosure case, a file is physically transported at a minimum five to six times by cart between his office and that of the Circuit Court Clerk's office two buildings away. If the files were processed in electronic format, less time would be spent carting the files around downtown and the risk of a misplaced pleading would be greatly reduced.

Although parts of the economy have started to show signs of recovery, the foreclosure process might be one of the last to recover. Albers believes that until the unemployment numbers begin to decrease, the Commissioner's office will continue to be overwhelmed with foreclosures. He notes that the progress made with loan workouts and modifications is beneficial to the economy, but an individual cannot pay a loan off if he doesn't have a job.

Albers credits the success of his office during this difficult financial period to his wonderful staff, including the deputy commissioners and paralegals. He told me "they are doing a wonderful job" in staying abreast of their workload.

Charles E. Ricketts Jr., Ricketts Law Offices, is a member of the LBA Communications Committee. ■

K. [15.178] Appendix K: Sample Arbitration Provisions in Settlement Agreements

Sample arbitration provisions in settlement agreements:

In the event the parties are unable to mediate their differences within thirty (30) days from enlisting the services of a mediator, then an arbitrator shall be chosen to hear all disputed issues as to value and award of household goods and furnishings and the arbitrator's decision shall be binding and final with no right of appeal to any court. Each party shall pay one-half (½) of the mediation/arbitration services incurred in this process; however, upon request of either party, the arbitrator has full authority to charge one party a disparate sum for said arbitration fees and costs if, in the arbitrator's determination, said party has not acted in good faith or otherwise has caused the matter to be prolonged and/or unnecessary additional fees and costs incurred.

If the parties cannot readily agree on a choice for a mediator or arbitrator, then the parties shall each submit to the other the names of three (3) mediators or arbitrators and any names appearing on both parties' lists shall be eligible for selection.

* * *

ARBITRATION OF FUTURE DISPUTED ISSUES.

a. The parties specifically agree that neither of them desires to be involved in future litigation or formal court process; therefore, they agree that all disputed issues in this litigation will be submitted to arbitration and agree that _____, Esq. shall serve as the Arbitrator. In the event _____ is unavailable or refuses to serve as Arbitrator, then the parties agree to use the services of _____ as Arbitrator.

b. The Arbitrator shall have the authority to adjudicate all issues and is granted the specific authority to adjudicate remedies consistent with the facts and positions advocated by the parties and as occasioned by existing statutory or case authority.

c. The Kentucky Rules of Civil Procedure as supplemented by the Jefferson Family Court Rules of Practice and the Kentucky Rules of Evidence shall govern the conduct of these proceedings.

d. All proceedings of any nature shall be heard by the Arbitrator. The Arbitrator's ruling on any such issue shall be in writing and shall become an order of Court immediately upon filing of the ruling.

e. All motion practice shall be conducted in the following manner. Motions shall be served upon opposing counsel and the Arbitrator via facsimile and first class mail and the original shall be filed in the Court's record. A date and time for hearing on any motion shall be set following the date of service of the motion. The Arbitrator may determine to conduct the hearing by telephone conference call. In any event, all hearings shall be recorded in a manner sufficient to permit transcription of the record of the hearing. The Arbitrator shall issue a written ruling within five (5) business days following the completion of any hearing or the submission of all matters necessary to permit the Arbitrator to make a ruling on the presented issues.

f. If requested by either party, an order shall be prepared by the Arbitrator that schedules all discovery, disclosure, appraisal and other deadlines necessary for the proper conduct of any hearing in this action; further, the pre-hearing order may require and establish the pre-hearing deadline for each party to file Proposed Findings of Fact, Conclusions of Law and Memoranda supporting same.

g. At the conclusion of the hearing and within thirty (30) business days following the hearing and submission of all matters necessary to permit the Arbitrator to make a ruling on the issues presented in this action, the Arbitrator shall prepare written Findings of Fact, Conclusions of Law, and a proposed Judgment and shall serve same on counsel via facsimile and first-class mail. The Arbitrator shall file the original of same in the record of the Court. The copy served on counsel shall bear the clocking stamp identification of the date and time of the filing of the original in the office of the Jefferson Family Court Clerk. The Findings of Fact, Conclusions of Law and proposed Judgment may be commensurate in depth and complexity with the requirements of the disputed issue.

h. Each party may file a motion to alter, amend, or vacate the Findings of Fact, Conclusions of Law, and tendered Judgment prepared by the Arbitrator within twenty (20) days following the date of filing of the original of same in the office of the aforesaid clerk. Any such motion shall be served by facsimile and first-class mail on opposing counsel and the Arbitrator. Either party may file a reply to any such motion filed by the opposing party on or before the thirtieth (30th) day following the filing of the original tendered Judgment in the aforesaid clerk's office. At the Arbitrator's

discretion, the issues raised in any motion to alter, amend, or vacate may be set for hearing by the Arbitrator. Within ten (10) business days following the Arbitrator's receipt of the last motion or reply of either party, or the completion of any hearing scheduled by the Arbitrator, the Arbitrator shall make a final written ruling in the form of a final Judgment in this action. The final Judgment shall be filed with the Court and served on the parties by facsimile and first-class mail.

i. The Court shall enter the Arbitrator's tendered final Judgment and the same shall be enforced by the Court as its final Judgment.

j. The final judgment tendered by the Arbitrator and entered by the Court shall be binding on the parties and shall not be subject to appeal.

k. The parties intend the provisions of KRS Chapter 417 to govern except where in specific conflict with the express terms of this Arbitration Agreement.

l. The Arbitrator's fees shall be charged at the Arbitrator's standard hourly rate and shall be allocated by the Arbitrator and shall be paid by the parties when billed. All court reporting or other recording or transcription costs incurred by the Arbitrator shall be allocated by the Arbitrator and shall be paid by the parties when billed.

16

APPELLATE PRACTICE

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I. [16.1] Introduction

Although family court proceedings are as tightly bound with rules as any other area of the law, many of the rules at the family trial court level have an elasticity that allows the trial court to make adjustments in the interests of fairness and for the benefit of children. When these cases graduate to the appellate level, parties find the proceedings restricted by rules as inflexible as reinforced steel. As attorneys, we understand the need for these rules to safeguard our clients from the energy and expense of endless litigation and the necessity to have appeals proceed efficiently in our overflowing appellate system. The rules that effectuate these goals can also be merciless, stealthy, and staunch enemies to your client's cause – should you fail to properly follow an appellate Rule of Civil Procedure, you may lose your client's case. As the guardian of the client's cause, an attorney preparing for appeal must become intimately familiar with these rules. This chapter will hopefully provide a series of warnings, suggestions, and plain language interpretations of the rules to facilitate that goal. Several documents are mentioned throughout this chapter; samples of some of these documents are available as Appendix A to this chapter. The full text of all Kentucky Civil Rules relating to appeals is contained in Appendix B to this chapter.

II. [16.2] Preparing for the Appeal

Preparation for the appeal of your case should occur at the initial stages of taking on a new case. Each case may present issues of law that are unresolved or that are ripe for review by our appellate courts, and as the case proceeds at the trial court level, your arguments for the trial court will set the stage for your appellate case, should your client receive an adverse decision. Even those clients whose cases appear to be "dead on arrival" should be evaluated for the possibility of winning on appeal. Changes in cultural mores and attitudes speed the evolution of family law perhaps more than any other area of the law but criminal. In recent years, the Kentucky Supreme Court has made significant new case law regarding the nonmarital nature of personal goodwill, *Gaskill v. Robbins*, 282 S.W.3d 306 (Ky. 2009), the modification of maintenance awards, *Woodson v. Woodson*, 338 S.W.3d 261 (Ky. 2011), and in custody cases, the treatment of relocation, *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008) and the potential waiver of superior custody rights, *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010). Thus, care must be taken at the trial court level to identify the legal grounds for appeal and properly preserve the errors which may become the basis for an appeal. The grounds for error given to the appellate court must be the same given to the trial court. *Raisor v. Raisor,* 245 S.W.3d 807, 808-09 (Ky. Ct. App. 2008). It may also be necessary to seek comprehensive findings of fact under CR 52.04. If the trial court fails to make a finding essential to the judgment on a particular claim, the appellate court may

not consider the claim at the appellate level. *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011). However, if the basis for error is insufficiency of evidence to support the findings of fact, no post-judgment motion is necessary. *Eiland v. Ferrell*, 937 S.W.2d 713, 715,716 (Ky. 1997).

A. [16.3] Advising the Client

Evaluate the advisability of appeal without reference to the client's emotional reaction to the outcome of the trial. Angry or disappointed clients may demand an appeal moments after they learn of a judge's decision, thereby staving off the acceptance of defeat. Despite the high energy level associated with this emotionality, this is the worst time to discuss the possibility for appeal. As will be discussed below, the merits of an appeal are best assessed in the absence of emotion, from a purely rational point of view. Once both client and attorney have enjoyed a cooling-off period after receiving the court's decision, the attorney should first advise the client whether an appeal can be made at that time, based on the appealability of the order and the client's standing in the case. If an appeal can be made at that time, the client should be advised on the possibility of success of the appeal, giving consideration to the court's standard of review for the claimed error(s). Armed with this information, only then is the client equipped to decide whether he should expend the time, money, and energy that fuel an appeal.

Though the decision to appeal should not be made hastily, tasks in preparation of an appeal must be started immediately. Throughout this chapter the reader will find numerous time limits imposed on the formal steps of the appeal. These time limits are strictly adhered to, and, with few exceptions, there are no avenues to bypass the time limits through judicial grace. Thus, a smart practitioner might impose her own incremental time limits onto the timeline to ensure that each of the deadlines is met. Directly after the judge's decision is entered by the court clerk, a trial transcript or videotape should be ordered and reviewed. Possible grounds for appeal must be tested against the current state of the law. Thoroughly familiar with the record and the appellate treatment of perceived errors in her case, the attorney may now guide the client in the decision-making process.

If the client wishes to proceed with an appeal contrary to your advice, substitution of counsel should be recommended to the client. If you were to continue representing the client, you might not only subject yourself to sanctions for the filing of a frivolous appeal, *Raley v. Raley*, 730 S.W.2d 531, 531 (Ky. Ct. App. 1987), but you will also find yourself conceding defeat to a challenge that will consume a significant proportion of your professional life for the next year or so. The client's receipt of your letter advising him of the problems with an appeal, recommending substitution of counsel, and advising him of the imminent deadlines for filing post-trial motions and the notice of appeal takes the responsibility for meeting the deadlines of an appeal off of your shoulders.

B. [16.4] Appealable Orders

A party may not appeal from an order dissolving a marriage per Kentucky statute, but many other aspects of a trial court's orders may be appealed, including orders relating to property division, maintenance, child support, child custody, and visitation. KRS 22A.020(3). However, a party may attack an order of dissolution on the basis that the court was without jurisdiction to dissolve the marriage, thus making the order void. *Id*.

Generally, only final judgments may be appealed. CR 54.01. A judgment is final if it adjudicates all rights of all parties to the proceeding. *Id*. A family law judgment is frequently labeled a "decree" or "order."

CR 54.02 requires, in cases involving multiple claims, a recitation in the judgment that the order is final and that there is no just cause for delay. *Mitchell v. Mitchell*, 360 S.W.3d 220 (Ky. 2012). Absent such recitation, the decision is interlocutory and subject to revision at any time before entry of judgment adjudicating all claims. *Id*. However, this language in itself cannot make an interlocutory judgment final, nor will its absence from an otherwise final judgment render it interlocutory. CR 54.02 is confined to actions involving multiple claims or multiple parties. *Hook v. Hook*, 563 S.W.2d 716, 717 (Ky. 1978); *Mollett v. Trustmark Ins. Co.*, 134 S.W.3d 621, 624 (Ky. Ct. App. 2003).

Because an order must be final to be appealable, most orders that are temporary or pendente lite, including temporary orders of maintenance, child support or custody, or a temporary restraining order, may not be appealed. *Id*. A venue determination is also interlocutory. *Martin v. Fuqua*, 539 S.W.2d 314, 316 (Ky. 1976). Appeals from such interlocutory orders will be dismissed as premature.

Since awards of custody are made and may change based on the best interests of the child, they are not final in the constitutional sense. Those custody awards that are not made on a temporary basis are nonetheless appealable. *N.B. v. C.H.*, 351 S.W.3d 214, 219 (Ky. Ct. App. 2011).

Some rulings, though they do not adjudicate all rights of the parties, are nonetheless appealable: temporary injunctions, jurisdictional challenges, and discovery rulings which would result in irreparable harm or a substantial miscarriage of justice.

Lastly, summary judgments are final, but denials of motions for summary judgment are interlocutory. However, an exception to this rule applies where: (1) the facts are not in dispute, (2) the only basis of the ruling is a matter of law, (3) there is a denial of the motion, and (4) there is an entry of a final judgment with an appeal therefrom. *Hazard Coal Corporation v. Knight*, 325 S.W.3d 290, 298 (Ky. 2010).

C. [16.5] Standing

Only an aggrieved party may appeal an order. *Knight v. Knight*, 419 S.W.2d 159 (Ky. 1967). Practical application of this rule generally does not limit the parties' ability to appeal. A party that does not receive all that was requested of a trial court, though the result was otherwise favorable, can appeal the unfavorable portion of the opinion. *Molloy v. Barkley*, 294 S.W. 168 (1927). Due to the many issues that are frequently presented in family law cases, and the varying degrees of relief that might be had, it is likely that a party will not receive exactly the relief requested on every issue, and judgment on those issues may be appealed.

The rule can have an immense impact on custody cases involving past, current, or prospective guardians other than the child's biological parents. These individuals must be made parties to the lower court action if they are to be named in or prosecute an appeal. CR 73.02, 73.03; *White v. England*, 348 S.W.2d 936 (Ky. 1961). Furthermore, if a party received notice of an action but never entered an appearance in the lower court, he shall not have standing to appeal. *Moore v. Bates*, 332 S.W.2d 636 (Ky. 1960).

Accepting the financial benefits of a judgment may also eliminate the availability of an appeal of that particular judgment if your opponent successfully argues that your client is estopped from challenging the decision. *Mason v. Forrest*, 332 S.W.2d 634 (Ky. 1959). However, implementation of periodic payments such as maintenance or child support should not estop the payor from appealing the adverse decision. *Walden v. Walden*, 486 S.W.2d 57 (Ky. 1972).

D. [16.6] Standards of Review

If a party alleges that the court erred in its finding of fact, including improper application of a rule or standard to the facts, then the standard of review is "clear error." *Clark v. Clark*, 782 S.W.2d 56 (Ky. Ct. App. 1990); *Rupley v. Rupley*, 776 S.W.2d 849 (Ky. Ct. App. 1989); *Temple v. Temple,* 298 S.W.3d 466, 470 (Ky. Ct. App. 2009). The appellate court will review the findings to determine whether they were supported by substantial evidence in the record. *Temple v. Temple*, 298 S.W.3d 466, 470 (Ky. Ct. App. 2009). The appellate court shall give "due regard" to the trial court's ability to judge the credibility of witnesses. CR 52.01.

If a party claims that the court erred in its legal findings, the appellate court reviews the legal findings "de novo," giving no deference to the trial court. *Temple v. Temple*, 298 S.W.3d 466, 470 (Ky. Ct. App. 2009). The appellate court may cite other legal reasons than those given by the trial court, but only those questions of law presented to the appellate court will be reviewed. *Fischer v. Fischer*, 348 S.W.3d 582 (Ky. 2011). Although it might seem to be a question of fact, classification of property as marital or nonmarital is reviewed as a matter of law. *Jones v. Jones*, 245 S.W.3d 815 (Ky. Ct. App. 2008).

If the lower court did not clearly err in its factual findings and drew the correct legal conclusions, the appellate court may review the decision as to whether the trial court abused its discretion in applying the law to the facts. *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. Ct. App. 2005). Many family law cases on appeal will be subjected to the abuse of discretion standard, including division of marital property, maintenance and child support awards, and custody decisions. The lower court abuses its discretion when it renders decisions that are "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Sexton v. Sexton*, 125 S.W.3d 258, 273 (Ky. 2004).

If an error was not preserved at the trial court level, an appeal can be sought, but the standard for review, palpable error, greatly limits the possibility of success. The appellate court will review errors made by the court, not the attorneys or litigants, and will determine if the error resulted in manifest injustice to the appellant. *Carrs Fork Corp. v. Kodak Mining Corp.*, 809 S.W.2d 699 (Ky. 1991). If it is determined that an error was made by the court, but the error did not prejudice the substantial rights of the complaining party, then such an error will be determined to be "harmless error" and the trial court will be affirmed on that issue. *Escott v. Harley*, 214 S.W.2d 387, 389 (Ky. Ct. App. 1948).

III. [16.7] Filing the Appeal

A. [16.8] Time Limits – CR 73.02

In recent decades, the appellate courts have been moving away from requiring the parties to an appeal to comply strictly with the procedural rules to allowing substantial compliance, in some cases, to save the appeal. However, only when errors are judged to be "non-jurisdictional" will the appellate court look beyond the strict adherence to the rules. This is because the appellate court does not have jurisdiction over a party to the appeal until a Notice of Appeal has been filed identifying that party and certifying that the notice was sent to that party. *Excel Energy, Inc. v. Commonwealth Institutional Securities, Inc.*, 37 S.W.3d 713 (Ky. 2001); *City of Devondale v. S. J. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990).

Thus, if a notice is not timely filed, does not list a necessary party, or does not certify that that party received a copy of the notice, the appellate court does not have jurisdiction over that party and is without the authority to decide the appeal. This means that, while compliance with all of the Rules is necessary, non-compliance with the Rules pertaining to the Notice of Appeal is almost an assured fatality for your client's appeal. Multiple layers of "safety nets" should be in place during this time: more than one person should be aware of the deadline for filing, and the appeal should be ready for filing a few days early, if possible. Once the case has been submitted to the trial court, file a Notice of Submission for Final Adjudication to keep

the case from getting lost from the court's radar. *See* Section [16.39], *infra.* Kentucky courts provide Kentucky-licensed attorneys online access to court records at: <http://apps.kycourts.net/courtrecordsKBA>, so once your case has been submitted to the court, start checking the court records regularly for entry of an order or decree.

When beginning the appellate process from a circuit court decision, the filing of a post-judgment motion will toll the time limit for filing an appeal, until such time as an order responding to the motion has been entered and served. However, a motion to correct clerical error does not toll the limit for filing a Notice of Appeal. *United Tobacco Warehouse, Inc. v. Southern Frankfort Cooperative, Inc.*, 737 S.W.2d 708 (Ky. Ct. App. 1987).

The Kentucky Rules of Civil Procedure impose a ten-day time limit on the filing of post-judgment motions, and the trial court loses control of the judgment at the expiration of the tenth day if no post-judgment motion has been filed. *Marrs Electric Co., Inc. v. Rubloff Bashford, LLC*, 190 S.W.3d 363 (Ky. Ct. App. 2006). However, "other rules of procedure…can operate to re-invest a trial court with control over its judgment subject to the contingencies and time periods specified therein, *i.e.*, CR 60.01, CR 60.02, and CR 60.03. This may be so even though an appeal is pending, in which case the party commencing such proceeding shall promptly move the appellate court to abate the appeal until a final order is entered therein." *James v. James*, 313 S.W.3d 17 (Ky. 2010).

In the family law context, post-judgment motions will generally take the form of Motions to Alter, Amend, or Vacate (CR 59.01) or a Motion to Amend or Make Additional Findings (CR 52.02). A sample Motion to Alter, Amend or Vacate may be found in Section [16.36], *infra*. Once the order granting or denying the motion has been entered and served per CR 77.04(2), the clock begins ticking again, starting from the beginning, for the 30-day time limit to file the Notice of Appeal. The filing of successive post-judgment motions by the same party will not postpone the ticking of the clock for the Notice of Appeal time limit. *Mollett v. Trustmark Ins. Co.*, 134 S.W.3d 621, 624 (Ky. Ct. App. 2003). Once the court rules and enters the last order disposing of each of the party's first timely-filed post-judgment motions, the 30-day Notice of Appeal time limit will begin, even if successive post-judgment motions were filed, whatever their nature. For cross-appellants, the running of time to file the cross-appeal is tolled by a CR 76.34(6) filing of a motion to dismiss the appellant's appeal. *Welch v. Velten*, 185 S.W.3d 163 (Ky. 2006).

Once the 30-day time limit has expired for filing the Notice of Appeal and no Notice has been filed, any appeal filed in that case will be dismissed or denied by the appellate court. If you hold this book in your hands, having frantically flipped the pages of this appellate chapter for the words that might rescue your client from the missed deadline guillotine, here they are: excusable neglect. CR 73.02(d). This rule provides that *if* a party has failed "to learn of the entry of a judgment or an order which affects the running of the time for taking an appeal, *the trial court may* extend the time for appeal, not exceeding ten days from the expiration of the

original time." *Emphasis added.* Thus, the trial judge will decide first, whether you *failed to learn* of the entry of the judgment, and then, whether your reason for not knowing merits granting additional time to you. Once you have imagined the unhappy circumstances that could qualify for this narrow category of mercy, simply tuck this rule away and hope you never need it!

B. [16.9] The Notice of Appeal – CR 73.03

Once the attorney has received an adverse decision from the lower court in response to a Motion to Alter, Amend or Vacate or other similar motion, he or she must then, within 30 days, file a Notice of Appeal per the parameters of CR 73.03; the Notice must be filed in the lower court. When the Notice had been timely but incorrectly filed in the Court of Appeals and then correctly filed with the lower court after expiration of the thirty-day time limit, the Court of Appeals held that the filing party lacked standing to proceed with the appeal. *Johnson v. Smith,* 885 S.W.2d 944, 950 (Ky. 1994). "Timely" has a more expansive definition than usual when applied to the filing of a Notice of Appeal; a Notice of Appeal is not complete until the filing fee is paid in full to the trial court clerk. CR 73.02. As is the case with incorrectly filing the Notice in the appellate court rather than the trial court, the time limit for filing is not stayed while the mistake is corrected. Thus, these non-substantive errors could be deadly to your client's right to appeal.

The contents of the Notice of Appeal are listed in CR 73.03. First, the appellant must specifically list all parties to the appeal. Failure to name a necessary party may result in dismissal of the entire appeal. Second, the notice must designate the judgment or order from which the appeal stems. When this designation is missing or listed incorrectly, the appeal will be dismissed even in the absence of prejudice to any party. Lastly, the Notice must contain a Certificate of Service to all parties identified in the appeal, either by service on their counsel or by service to a *pro se* party's last known address.

Each piece of information to be provided in a Notice of Appeal serves a general purpose: to guarantee that all parties to an appeal are adequately notified of it. A sample Notice of Appeal may be found in Section [16.37], *infra*. A sample Notice of Cross Appeal may be found in Section [16.38], *infra*.

C. [16.10] Costs – CR 72.13

CR 76.42 provides that a fee of $150.00 is charged for filing of pleadings with the appellate and supreme courts. Motions for Transfer and for Leave to file *Amicus Curiae* briefs may incur different charges. Because failing to pay costs fully or properly may affect the timeliness of your filings (the death knell!), the safest bet would be to verify the costs with the court prior to filing.

D. [16.11] Supersedeas Bond CR 73.04

The client has the option of staying the enforceability of a money judgment against him via payment to the court or the clerk of a supersedeas bond. CR 62.03. The amount of the supersedeas bond shall be, in most cases, the sum of the unsatisfied judgment, the costs of the appeal, interest that has and will accrue, and damages that have or will occur due to the delay. CR 73.04. If the client's appeal is unsuccessful, the actual amount of these expenses is assessed against the bond. If the appeal is not the client's original appeal of right, the supersedeas bond will also invoke KRS 26A.300, requiring the appellant to pay an additional 20% penalty.

Supersedeas bonds will not stay non-monetary judgments, such as transfer of a child's primary residence or a limitation on parenting time. A copy of the Supersedeas Bond form used by the Administrative Office of the Courts may be found in Section [16.40], *infra*.

IV. [16.12] Prehearing Statement and Conference – CR 76.03

The required Prehearing Statement and Conference of CR 76.03 engenders focused and efficient litigation by requiring the appellant to submit essential information immediately, and by limiting the appeal to the claims, issues, and areas of law submitted within the statement. If a party fails to include an issue in a prehearing statement, the appellate court will not consider the issue. *Sallee v. Sallee*, 142 S.W.3d 697 (Ky. Ct. App. 2004). For this reason, the majority of your research and an outline of your brief should be ready prior to filing the Prehearing Statement so that all issues and law may be cited in the Prehearing Statement.

The statement must list the style and docket number of the case at the trial court level, the names, mailing addresses, and telephone numbers of the parties' attorneys, the name of the trial court judge, and the dates of the filing of the Notice of Appeal and Notice of Cross-Appeal, if any.

The appellant (or cross-appellant) must also submit a statement describing the claims, defenses, and issues litigated at the trial court level, the facts and issues to be raised on appeal, and, if interpretation or application of precedent or statute is at issue, the name of the case or number of the statute. The appellee or cross-appellee may file a supplemental statement within ten days of the filing of appellant/cross-appellant's statement. CR 76.03(4). A sample Civil Appeal Prehearing Statement may be found in Section [16.41], *infra*.

V. [16.13] The Record on Appeal

A. [16.14] Certification of the Record – CR 73.08

The trial court clerk must prepare and certify the record within ten days from the filing of the transcript of the record by the court reporter, or if the evidence was recorded on video alone, then the clerk must certify the record within 30 days after the date of filing the first notice of appeal. CR 73.08. The time limit may be extended by leave of the appellate court if requested prior to expiration of the original time limit and for good cause, but this is the appellant's burden, not the clerk's. *Id.*

B. [16.15] Designation of the Record – CR 75

Although some portions of the clerk's original record will be automatically included in the appellate record, there are some portions not automatically included that an appellant may need to have the appellate court consider. Therefore, the appellant must designate those portions of the trial court record to the appellate court that support his claim. Failure to cite to evidence in the record in support of an appellant's claims will result in the appellate court's assumption that the evidence supported the findings of the lower court. *Combs v. Stortz*, 276 S.W.3d 282, 293 (Ky. Ct. App. 2009).

Similarly, a cross-appellant must designate those portions of the trial court record that support his record, and an appellee must designate the portion of the trial court record that supports the trial court's judgment. CR 75. As will be seen below, there are several avenues that may be taken to accomplish this task. Which method is chosen will largely be a measure of the complexity of the issues involved, the legal versus factual nature of the dispute, and the likelihood of achieving a level of agreement with opposing counsel in order to conserve legal costs. A sample Designation of Record from the Appellee's perspective may be found in Section [16.42], *infra.*

1. [16.16] Narrative Statements – CR 75.13

This rule allows a narrative statement of all or a portion of the proceedings or evidence of a trial to be submitted to the trial court for inclusion in the record on appeal in lieu of the actual recording or transcript. If all the parties agree to do so, a narrative statement of the evidence or proceedings may be substituted for the stenographic transcript or mechanical recording of the evidence or proceedings. If the parties cannot agree upon this substitution, then the narrative statement may be filed by the appellant *only if* no mechanical recording or stenographic transcript exists. If the appellant chooses to file the narrative statement under these circumstances, the statement must first be served upon the appellee. The appellee will then have ten days to serve objections or proposed amendments upon the appellant. The

appellant's proposed statement and the appellee's objections and/or amendments shall all be submitted to the trial court for settlement and approval. Once the statement has been "settled and approved," or in other words, revised by the trial court to reflect the proceedings accurately, it will be included in the record on appeal.

2. [16.17] Designation of Record by Agreed Statement – CR 75.15

When the facts of a case are not in contest, the parties may find it most efficient to designate the record via CR 75.15's Agreed Statement. For situations in which the appellate court would need only certain facts or proceedings to arrive at its decision, such as when an appeal is based on resolution of a legal question, the parties may draft and execute a statement of the case setting forth the question, the circumstances, or proceedings leading to the question and only those facts proved or sought to be proved at trial that are relevant to the question.

The statement must be accompanied by a copy of the judgment appealed from, a copy of the Notice of Appeal with its filing date, and a concise statement of the points to be relied upon by the appellant. After the trial court reviews the statement for accuracy and adds any additional pertinent information, the statement shall be certified to the appellate court as the record on appeal in lieu of the record required by CR 75.07.

3. [16.18] Designation of Record by Stipulation – CR 75.06

Rather than attempting to agree on any statement, the parties may stipulate which portions of the stenographic transcript or mechanical recording should be included in the designation of the record. Although the appellate court will still be reviewing the actual court recordings rather than a summary, the record will be limited in scope and thus will provide a more useful tool for the appellate court's review.

4. [16.19] Designation of Record – CR 75.01

The rules listed above provide methods for circumventing the potentially more time-consuming, catch-all rule for designation of the record on appeal. Per CR 75.01, if the record has not been designated by stipulation, an agreed statement or narrative statement has not been filed, the proceedings were not entirely recorded on videotape, and if there are proceedings to transcribe, the appellant must file a designation of the untranscribed material with the clerk of the trial court and serve it upon the appellee within 10 days of filing the Notice of Appeal (unless the appellant is seeking a pre-hearing conference under CR 76.03, in which case he or she shall have 10 days after entry of the order ending the pre-hearing procedure).

In the designation, the appellant must list those untranscribed portions of the record that he would like included in the record. Also to be listed are any depositions not read into evidence, as these must be excluded from the record per

CR 75.07(1). The appellee will have the following ten days to designate additional portions of the record for inclusion.

When any portion of the proceedings are to be transcribed by a court reporter, a certificate shall be filed with the designation identifying the date of request and an estimated number of pages and completion date, as well as providing that satisfactory arrangements have been made for payment of the court reporter's services. The court reporter will have 50 days to complete the transcription, but CR 75.01(3) provides for extensions of time to complete the task, if necessary.

5. [16.20] Designation of Video Recordings – CR 98

If the trial court proceedings were recorded on video, then no transcript of the record shall be made and the video alone shall constitute the entire record on appeal, except when CR 98(4)(b) permits transcription of a portion of the proceedings as an evidentiary appendix to a brief. The appellant must still "designate" the video recordings by providing to the clerk a list of the dates on which all pre-trial and post-trial proceedings necessary for inclusion on appeal were recorded. All the time limitations for CR 75.01's designation of the record also apply to the video recording designation.

VI. [16.21] Perfection and Cross Appeals – CR 76.02

In order to perfect an appeal, the appellant must first ensure that the trial court clerk transmits the certification of the record required by CR 75.07(5) or CR 98(3)(c) (video records) to the clerk of the appellate court within the time prescribed by those rules. The appeal is not perfected, however, until he or she has also filed his brief per CR 76.12 and discussed at Section [16.22], *infra.* A cross-appellant must also file a brief to perfect his or her cross-appeal.

VII. [16.22] Appellate Briefs – CR 76.12

Failure to comply with any substantial requirement of CR 76.12 may result in the striking of the brief. CR 76.12(8)(a). The appellate court may utilize a variety of sanctions as consequences for a party's failure to timely file a brief in support of or against an appeal. An appellant's case may be dismissed. CR 76.12(8)(b). The court may reverse a case without consideration of the merits by treating the failure to file as an admission of error or accept the opponent's statement of facts and issues as accurate. Which of these sanctions is imposed, if any, is within the discretion of the appellate court. CR 76.12(8)(c); *Roberts v. Bucci*, 218 S.W.3d 395 (Ky. Ct. App. 2007).

Only initial briefs and reply briefs may be filed, including the initial briefs of appellant, appellee, cross-appellant, cross-appellee, and the replies of appellant and cross-appellant. Cross-appeal arguments are requested, but not required, to be combined with arguments on appeal and both parties are to provide in their brief statements whether oral argument is needed.

A. [16.23] Format and Time Limits – CR 76.12

In the Court of Appeals, five copies of every brief must be filed. In the Supreme Court, ten copies of each brief shall be filed. Every brief must be typewritten (by computer printer) or typeset. Typewritten briefs must be on 8 ½ by 11 inch unglazed white paper, double-spaced in black ink in at least 12 point font. The right margin must be one inch, while the one and a half inch left margin requirement will allow for the required binding on the left side. Both front and back shall have colored covers as designated by the type of document. *See* Sections [16.23]-[16.25], *infra.*

1. [16.24] Appellant's Brief

The appellant's brief must be filed within 60 days after the trial court clerk has certified the record as required by CR 75.07(6). The brief's covers must be red. It must be no longer than 25 pages in length, exclusive of the introduction, statement of points and authorities, exhibits, and appendices. A sample shell of an Appellant's Brief may be found in Section [16.43], *infra*.

2. [16.25] Appellee's Brief

The appellee's brief must be filed within 60 days after the appellant has filed his brief. The brief's covers must be blue. It must be no longer than 25 pages in length, exclusive of the introduction, statement of points and authorities, exhibits, and appendices. The appellant is encouraged to combine his arguments for cross-appeal in this brief, and the brief must be no longer than 40 pages under these circumstances, exclusive of the introduction, statement of points and authorities, exhibits, and appendices.

3. [16.26] Reply Brief

The reply brief must be filed within 15 days after the date on which the last appellee's brief was filed or due to be filed and it must be no longer than five pages. The appellant may also include his cross-appellee arguments in the brief, in which case it must be no longer than 30 pages long. The covers of the reply brief must be yellow.

No new issues may be raised in the reply brief, but an appellant should cite new persuasive authority in a reply brief. New issues raised in a reply brief will not be considered by the appellate court. *Catron v. Citizens Union Bank*, 229

S.W.3d 54, 59 (Ky. Ct. App. 2006). Kentucky appellate courts routinely grant motions for leave to file supplemental authority when new cases are rendered, even after the time limits for filing all briefs have expired. *Hudson v. Hudson*, 2011 WL 3805980 (Ky. 2011).

B. [16.27] Drafting the Brief

The appellant's and appellee's briefs must contain a certain organization and structure, as follows: first, to be included only in the Appellant's brief, an "Introduction" indicating the nature of the case, no more than two simple sentences in length; next, a "Statement Concerning Oral Argument," no more than one brief paragraph, indicating whether oral argument is desired and the reasons in support thereof; a "Statement [or Counterstatement] of Points and Authorities," which lists, in the order in which they appear in the brief, the legal arguments for reversal, the authorities supporting the arguments, and the page numbers on which they appear; a "Statement of the Case," which shall contain a chronological summary of the facts and procedural events underlying the appeal and specific references to each in the record; the "Argument" which must begin with a statement with reference to the record showing whether the issue was properly reserved for appeal and which must conform to the order of the Statement of Points and Authorities; a "Conclusion" requesting the specific relief sought; an "Appendix" and an "Index," if desired. Care must be taken to carefully cite to specific locations in the record to evidence and error preservation. Failure to do so amounts to failure to preserve the issues for appeal, and accordingly, the possible loss of your case. *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593 (Ky. Ct. App. 2006).

The Appellant's "Appendix" must first list all documents included in the Appendix, and must include the findings of fact, conclusions of law, and judgment of the trial court; any written opinions filed by the trial court in support of the judgment, the opinion or opinions of the court from which the appeal is taken, and any pleadings or exhibits provided for the appellate court's convenience. The Appellee's "Appendix" should include only those documents or exhibits not already included in the Appellant's brief that the Appellee wishes to reference. If documents or materials are not included in the record, they may not be included or referenced in the briefs.

For further recommendations and suggestions for writing the brief, see the "Briefs" chapter of the UK/CLE Civil Practice After Trial Handbook (3d ed. 2010).

VIII. [16.28] Oral Argument – CR 76.16

Unless the appellate court directs otherwise, on its own motion or on motion of either of the parties, oral arguments will be heard in all cases. Each side is

allowed fifteen minutes to argue, unless otherwise directed, and the party with the burden shall have the right to open and close. Visual aids may be used if leave of court is granted to do so.

A. [16.29] Preparation

Before you can argue your client's position, whether on a legal or factual basis, the facts of the case, the record before the court, all briefs and citations must be rooted in your mind. The justices of the appellate court will have the opportunity to question you about any aspect of the case, whether for clarification of the record or of your argument. If you are able to respond to factual questions by rote, you will be able to focus on and direct the persuasive argument. *See* "Oral Advocacy" chapter by Branham and Vanover, p. 12-9 in UK/CLE Civil Practice After Trial Handbook (3d ed. 2010).

Although there exists disagreement as to the merits of formal rehearsal of your oral argument, some method of rehearsal is a must, whether you recite your oral argument to the mirror, a tape recorder, or in front of colleagues or friends. *Id.* at 12-11. For further recommendations and suggestions for oral argument preparation, see the "Oral Advocacy" chapter of the UK/CLE Civil Practice After Trial Handbook (3d ed. 2010).

B. [16.30] Presentation

When presenting your oral argument before the Court of Appeals, first impressions may not be everything, but they carry more weight than later impressions. Deference to the court, a professional but persuasive voice inflection, and confident body language combined with high impact opening remarks and statement of the case can put you in a good position early on.

On the other hand, the justices' questions for you, when you are adequately prepared for them, are a wonderful opportunity to discuss what they are thinking and tailor your arguments in response. When it comes time for your closing remarks, you are given another golden opportunity to crystallize your points and goals. For further recommendations and suggestions for oral argument presentation, see the "Oral Advocacy" chapter of the UK/CLE Civil Practice After Trial Handbook (3d ed. 2010).

IX. [16.31] Discretionary Review by the Supreme Court of Kentucky

A. [16.32] Time Limits and Procedure – CR 76.20(2)

If a party wishes to seek review of a Court of Appeals decision, he may request review of the decision by the Supreme Court of Kentucky. That Court has

previously stated that discretionary review will only be granted "when there are special reasons for it," such as: the need to correct a manifest injustice, the presence of novel or different issues necessary to establish a developing area of the common law, the resolution of a matter important to the general public interest or in the administration of justice, or the presence of a legitimate constitutional question or statutory or rule interpretation. Even though reversible error may have occurred in the lower court, the Court has stated that denial of discretionary review is still appropriate if those special reasons are lacking. *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.,* 163 S.W.3d 408, 419 (Ky. 2005).

Once the opinion has been received by the Court of Appeals, a party will have 30 days to file a motion for discretionary review, unless the opposing party has timely requested a rehearing under CR 76.32 or reconsideration under CR 76.38. If rehearing or reconsideration has been requested, then the party has 30 days following denial of the request or issuance of the opinion finally disposing of the case in the Court of Appeals to seek discretionary review.

B. [16.33] Motion for Discretionary Review – CR 76.20(3)(d)

In addition to other specific information listed in CR 76.20(3), the motion for discretionary review shall include a "clear and concise statement of (i) the material facts, (ii) the questions of law involved, and (iii) the specific reason or reasons why the judgment should be reviewed…." The maximum length of the motion in its entirety is 15 pages; the Court strictly adheres to this length requirement. Given the brevity required and that the right to review is not automatic, a motion for discretionary review should be subjected to as many revisions as are required for maximum impact of the statement.

The opposing party is entitled to file a response to the motion within 30 days after the motion is filed, and must file a Motion if he wishes to preserve the right to argue issues which he lost in the Court of Appeals, or issues the Court of Appeals decided not to address. *Perry v. Williamson,* 824 S.W.2d 869, 871 (Ky. 1992). The response is also limited to 15 pages and, therefore, should be subjected to the same exacting level of scrutiny as the motion for review.

If the motion is granted, the parties shall follow the same time limits prescribed in Rule 76.12(2) for the filing of briefs, with the starting date to be the date of entry of the order granting the motion. For this purpose, the movant shall be deemed the appellant and the respondent the appellee.

A sample Motion for Discretionary Review may be found in Section [16.44], *infra*.

X. [16.34] Appendices

A. [16.35] Forms Appendix

1. [16.36] Motion to Alter, Amend or Vacate

NO. 00-FC-03101 **JEFFERSON CIRCUIT COURT**

FAMILY DIVISION SIX

NAME OF PETITIONER **PETITIONER**

V. **MOTION TO ALTER, AMEND OR VACATE**

NAME OF RESPONDENT **RESPONDENT**

* * * * * *

Respondent, by counsel, pursuant to CR 52 and CR 59, respectfully files this motion to alter/amend/vacate the Court's judgment entered January 15, 2003.

[ARGUMENT]

_____

ATTORNEY NAME
ATTORNEY FIRM
Counsel for Appellant/Appellee
623 West Main Street
Suite 100
CITY, KY. **ZIP**
Telephone _____
Facsimile _____

CERTIFICATE OF SERVICE

I certify a copy hereof was mailed this ____ day of _____, 20___ to _____, **CITY**, KY. **ZIP**.

_____

ATTORNEY NAME

2. [16.37] Notice of Appeal

NO. 92-FD-00000 **JEFFERSON CIRCUIT COURT**

DIVISION EIGHT

NAME OF PETITIONER **PETITIONER**

V. **NOTICE OF APPEAL**

NAME OF RESPONDENT **RESPONDENT**

* * * * * *

Respondent, **NAME**, by counsel, hereby appeals to the Kentucky Court of Appeals from the orders entered by this court **DATE** and **DATE**.

The Appellee against whom this appeal is taken is Petitioner, NAME.

_____
ATTORNEY NAME
ATTORNEY FIRM
Counsel for Appellant/Appellee
623 West Main Street
Suite 100
CITY, KY. **ZIP**
Telephone _____
Facsimile _____

CERTIFICATE OF SERVICE

I certify a copy hereof was mailed this ____ day of _____, 20___ to _____, **CITY**, KY. **ZIP**.

_____
ATTORNEY NAME

3. [16.38] Notice of Cross-Appeal

NO. 00-FC-008395 **JEFFERSON CIRCUIT COURT**

DIVISION SEVEN

NAME OF PETITIONER **PETITIONER**

V. **NOTICE OF CROSS-APPEAL**

NAME OF RESPONDENT **RESPONDENT**

* * * * * *

Petitioner, **NAME** by counsel, hereby cross-appeals from the Findings of Fact, Conclusions of Law and Judgment entered herein **DATE** and the Opinion and Order entered herein **DATE**. The Cross-Appellee against whom this cross-appeal is taken is **NAME**.

_____

ATTORNEY NAME
ATTORNEY FIRM
Counsel for Appellant/Appellee
623 West Main Street
Suite 100
CITY, KY. **ZIP**
Telephone _____
Facsimile _____

CERTIFICATE OF SERVICE

I certify a copy hereof was mailed this ____ day of _____, 20___ to _____, **CITY**, KY. **ZIP**.

_____

ATTORNEY NAME

4. [16.39] Notice of Submission of Case for Final Adjucation

Mail to Administrative Office of the Courts

AOC - 280 Doc. Code: NS Rev. 7-02 Page 1 of 1 Commonwealth of Kentucky Court of Justice SCR 1.050(8)	**NOTICE OF SUBMISSION OF CASE FOR FINAL ADJUDICATION**	Case No. _____ Court _____ County _____ Division No. _____

PLAINTIFF

VS.

DEFENDANT

Pursuant to SCR 1.050(8), this is to notify the Administrative Office of the Courts that the above-styled case was submitted to Judge _____ on _____, _____. Explain nature of case and type of submission: _____

_____

_____.

I certify a true copy of this Notice of Submission was mailed on _____, 2_____, to the following:

1. **Judge's Name:** _____
   Address: _____
2. **Petitioner/Attorney of Record:** _____
   Address: _____
3. **Respondent/Attorney of Record:** _____
   Address: _____
4. **Other Party/Attorney of Record:** _____
   Address: _____

If more space is needed to indicate copies sent, attach list. **If completing this form online via the Internet, an original and three (3) copies will print. Distribute the four (4) documents as specified at the top of each form.**

Signature: _____ Phone No. (____)_____
Name (type/print): _____
Address: _____

Clerk to complete if applicable: Notice for Submission [ ] **Withdrawn**; [ ] **Overruled**; [ ] **Issue Decided**.
Date: _____, 2_____ By: _____

White copy: Administrative Office of the Courts, Research & Statistics Section, 100 Millcreek Park, Frankfort, KY 40601
Yellow copy: Clerk **Pink copy:** Judge - (Judge may use back of form for explanation) **Gold copy:** Attorney

Circuit Clerk's Copy

AOC - 280 Doc. Code: NS Rev. 7-02 Page 1 of 1 Commonwealth of Kentucky Court of Justice SCR 1.050(8)	**NOTICE OF SUBMISSION OF CASE FOR FINAL ADJUDICATION**	Case No. _____ Court _____ County _____ Division No. _____

PLAINTIFF

VS.

DEFENDANT

Pursuant to SCR 1.050(8), this is to notify the Administrative Office of the Courts that the above-styled case was submitted to Judge _____ on _____, _____. Explain nature of case and type of submission: _____

_____

_____.

I certify a true copy of this Notice of Submission was mailed on _____, 2_____, to the following:

1. **Judge's Name:** _____
   Address: _____
2. **Petitioner/Attorney of Record:** _____
   Address: _____
3. **Respondent/Attorney of Record:** _____
   Address: _____
4. **Other Party/Attorney of Record:** _____
   Address: _____

If more space is needed to indicate copies sent, attach list. **If completing this form online via the Internet, an original and three (3) copies will print. Distribute the four (4) documents as specified at the top of each form.**

Signature: _____ Phone No. (____)_____
Name (type/print): _____
Address: _____

Clerk to complete if applicable: Notice for Submission [ ] **Withdrawn**; [ ] **Overruled**; [ ] **Issue Decided**.
Date: _____, 2_____ By: _____

White copy: Administrative Office of the Courts, Research & Statistics Section, 100 Millcreek Park, Frankfort, KY 40601
Yellow copy: Clerk **Pink copy:** Judge - (Judge may use back of form for explanation) **Gold copy:** Attorney

Judge's Copy

AOC - 280 Doc. Code: NS Rev. 7-02 Page 1 of 1 Commonwealth of Kentucky Court of Justice SCR 1.050(8)	**NOTICE OF SUBMISSION OF CASE FOR FINAL ADJUDICATION**	Case No. _____ Court _____ County _____ Division No. _____

PLAINTIFF

VS.

DEFENDANT

Pursuant to SCR 1.050(8), this is to notify the Administrative Office of the Courts that the above-styled case was submitted to Judge _____ on _____, _____. Explain nature of case and type of submission: _____

_____

_____.

I certify a true copy of this Notice of Submission was mailed on _____, 2_____, to the following:

1. **Judge's Name:** _____
   Address: _____
   _____
   _____
2. **Petitioner/Attorney of Record:** _____
   Address: _____
   _____
   _____
3. **Respondent/Attorney of Record:** _____
   Address: _____
   _____
   _____
4. **Other Party/Attorney of Record:** _____
   Address: _____
   _____
   _____

If more space is needed to indicate copies sent, attach list. **If completing this form online via the Internet, an original and three (3) copies will print. Distribute the four (4) documents as specified at the top of each form.**

Signature: _____ Phone No. (____)_____
Name (type/print): _____
Address: _____
_____
_____

Clerk to complete if applicable: Notice for Submission [ ] **Withdrawn**; [ ] **Overruled**; [ ] **Issue Decided**.
Date: _____, 2_____ By: _____

White copy: Administrative Office of the Courts, Research & Statistics Section, 100 Millcreek Park, Frankfort, KY 40601
Yellow copy: Clerk **Pink copy:** Judge - (Judge may use back of form for explanation) **Gold copy:** Attorney

Attorney's Copy

AOC - 280 Doc. Code: NS Rev. 7-02 Page 1 of 1 Commonwealth of Kentucky Court of Justice SCR 1.050(8)	**NOTICE OF SUBMISSION OF CASE FOR FINAL ADJUDICATION**	Case No. _____ Court _____ County _____ Division No. _____

PLAINTIFF

VS.

DEFENDANT

Pursuant to SCR 1.050(8), this is to notify the Administrative Office of the Courts that the above-styled case was submitted to Judge _____ on _____, _____. Explain nature of case and type of submission: _____

_____

_____.

I certify a true copy of this Notice of Submission was mailed on _____, 2_____, to the following:

1. **Judge's Name:** _____
   Address: _____
2. **Petitioner/Attorney of Record:** _____
   Address: _____
3. **Respondent/Attorney of Record:** _____
   Address: _____
4. **Other Party/Attorney of Record:** _____
   Address: _____

If more space is needed to indicate copies sent, attach list. **If completing this form online via the Internet, an original and three (3) copies will print. Distribute the four (4) documents as specified at the top of each form.**

Signature: _____ Phone No. (____)_____
Name (type/print): _____
Address: _____

Clerk to complete if applicable: Notice for Submission [ ] **Withdrawn**; [ ] **Overruled**; [ ] **Issue Decided**.
Date: _____, 2_____ By: _____

White copy: Administrative Office of the Courts, Research & Statistics Section, 100 Millcreek Park, Frankfort, KY 40601
Yellow copy: Clerk **Pink copy:** Judge - (Judge may use back of form for explanation) **Gold copy:** Attorney

5. [16.40] Supersedeas Bond

AOC- 155 Doc. Code: BSU Rev. 12-10 Page 1 of 1 Commonwealth of Kentucky Court of Justice *www.courts.ky.gov* CR 73.04, 73.07, 62.03(1)	**SUPERSEDEAS BOND**	Case No. _____ Court _____ County _____

_____ APPELLANT

VS.

_____ APPELLEE

The Appellant having appealed from a judgment of this Court rendered on _____, 2_____, for $_____ and costs, we, _____, as principal, and _____, as surety, bind ourselves and our estates to Appellee in the amount of $_____ to satisfy the judgment together with interest, costs and damages for delay if for any reason the appeal is dismissed or the judgment is affirmed, and to satisfy in full such modification of the judgment and such interest and costs, including costs of the appeal, as the appellate court may adjudge. I, as surety, agree that my liability may be enforced by Notice and Motion as provided in CR 5 and CR 73.07.

Principal's Signature: _____
Address: _____
_____
_____

Surety's Signature: _____
Address: _____
_____
_____

AFFIDAVIT OF SURETY

I, as surety, swear (or affirm) I am a resident of _____ County, Kentucky; I own property worth double the amount to be secured by this bond beyond the amount of my debts; and I own property in Kentucky subject to execution equal to the amount of this bond.

Surety Signature: _____

Sworn to before me this _____, 2_____. _____ Clerk

By: _____ D.C.

BOND APPROVED: _____, 2_____. _____

Title: _____

I certify I have served notice of the approval of this bond on all Appellees as required by CR 62.03.

Date: _____, 2_____. _____Clerk

By: _____ D.C.

6. [16.41] Civil Appeal Prehearing Statement

AOC-070 Rev. 2-10 Page 1 of 2 Commonwealth of Kentucky Court of Justice *www.courts.ky.gov* CR 76.03(3)	**KENTUCKY COURT OF APPEALS** **CIVIL APPEAL PREHEARING STATEMENT**	**Internal Use Only**

APPELLANT

VS. **COURT OF APPEALS DOCKET NO.** _____ *(leave blank)*

APPELLEE

Appeal From _____ Circuit Court **Action No.** _____

Trial Judge: _____ Judgment/Order Appealed From Entered: _____

Notice of Appeal Filed: _____ Notice of Cross Appeal Filed: _____

Identifying Information Regarding Counsel for **APPELLANT:**
Name of Client _____
_____
In the trial court, this party was the [ ] Plaintiff [ ] Defendant [ ] Other (specify) _____
Attorney's Name: _____
Address: _____
_____
_____
Telephone No. _____

Identifying Information Regarding Counsel for **APPELLEE:**
Name of Client _____
_____
In the trial court, this party was the [ ] Plaintiff [ ] Defendant [ ] Other (specify) _____
Attorney's Name: _____
Address: _____
_____
_____
Telephone No. _____

1. **Has this case been before an Appellate Court previously?** [ ] Yes [ ] No
   If Yes, provide date and prior case number(s) _____
2. **Type of litigation** (type of order; e.g., automobile negligence, breach of contract, domestic, product liability, property dispute, tax, UCC, zoning, etc.). **Attach copy of complaint or other document initiating Circuit Court action.**
   _____
   _____
3. Was this case **mediated** at the trial court level? [ ] Yes [ ] No

AOC-070
Rev. 2-10
Page 2 of 2

4. **Circuit Court Disposition** (type of order; e.g., Default or Summary Judgment, Dismissal, etc.). **Attach copy of final judgment and any separate written opinion by trial court.**

5. **Relief:** (a) Damages: **Amount Sought** $ _____ **Amount Granted** $ _____
(b) Injunction: [ ] Granted [ ] Denied
(c) Other:_____

6. **Facts and Issues:** (**Brief** statement of facts, claims, defenses and issues litigated. Attach separate sheet if necessary).

7. **Briefly** state **issues proposed to be raised on appeal**, including jurisdictional challenges, and any question of first impression. Attach separate sheet if necessary.

8. Will the appeal turn on interpretation or application of a **particular case or statute**? [ ] Yes [ ] No
If Yes, identify case/statute: _____

9. Is there any known case involving **substantially the same issue now pending** before either appellate court of this state? [ ] Yes [ ] No If Yes, give Case Number: _____
Case Name: _____

10. Would a prehearing conference be helpful? [ ] Yes [ ] No Why? _____

CERTIFICATION

I/We hereby certify a copy of the foregoing statement was executed and a copy served on:

Date: _____, 2_____. _____
Signature

Print Name: _____

Address: _____

NOTES: **1) Items 2 and 4 on page 1 require documents to be attached to this Form for proper filing.**

7. [16.42] Appellee's Designation of Record

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NUMBERS 2003-CA-000000
(Appeal from _____ Family Court Action No. 99-FC-000000)

NAME OF APPELLANT APPELLANT

V. APPELLEE'S DESIGNATION OF RECORD

NAME OF APPELLEE APPELLEE

* * * * * * * *

Appellee, by counsel, specifically designates and requests inclusion as part of the designation of evidence for this appeal the deposition transcript of **NAME OF APPELLANT**, of her deposition which was taken **DATE**, which has been transcribed, and which has been filed with the Office of the _____ Family Court Clerk below.

_____
ATTORNEY NAME
ATTORNEY FIRM
Counsel for Appellant/Appellee
623 West Main Street
Suite 100
CITY, KY. **ZIP**
Telephone _____
Facsimile _____

CERTIFICATE OF SERVICE

I certify a copy of the foregoing was filed with the clerk of the trial court and mailed to _____, **CITY**, KY. **ZIPCODE** and mailed to Hon. _____, Clerk, Court of Appeals, ADDRESS this ____ day of MONTH, 20____.

_____
ATTORNEY NAME

8. [16.43] Appellant's Brief (shell)

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 1999-CA-000000

JOHN R. JOHNSON **APPELLANT**

V. APPEAL FROM JEFFERSON CIRCUIT COURT

ACTION NO. 92-FD-00000

JANE A. JOHNSON **APPELLEE**

* * * * * *

BRIEF FOR APPELLANT

* * * * * *

CERTIFICATE OF SERVICE

I certify that a copy was mailed to Mr. _____, **CITY**, KY. **ZIP** and to Hon. _____, Judge, _____ Family Court, Division _____, _____ Judicial Center, 700 West Jefferson Street, **CITY**, KY. **ZIP** this _____ day of _____, 20_____. I further certify that the record on appeal was not withdrawn by counsel for (Appellant/Appellee) from the Clerk of the Trial Court.

_____
ATTORNEY NAME
ATTORNEY FIRM
Counsel for Appellant/Appellee
623 West Main Street
Suite 100
CITY, KY. **ZIP**
Telephone _____
Facsimile _____

INTRODUCTION

[…]

STATEMENT OF POINTS AND AUTHORITIES

[…]

STATEMENT OF THE CASE

[…]

ARGUMENT

[…]

CONCLUSION

[…]

Respectfully submitted,

_____
ATTORNEY NAME
ATTORNEY FIRM
Counsel for Appellant/Appellee
623 West Main Street
Suite 100
CITY, KY. **ZIP**
Telephone _____
Facsimile _____

9. [16.44] Motion for Discretionary Review

COMMONWEALTH OF KENTUCKY
SUPREME COURT
MOTION FOR DISCRETIONARY REVIEW
FROM COURT OF APPEALS NO. 2005-CA-000000-MR (CROSS)

NAME OF MOVANT **MOVANT**

v.

NAME OF RESPONDENT **RESPONDENT**

****

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of this pleading was served by U.S. Mail on the Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, Kentucky 40601, Judge, _____ County Family Court Division , **ADDRESS**, **CITY**, KY. **ZIP**, and Ms. _____, **CITY**, KY. **ZIP**, Counsel for Respondent, on this ____ day of _____, 20____.

_____
ATTORNEY NAME
ATTORNEY FIRM
Counsel for Appellant/Appellee
623 West Main Street
Suite 100
CITY, KY. **ZIP**
Telephone _____
Facsimile _____

CIVIL RULE 76.20 COMPLIANCE

In compliance with C.R. 76.20, Movant states as follows:

(1) The name of the Movant and the Respondent and their respective counsels are identified in the caption and certificate of service.

(2) The Court of Appeals Order sought to be reviewed was entered on the 18th day of November, 2005.

(3) No supersedeas bond has been executed for this appeal.

(4) Movant does not have any pending motion for rehearing or reconsideration pending in the Court of Appeals.

(5) Attached are the following exhibits:

Exhibit A – Court of Appeals Opinion, 11/18/05

Exhibit B – Notice of Cross-Appeal, 9/19/05

Exhibit C – Court of Appeals Order, 8/10/05

Exhibit D – Jefferson Family Court Order, 6/27/05

Exhibit E – Jefferson Family Court Order, 12/3/05

Exhibit F – Jefferson Family Court Judgment, 8/1/05

MOTION

Comes the Movant, **NAME**, by counsel, and moves this honorable court to grant her motion for discretionary review of the Opinion rendered by the Court of Appeals on _____, 20__, [for the reason that _____].

MATERIAL FACTS

[…]

QUESTIONS OF LAW / REASONS FOR REVIEW

[…]

Respectfully submitted,

ATTORNEY NAME
ATTORNEY FIRM
Counsel for Appellant/Appellee
623 West Main Street
Suite 100
CITY, KY. **ZIP**
Telephone _____
Facsimile _____

B. [16.45] Appendix B – Kentucky Rules of Civil Procedure: Appeals

CR 72 – Appeals from district courts

CR 72.01 Scope of Rule
Rule 72 applies only to appeals from the district court to the circuit court.

CR 72.02 When and how taken

(1) Appeals from the district court to the circuit court in civil cases shall be taken by filing a notice of appeal in the district court and paying the required filing fee.

(2) Two or more persons entitled to appeal may file a joint notice of appeal, or may later join in appeal, if practicable, after filing separate notices of appeal and they shall thereafter proceed as a single appellant.

(3) Rules 73.02, 73.03 and 74 are applicable to appeals from the district court to the circuit courtexcept when otherwise provided in statutes creating special remedies, including but not limited to:

Remedy		**Time to File Notice of Appeal**
Small Claims Statute	KRS 24A.340	10 days;
Paternity Statute	KRS 406.051	60 days;
Forcible Entry and Detainer Statute	KRS 383.255	7 days.

CR 72.04 Record on appeal from district court
The record on appeal to the circuit court shall consist of the entire original record of proceedings in the district court, including untranscribed electronic recordings made under the supervision and remaining in the custody of the district court or clerk. It need not be certified unless and until the Court of Appeals grants a motion for review of the final action of the circuit court disposing of the appeal.

CR 72.06 Perfecting appeals and cross-appeals from district courts

(1) To perfect an appeal from the district court the appellant shall file with the clerk of the circuit court the statement of appeal required by Rule 72.10.

(2) To perfect a cross-appeal from the district court the party taking it shall file with the clerk of the circuit court the counterstatement required by Rule 72.12.

CR 72.08 Time in which an appeal from the district court must be completed
An appeal from the district court must be perfected within 30 days after the date of filing the first notice of appeal.

CR 72.10 Statement of appeal from the district court

(1) A party or parties appealing from the judgment or a final order of the district court shall file with the clerk of the circuit court and serve on the appellee or appellees a statement of appeal signed by counsel for the appellant and setting forth:

(a) The style of the case and the district court docket number;

(b) The name, mailing address, and telephone number of each attorney whose appearance is entered in the case, together with the name of the party represented by the attorney;

(c) The name of the district judge who presided over the matter being appealed;

(d) The date on which the notice of appeal was filed and the date on which any notice of cross-appeal was filed;

(e) A statement as to whether the matter has been before the circuit court on any previous occasion and whether reference to the record of the prior appeal is necessary;
(f) The type of litigation;
(g) A statement as to whether the appellant wants an oral argument;
(h) A fair and accurate summary of the evidence heard by the district court, or a statement that the appeal does not require consideration of the evidence;
(i) A concise statement of the legal questions and propositions on which the appellant relies for a reversal of the judgment, with citations of pertinent authority;
(j) A concise statement of the relief to which the appellant contends he/she is entitled.

(2) In a criminal case appealed from district court to circuit court, a statement of appeal shall be served upon both the county attorney and the Commonwealth's attorney.

CR 72.12 Appellee's counterstatement

Within 30 days after the date on which the appellant's statement of appeal from the district court was filed the appellee shall file and serve a counterstatement, not exceeding 10 pages, signed by counsel for the appellee and setting forth:

(a) The same information required for cross-appeals from the circuit court;
(b) A statement of whether the appellee or cross-appellant wants an oral argument;
(c) A statement of whether the appellant's summary of the evidence is accepted and, if not, a fair and accurate counterstatement of the evidence in question; and
(d) A response to the appellant's statement of legal points and propositions.

CR 72.13 Costs

Upon final disposition of an appeal in the circuit court the clerk shall send the parties a statement of what portion, if any, of the filing fee or fees mentioned in Rule 73.02(1)(c) shall be reimbursed by one party to the other, to the end that such costs shall be borne by the unsuccessful party or parties, except, however, that in criminal cases no reimbursement shall be required of the Commonwealth or a municipality. Liability for reimbursement of costs may be enforced on motion without the necessity of an independent action.

CR 73 All appeals

CR 73.01 General provisions

(1) Rules 73, 74, 75 and 76 apply to all appeals in civil actions except as otherwise provided in Rule 72, Rule 98 or in statutes creating special remedies.
(2) All appeals shall be taken to the next higher court by filing a notice of appeal in the court from which the appeal is taken. Appeals from family courts that are established pursuant to Ky. Const. § 110 (5) (b) or Ky. Const. § 112 (6) shall be taken to the Court of Appeals. After such filing, if the appeal is from a circuit court, any party may file a motion for transfer of the case to the Supreme Court as provided in CR 74.02. A motion for discretionary review by the Supreme Court of a decision of the Court of Appeals, or by the Court of Appeals of an appellate decision of the circuit court, shall be made as provided in Rule 76.20.
(3) Two or more persons entitled to appeal may file a joint notice of appeal, or may later join in appeal, if practicable, after filing separate notices of appeal, and they shall thereafter proceed as a single appellant.

(4) The taking of an appeal from a final order or judgment in any action in which the trial court has denied a defense asserted under Rule 12.02 based upon (a) lack of jurisdiction over the person, or (b) improper venue, or (c) insufficiency of process, or (d) insufficiency of service of process, shall not constitute an entry of appearance in said action in any court by the appellant.

CR 73.02 When and how taken

(1) (a) The notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2).

(b) If an appeal or cross-appeal is from an order or judgment of the circuit court, the filing fee required by Rule 76.42(2)(a)(i) or (ii) shall be paid to the clerk of the circuit court at the time the notice of appeal or cross-appeal is tendered, and the notice shall not be docketed or noted as filed until such payment is made. Motions to proceed in forma pauperis on such an appeal or cross-appeal must be addressed to the circuit court. If timely tendered and accompanied by a motion to proceed in forma pauperis supported by an affidavit, a notice of appeal or cross-appeal shall be considered timely but shall not be filed until the motion to proceed in forma pauperis is granted or, if denied, the filing fee is paid. If the motion to proceed in forma pauperis is denied, the party shall have 30 days within which to pay the filing fee or to appeal the denial to the appropriate appellate court. Time for further steps in the appeal or cross-appeal shall run from the date that the notice of appeal is filed upon payment of the filing fee or the granting of the motion to proceed in forma pauperis.

(c) If an appeal or cross-appeal is from an order or judgment of the district court, the filing fee required by KRS 23A.210 or 23A.205(1) shall be paid to the clerk of the district court at the time the notice of appeal or cross-appeal is filed, and the notice shall not be docketed or noted as filed until such payment is made.

(d) Upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment or an order which affects the running of the time for taking an appeal, the trial court may extend the time for appeal, not exceeding 10 days from the expiration of the original time.

(e) The running of the time for appeal is terminated by a timely motion pursuant to any of the Rules hereinafter enumerated, and the full time for appeal fixed in this Rule commences to run upon entry and service under Rule 77.04(2) of an order granting or denying a motion under Rules 50.02, 52.02 or 59, except when a new trial is granted under Rule 59.

(i) If a party files a notice of appeal after the date of the docket notation of service of the judgment required by CR 77.04(2), but before disposition of any of the motions listed in this rule, the notice of appeal becomes effective when an order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge a post-judgment order listed in this rule, or a judgment altered or amended upon such motion, must file a notice of appeal, or an amended notice of appeal, within the time prescribed by this rule measured by the date of the CR 77.04(2) docket notation regarding service of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(2) The failure of a party to file timely a notice of appeal, cross-appeal, or motion

for discretionary review shall result in a dismissal or denial. Failure to comply with other rules relating to appeals or motions for discretionary review does not affect the validity of the appeal or motion, but is ground for such action as the appellate court deems appropriate, which may include:

(a) A dismissal of the appeal or denial of the motion for discretionary review,
(b) Striking of pleadings, briefs, record or portions thereof,
(c) Imposition of fines on counsel for failing to comply with these rules of not more than $500, and
(d) Such further remedies as are specified in any applicable Rule.

(3) When the right of appeal in special civil cases is granted by statute, such appeals shall be prosecuted as provided in KRS 446.190.

(4) If an appellate court determines that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that it is so totally lacking in merit that it appears to have been taken in bad faith.

Legislative Research Commission Note: The appeal from the Small Claims division of District Court is governed by KRS 24A.340, which provides that an appeal may be taken within 10 days of the judgment to the appropriate Circuit Court.

CR 73.03 Notice of appeal

(1) The notice of appeal shall specify by name all appellants and all appellees ("et al." and "etc." are not proper designation of parties) and shall identify the judgment, order or part thereof appealed from. It shall contain a certificate that a copy of the notice has been served upon all opposing counsel, or parties, if unrepresented, at their last known address.

(2) When the notice of appeal is filed, the clerk shall serve notice of its filing by mailing a copy showing the date filed and a copy of the official docket sheet to the clerk of the appellate court and to the attorney of record of each party or to the party, if unrepresented. The clerk shall note in the civil docket the names of the parties mailed the copies, with the date of mailing. Failure of the clerk to comply with this rule does not affect the validity of the appeal.

CR 73.04 Supersedeas bond

(1) Whenever an appellant entitled thereto desires a stay on appeal, as provided in Rule 62.03, he may present to the clerk or the court for approval an executed supersedeas bond with good and sufficient surety. The address of the surety shall be shown on the bond. The bond shall be in a fixed amount and conditioned for the satisfaction of the judgment in full together with costs, interest and damages for delay, if the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, including costs on the appeal and interest as the appellate court may adjudge.

(2) When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the trial court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond.

(3) When the judgment determines the disposition of the property in controversy as in real actions or replevin, or when such property is in the custody of the sheriff, or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and

detention of the property, the costs of the action, costs on appeal, interest, and damages for delay. A supersedeas bond may be given to stay proceedings on a part of a judgment, and in such case the bond need only secure the part superseded.

CR 73.05 Bond on appeal – Repealed

CR 73.06 Failure to file or insufficiency of supersedeas bond

(1) The sufficiency of the bond or the surety may be determined by the trial court upon motion and hearing.

(2) During an appeal, the trial court shall retain original jurisdiction to determine all matters relating to the right to file a supersedeas bond, the amount and sufficiency thereof and the surety thereon.

CR 73.07 Judgment against surety

By entering into a supersedeas bond, the surety submits to the jurisdiction of the court with which the bond is filed and liability may be enforced on motion without the necessity of an independent action. The motion shall be served on the surety as provided by Rule 5 at least 20 days prior to the date of the hearing.

CR 73.08 Certification of record on appeal

The record on appeal as constituted under Rule 75 or Rule 76 shall be prepared and certified by the clerk of the court from which the appeal is taken within 10 days after the filing of the transcript of evidence by the court reporter. If the proceedings were taken exclusively by video recording, if there are no proceedings to transcribe, or if the appeal is from a Circuit Court order determining paternity, dependency, abuse, neglect, domestic violence, or juvenile status offense, then the record on appeal shall be certified by the clerk within 30 days after the date of filing the first notice of appeal. In Forma Pauperis cases, the time for certifying the record on appeal in cases taken exclusively by video recording or where there are no proceedings to transcribe shall run from the date the Motion to Proceed In Forma Pauperis is granted. If CR 76.03 applies to the appeal, the time for certifying the record shall begin to run as provided in CR 76.03. The appellate court, in its discretion, may extend the time for certification of the record upon motion and a showing of good cause.

CR 74 Cross-appeals – Deleted

CR 74.01 Cross-appeals

(1) Any party properly named as an appellee or cross-appellee may take a cross-appeal from a judgment of the trial court. A cross-appeal shall be denominated as such and shall be prosecuted like a regular appeal and governed by the Rules applicable thereto, except that the notice of cross-appeal shall be filed not later than 10 days after the last day allowed for the filing of a notice of appeal. The failure of a party taking an appeal to prosecute the appeal, or that party's dismissal of it shall not prevent any party taking a cross-appeal from prosecuting the crossappeal.

(2) A cross-appellant may name as cross-appellee any party to the circuit court action against whom relief is sought on the cross-appeal.

(3) Any cross-appellee, who has not previously filed a notice of appeal or cross-appeal from the judgment to be reviewed, may file an additional cross-appeal within ten (10) days of the filing of the notice of cross-appeal which first names that cross-appellee as a party to the appellate action seeking review of this particular judgment.

CR 74.02 Transfer of appeal from Court of Appeals to Supreme Court

(1) General.
Within 10 days after the date on which a notice of appeal to the Court of Appeals has been filed any party may serve and file a motion in the Supreme Court for transfer of the case to the Court. A copy of the notice of appeal shall accompany a motion for transfer filed in the Supreme Court. The requirements of Rule 76.20, excepting paragraphs (1), (2), (9)(a), and (9)(b), shall apply to such motions.

(2) Considerations governing transfer.
Such transfer is within the discretion of the Supreme Court and will be granted only upon a showing that the case is of great and immediate public importance, except that if separate appeals in a criminal case to the Supreme Court and to the Court of Appeals arise from the same trial, the Supreme Court in its discretion, on motion of the appellant whose appeal lies to the Court of Appeals, may transfer the latter appeal to the Supreme Court. The filing of a notice of appeal in a case in which a death penalty has been imposed will automatically serve to transfer the appeal to the Supreme Court.

(3) Running of time.
Filing of the motion shall suspend the running of time for further steps in the appeal, and the full time for such steps shall be computed from the date of the order granting or denying the transfer.

(4) Granting of motion.
If the motion is granted, the appeal shall be perfected and prosecuted as in the instance of appeals taken as a matter of right unless otherwise directed by the Supreme Court.

(5) Recommendation by Court of Appeals.
The Supreme Court may at any time, upon recommendation of the Court of Appeals, transfer to the Supreme Court any case pending before the Court of Appeals that falls within the criteria set forth in paragraph (2) of CR 74.02. The entry of a recommendation for transfer by the Court of Appeals shall suspend the running of time for any further steps in the appeal, and the full time for such steps shall be computed from the date of the order of the Supreme Court granting or denying the transfer.

(6) Costs.
Payment of filing fee specified in Rule 76.42(2)(a) shall be required with the motion.

CR 75 Record on appeal

CR 75.01 Procedure for designation of evidence or proceedings reported by a court reporter

(1) Unless an agreed statement of the case is certified as provided in Rule 75.15, the proceedings were taken exclusively by video recording as governed by Rule 98, or there are no proceedings to transcribe, the appellant shall file a designation of untranscribed material. The designation shall be filed with the clerk of the trial court and shall be served on the appellee, the court reporter, and the clerk of the appellate court. The designation shall be filed with the clerk of the trial court within 10 days of the filing of the notice of appeal unless Rule 76.03 applies to the appeal, in which case, the designation shall be filed within 10 days of the order ending the prehearing procedure under Rule 76.03(3). The designation shall: (1) list such untranscribed portions of the proceedings stenographically or electronically recorded as appellant wishes to be included in the record on appeal and (2) list any depositions or portions thereof as have been filed with

the clerk but were not read into evidence and are thus required by Rule 75.07(1) to be excluded from the record on appeal. Within 10 days after the service and filing of such designation, or within 10 days after the time for filing of such designation has expired, any other party to the appeal may file a designation of additional portions of the untranscribed proceedings stenographically or electronically recorded as that party wishes to be included. If an appellee files the original designation, the parties shall proceed under Rule 75.01 in the same manner as if the original designation had been filed by the appellant. If no designation is required, a statement identifying such depositions, if any, or any portions thereof, as have been filed with the clerk but were not read into evidence and are thus required by Rule 75.07(1) to be excluded from the record on appeal, shall be filed with the clerk of the trial court and served upon the appellee and the clerk of the appellate court within the time periods set forth in this rule.

(2) If any part of the proceedings are to be transcribed by a court reporter there shall be attached to the designation a certificate signed by the designating counsel and by the court reporter stating:
   (a) Date on which transcript was requested;
   (b) Estimated number of pages;
   (c) Estimated completion date; and
   (d) That satisfactory financial arrangements have been made between counsel and reporter for the transcription.

(3) Except in cases in which the death penalty was sought at trial, the court reporter shall prepare the transcript of evidence within 50 days from the date of service of the designation of record. If the transcript of evidence cannot be completed within 50 days, it shall be the duty of the court reporter to make a written request to the appellant's attorney who shall file in the appropriate appellate court for an extension of time. If the transcript cannot be completed within 110 days of the service of the designation of the record, the reporter is required to make another written request to the appellant's attorney for an extension and must reduce the transcript preparation fee by 10% for every 30 days over the 110 days.

(4) In cases in which the death penalty had been sought at trial, the court reporter shall prepare the transcript of evidence within 170 days from the date of the service of the designation of record. If the transcript cannot be completed within 170 days, it shall be the duty of the court reporter to make a written request to the appellant's attorney who shall file in the Supreme Court of Kentucky for an extension of time. If the transcript cannot be completed within 230 days of the service of the designation of record, the reporter is required to make another written request to the appellant's attorney for an extension and must reduce the transcript preparation fee by 10% for every 30 days over the 230 days.

(5) All written requests for extensions by the court reporter to the appellant's attorney must be made at least ten (10) days before the expiration of the period as originally prescribed or as extended by a previous order.

(6) The court reporter shall immediately notify all counsel of record of the completion and filing of the transcript of evidence and one (1) copy with the clerk of the circuit court.

CR 75.02 Transcript of evidence and proceedings

(1) If there be designated for inclusion any proceedings that were not electronically recorded but were stenographically recorded, the court reporter shall file

promptly in the trial court the original and one copy of the transcript of the portion or portions thereof included in the designation. If the designation includes only a portion or portions of the reporter's transcript, the court reporter at the request of the appellant shall file such additional portions as the appellee would reasonably require to enable him or her to complete the record on appeal and if the appellant fails to do so the trial court on motion may require the additional material needed to be so furnished. Initially the cost of a transcript will be borne by the party designating it.

(2) Except in cases in which the death penalty was sought at trial, unless otherwise directed by the court, the transcript of proceedings shall include only those portions of the voir dire or opening statements and closing arguments by counsel which were properly objected to in the proceedings in the trial court and which are designated by one of the parties to be a part of the record on appeal.

(3) In the event any of the proceedings designated for inclusion have been electronically recorded, it shall not be necessary that they be transcribed, and in lieu of a transcript the original tapes or recordings shall be transmitted by the clerk pursuant to Rule 75.07.

CR 75.03 Form of testimony

Testimony of witnesses designated for inclusion may be either in question and answer form or in narrative form. A party may prepare and file with his designation a condensed statement in narrative form of all or part of the testimony, and any other party to the appeal, if dissatisfied with the narrative statement may require testimony in question and answer form to be substituted for all or part thereof.

CR 75.04 Statement of points – Repealed

CR 75.05 Record to be abbreviated

No party shall designate any matter not essential to the decision of the questions presented by the appeal. For any infraction of this rule or for the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties. On motion the trial court may require a party filing a counterdesignation under Rule 75.01 to advance all or part of the costs of the additional record if it does not appear reasonably necessary to the disposition of the appeal.

CR 75.06 Stipulation as to record

Instead of serving designations as provided in Rule 75.01, the parties by stipulation filed with the clerk of the trial court may designate the parts of the proceedings and evidence to be included in the record on appeal.

CR 75.07 Record to be prepared and transmitted by clerk

(1) The clerk of the trial court shall prepare and certify the entire original record on file in his or her office, in accordance with the requirements of paragraphs (10) and (11) of this Rule 75.07, including the designations or stipulations of the parties with respect to proceedings stenographically or electronically recorded and a certified copy (rather than the original) of the docket assigned to the action, but excluding depositions not read into evidence.

(2) The transcript of proceedings stenographically recorded (or tapes or recordings of proceedings electronically recorded), or such lesser portions thereof as have

been designated or agreed upon by stipulation, shall when filed with the clerk be certified as a part of the record on appeal.

(3) Except for (a) documents, (b) maps and charts, and (c) other papers reasonably capable of being enclosed in envelopes, exhibits shall be retained by the clerk and shall not be transmitted to the appellate court unless specifically directed by the appellate court on motion of a party or upon its own motion.

(4) The written record on appeal shall include the juror strike sheets made pursuant to RCr 9.36.

(5) The matter certified under subsections (1), (2), (3), and (4) of this Rule and Rule 98 shall constitute the record on appeal. It is the responsibility of the appellant or counsel for the appellant, if any, to see that the record is prepared and certified by the clerk within the time prescribed by Rule 73.08.

(6) If the appeal is to the Court of Appeals or Supreme Court, the clerk of the circuit court or of the Court of Appeals in workers' compensation cases, or original proceedings pursuant to CR 76.36(7) shall immediately notify the clerk of the appellate court when the record has been completed and certified as required by this Rule, and shall simultaneously serve copies of such notification upon all parties to the appeal. Such notification shall indicate the name or names of counsel for the appellant. The clerk shall enter the fact and date of such notification in the docket of the case, and the date of such docket entry shall govern the time for perfecting the appeal.

(7) The record on appeal shall be retained under the responsibility and control of the clerk of the trial court until it is transmitted to the clerk of the appellate court. It will be made available first to counsel for the appellant and then to counsel for the appellee. If it is removed from the clerk's office, counsel for the appellant shall return it before submitting his or her brief to the appellate court in order that it may be available to counsel for the appellee. Counsel for the appellee shall return it before submitting his or her brief to the appellate court. If it is withdrawn by counsel for the appellant for the purpose of preparing a reply brief it shall be returned before such brief is submitted to the appellate court. In no event shall the original of an electronic recording be removed from the clerk's office, nor shall a record on appeal be retained by counsel beyond the filing date on which his or her appellate brief is due.

(8) Whenever the clerk permits a record on appeal to be withdrawn by counsel, the original of the reporter's transcript, including evidentiary exhibits, shall be retained in the clerk's office until it is transmitted to the appellate court.

(9) Withdrawals and returns of the record on appeal shall be noted by the clerk on the docket kept for that action (which, in the instance of appeals from the district court, shall be the circuit court's appellate docket).

(10) All parts of the written record on appeal shall be arranged in the order in which they were filed or entered. If the record comprises more than 150 pages, it shall be divided into two or more volumes not exceeding 150 pages each. Each volume shall be securely bound at the left side.

(11) There shall be a general index at the beginning of the record and an index to each volume in the front thereof which shall show, in the order in which they appear, the pages on which all pleadings, orders, judgments, instructions, and papers may be found, together with the name of each witness and the pages on which his or her examination and cross-examination appear. All exhibits filed with the record shall be sufficiently identified and the index shall direct where they may be found.

(12) If the appeal is to the Court of Appeals or Supreme Court, the clerk of the trial court shall transmit the record on appeal to the appellate court when so requested by the clerk of that court.

CR 75.08 Power of court to correct or modify record

It is not necessary for the record on appeal to be approved by the trial court or judge thereof except as provided in Rule 75.12, Rule 75.13, and Rule 76, but if any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the trial court. All other questions as to the content and form of the record shall be presented to the appellate court.

CR 75.09 Orders as to original papers – Repealed

CR 75.10 Record for preliminary hearing in an appellate court

If at any time before the record on appeal to the Court of Appeals or Supreme Court has been transmitted to the appellate court a party desires to move that court for a dismissal, for a stay pending appeal, or for any other intermediate order, the clerk of the trial court at his request shall prepare for transmission to the appellate court a photocopy of the judgment or order from which the appeal is taken, the notice of appeal and such other portions of the record as the parties may request or as may be necessary including a copy of the certificate as to transcript under Rule 75.01(2), if applicable.

CR 75.11 Several appeals

When more than one appeal is taken to an appellate court from the same judgment, a single record on appeal shall be prepared containing all the matter designated or agreed upon by the parties, without duplication. If there are separate appeals to the Supreme Court and Court of Appeals in a criminal case, a copy of the original record shall be made up and certified as the record on appeal to the Court of Appeals.

CR 75.12 Appeals in forma pauperis – Deleted

CR 75.13 Narrative statement

(1) In the event no stenographic or electronic record of the evidence or proceedings at a hearing or trial was made or, if so, cannot be transcribed or are not clearly understandable from the tape or recording, the appellant may prepare a narrative statement thereof from the best available means, including his/her recollection, for use instead of a transcript or for use as a supplement to or in lieu of an insufficient electronic recording. This statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service upon him/her. Thereupon the statement, with the objections or proposed amendments, shall be submitted to the trial court for settlement and approval, and as settled and approved shall be included in the record on appeal.

(2) By agreement of the parties a narrative statement of all or any part of the evidence or other proceedings at a hearing or trial may be substituted for or used in lieu of a stenographic transcript or an electronic recording.

CR 75.14 Bystanders bill

In the event that the trial judge refuses or is unable for any reason to approve a record of the proceedings and evidence when submitted to him for settlement; or in the event he approves such a record or enters a correction thereon over a party's objection, an aggrieved party may, within five days after the trial judge's action, serve an exception as written by him, if its truth is attested by the affidavits of two bystanders, but its truth may be controverted and maintained by other affidavits so served, not exceeding five on either side. Affidavits controverting must be filed within five days after the serving of the correction and those maintaining within 10 days after the serving of the correction.

CR 75.15 Record on appeal; agreed statement

When the questions presented by an appeal can be determined without an examination of all the proceedings and evidence in the trial court, the parties may prepare and sign a statement of the case showing how the questions arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions by the appellate court. The statement shall include a copy of the judgment appealed from, a copy of the notice of appeal with its filing date, and a concise statement of the points to be relied on by the appellant. If the statement conforms to the proceedings and evidence it shall, with such additions as the trial court may consider necessary fully to present the questions raised by the appeal, be approved by the trial court and shall then be certified to the appellate court as the record on appeal in lieu of the record specified in Rule 75.07.

CR 76 Practice and procedure in Court of Appeals and Supreme Court

CR 76.01 Scope of rule

(1) Rule 76 applies only to practice and procedure in the Court of Appeals and Supreme Court. Wherever "court" or "appellate court" is used it means the court to which an appeal is or may be taken or in which it is pending, "judge" means either a judge or justice of that court, and "clerk" means the clerk of that court, unless the context indicates otherwise. Wherever the appellate court is called by its title the rule shall apply to that court alone.

(2) Appeals to the Supreme Court from judgments and final orders in proceedings originating in the Court of Appeals shall be governed by Rule 76.36(7), and the provisions of Rules 76.02 and 76.04 with respect to perfecting appeals and submission of briefs shall not apply.

CR 76.02 Perfecting appeals and cross-appeals

(1) To perfect an appeal from the circuit court the appellant shall:

(a) (i) cause the clerk's notice required by CR 75.07(6) to be transmitted to the clerk of the appellate court or (ii) if the appeal is taken of a case recorded pursuant to CR 98(1), cause the clerk's notice required by paragraph CR 98(3)(c) to be transmitted to the clerk of the appellate court; and (b) file with the clerk of the appellate court the brief required by Rule 76.12.

(2) When an appeal has been perfected and so noted on the docket the clerk shall forthwith mail notice of the date of such entry to the attorneys for the parties as shown on the notice of appeal.

(3) To perfect a cross-appeal the party taking it shall file with the clerk of the appellate court the brief required by Rule 76.12.

CR 76.03 Prehearing conference

(1) This Rule, 76.03, applies to all civil actions appealed to the Court of Appeals, except prisoner applications seeking relief relating to confinement or conditions of confinement and appeals from Circuit Court orders determining paternity,

dependency, abuse, neglect, domestic violence, or juvenile status offense.

(2) Upon the filing of a notice of appeal to the Court of Appeals in a civil case to which this rule applies, the clerk of the circuit court shall forthwith transmit a copy of the notice of appeal to the Clerk of the Court of Appeals, together with copies of (a) the docket sheet of the court from which the appeal is taken; (b) the judgment or order sought to be reviewed; and (c) any opinion or findings of the circuit court or administrative agency.

(3) In any appeal to which this Rule, 76.03, applies, following the filing of the notice of appeal, the running of time for further steps shall not run until so ordered by the Court of Appeals except for the following: (a) the filing of a notice of cross-appeal under Rule 74.01; (b) the filing of a motion to transfer under Rule 74.02; or the filing of a prehearing statement under this Rule, 76.03. Unless otherwise ordered by the Court of Appeals, the full time for such further steps shall be computed from the date of entry of the order stating that no prehearing conference shall be held pursuant to this rule, or from the date of entry of the order reciting the actions taken and the agreements reached by the parties during a prehearing conference held pursuant to this rule.

(4) Within twenty days after filing the notice of appeal or notice of cross- appeal in the circuit court, each appellant and cross-appellant shall file with the Clerk of the Court of Appeals, with service on all other parties, a prehearing statement, on a form to be supplied by the clerk of the circuit court at the time the notice of appeal is filed, setting forth the following information:
   (a) The style of the case and circuit court docket number;
   (b) The name, mailing address, and telephone number of each attorney whose appearance is entered in the case, together with the name of the party represented by the attorney;
   (c) The name of the judge who presided over the matter being appealed;
   (d) The date on which the notice of appeal and the date on which any notice of crossappeal was filed;
   (e) A statement as to whether the matter has been before the Court of Appeals, on a previous occasion, in which case the clerk shall, if necessary, obtain the old record from the clerk of the trial court, and shall place the old record with the new one;
   (f) The type of litigation;
   (g) A brief description of the claims, defenses, and issues litigated;
   (h) A brief statement of the facts and issues proposed to be raised on appeal, including jurisdictional challenges;
   (i) A statement, based on counsel's present knowledge, as to whether the appeal involves a question of first impression;
   (j) A statement as to whether the determination of the appeal will turn on the interpretation or application of a particular case or statute and, if so, the name of the case or the number of the statute;
   (k) A statement, based upon counsel's present knowledge, as to whether there is pending before the Court of Appeals or the Supreme Court another case arising from substantially the same case or controversy or involving an issue which is substantially the same, similar or related to an issue in this appeal.

(5) In any civil case to which this rule applies in which the constitutionality of a statute is challenged by any party as an issue in the appeal, a copy of the prehearing statement shall be served upon the Attorney General. The Attorney

General may file within 10 days of the filing of the prehearing statement an entry of appearance. If no entry of appearance is filed in such a case by the Attorney General, then no further filings or briefs shall be served on the Attorney General.

(6) Within ten days after the filing of appellant's or cross-appellant's prehearing statement each appellee or cross-appellee may file with the Clerk of the Court of Appeals, with service on all other parties, a supplemental statement containing any other information needed to clarify the issues on appeal and on cross-appeal, and a statement as to whether in the opinion of counsel, the appeal should be designated a special appeal pursuant to CR 76.05.

(7) All civil cases shall be reviewed to determine if a prehearing conference would be of assistance to the Court or the parties; and any party may move for a prehearing conference at the time of filing the prehearing statement or supplemental statement. Such a conference may be conducted by a judge of the Court of Appeals or a staff attorney of the Court known as a conference attorney.

(8) A party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion.

(9) A judge of the Court of Appeals designated by the Chief Judge of the Court of Appeals or a conference attorney designated by the Chief Judge of the Court of Appeals may direct the attorneys for all parties to attend a prehearing conference, in person or by telephone, to be held as soon as practicable after the filing of the prehearing statement.

(10) The purpose of the conference shall be to consider the possibility of settlement, the simplification of issues, the contents of the record, the time for filing the record and briefs, and any other matters which the judge or conference attorney determines may aid in the handling or disposition of the proceedings.

(11) At the conclusion of the prehearing conference, the judge or conference attorney shall enter an order reciting the actions taken and the agreements reached by the parties and that order shall govern the subsequent course of the proceedings.

(12) The comments made during the prehearing conference are confidential, except to the extent disclosed by the prehearing order entered pursuant to CR 76.03(10), and shall not be disclosed by the conference judge or conference attorney nor by counsel in briefs or argument.

(13) In the event of default by any party in any action required by a prehearing conference order, the Clerk of the Court of Appeals shall issue a notice to the party in default providing a 10-day period within which to file an affidavit showing good cause for the default and including when the required action will be taken.

(14) Upon failure of a party or attorney to comply with the provisions of this rule or the provisions of the prehearing conference order, the Court of Appeals may assess reasonable expenses caused by the failure, including attorney's fees; assess all or a portion of the appellate costs; or dismiss the appeal.

(15) A judge who participates in a prehearing conference or becomes involved in settlement discussions pursuant to this rule shall not sit as a member of the panel assigned to hear the appeal.

CR 76.04 Time in which appeals and cross-appeals must be perfected – Deleted

CR 76.05 Special Appeals of the Court of Appeals – Deleted

CR 76.06 Statement of appeal – Deleted

CR 76.08 Statement of cross-appeal – Deleted

CR 76.10 Record of previous appeal – Deleted

CR 76.12 Briefs

(1) When required.

Unless otherwise directed by the appellate court, before any appeal is taken under submission for final disposition on the merits briefs shall be filed by the respective parties. An appellant or crossappellant may file a reply brief. No further briefs will be considered without leave of the court. The combining of arguments on an appeal and cross-appeal into one brief is both permitted and encouraged. Should the appellant or appellants fail to file a brief, no brief shall be required of the appellees unless so ordered by the court.

(2) Time for filing.

(a) Civil cases. In civil cases, including workers' compensation appeals, except appeals from Circuit Court orders determining paternity, dependency, abuse, neglect, domestic violence or juvenile status offense, the appellant's brief shall be filed with the clerk of the appellate court within 60 days after the date of the notation on the docket of the notification required by Rule 75.07(6). The appellee's brief (or combined briefs, if the appellee is also a cross-appellant) shall be so filed within 60 days after the date on which the appellant's brief was filed. The appellant's reply brief shall be filed within 15 days after the date on which the last appellee's brief was filed or due to be filed. If the appellant is also a cross-appellee, a combined brief may be filed within 60 days after the date on which the last appellee's brief is filed or due to be filed. When a motion for discretionary review has been granted by the Supreme Court, the time in which the movant's brief must be filed shall be computed from the date of entry of the order granting review.

(i) Civil appeals from Circuit Court orders determining paternity, dependency, abuse, neglect, domestic violence or juvenile status offense. Appeals in these cases shall be expedited. The appellant's brief shall be filed with the clerk of the appellate court within 30 days after the date of the notation on the docket of the notification required by Rule 75.07(6). The appellee's brief shall be filed within 30 days after the date of filing of the appellant's brief. The appellant's reply brief shall be filed within 10 days after the date of filing of the appellee's brief. Motions for extension of time will not be considered except under extraordinary circumstances.

(b) Criminal cases. The times in which briefs are required to be filed in criminal cases shall be the same as in civil cases, except as follows:

(i) If counsel for the appellant is the Public Advocate of the Commonwealth or the Attorney General of the Commonwealth, or designee, the appellant's brief shall be filed within 60 days after the date on which the record on appeal was received by the clerk of the appellate court (notice of which shall be sent); and

(ii) If counsel for the appellant is someone other than the Public Advocate of the Commonwealth or the Attorney General of the Commonwealth, or designee, the appellee's brief shall be filed within 60 days after the date on which the appellant's brief was filed or within 60 days after

the date on which the record on appeal was received by the clerk of the appellate court, whichever is the later.

(3) Number of Copies.

(a) Briefs in the Court of Appeals shall be filed in quintuplicate. In the Supreme Court ten copies shall be filed.

(b) Filing of Electronic Briefs on Diskette or CD-ROM. Any party filing a brief on the merits with the Clerk of the Supreme Court or the Court of Appeals may, and is encouraged to, file with the required copies of the paper brief an electronic brief thereof on a floppy disk or CD-ROM (preferred). The appellate court clerk shall receive and file the floppy disk or CD-ROM with the papers of that case.

(i) All electronic briefs shall be on a 3.5 floppy disk or CD-ROM that can be read via Microsoft Windows and shall contain in a single file all information contained in the paper brief, including the cover, the table of contents, and the certifications, in the same order as the paper brief. The electronic briefs may also contain hypertext links or bookmarks to cases, statutes and other reference materials available on the Internet or appended to the brief.

(ii) An electronic brief must be formatted in Microsoft Word, WordPerfect, or in a .pdf document (preferred).

(iii) An electronic brief shall contain a label indicating:

(a) The style and docket number of the case,

(b) The name of the document contained on the diskette or CD-Rom, and

(c) The language format of the document.

(4) Form and content.

(a) Printed or typewritten brief. In the Supreme Court and the Court of Appeals, all briefs may be printed or typewritten. "Printed briefs" are those which have been typeset. A brief produced on a computer printer is considered to be typewritten.

(i) If *printed*, briefs shall be in black ink on unglazed opaque white paper 6 1/8 by 9 1/4 inches in dimension, in type no smaller than 11-point, and enclosed in covers colored as specified in this rule.

(ii) If *typewritten*, briefs shall be on unglazed white paper 8 1/2 by 11 inches in dimension in black type no smaller than 12 point set at standard width. Typing shall be double spaced and clearly readable. The brief shall have a 1 1/2 inch margin on the left side and a 1 inch margin on all other edges. Briefs shall be enclosed (front and back) in covers colored as specified in this rule. Typewritten briefs shall be securely bound at the left side.

(iii) *Covers*. All briefs shall be enclosed (front and back) in covers colored as follows:

Appellants--red; Appellees--blue; Appellants reply brief-- yellow; Amicus curiae--brown;

Petitions for Rehearing--green; Response-- gray; Other--white. Brief covers shall show the file number(s) of the appeal(s), the file number(s) of the circuit court action(s), a caption containing at least the lead appellants and appellees, the name of the party on whose behalf the brief is submitted, and the certificate required by subsection (6) of this rule. See official forms 24 and 25.

(b) Length.

(i) In the Court of Appeals, unless otherwise ordered by that court, the appellant's brief and the appellee's brief in response shall be limited to 25 pages each, excluding the introduction, statement of points and authorities, exhibits and appendices. Reply briefs shall be limited to five pages each, except that when an appellant is called upon to respond to more than one appellee brief the appellant is permitted up to five additional pages for each additional appellee brief. A brief combining arguments as an appellee and cross-appellant shall be limited to 40 pages. A brief combining an appellant's reply and a cross-appellee brief shall be limited to 30 pages.

(ii) In the Supreme Court, unless otherwise permitted by order of that Court the appellant's brief and the appellee's brief in response shall be limited to 50 pages each, excluding the introduction, statement of points and authorities, exhibits and appendices, and reply briefs shall be limited to 10 pages each. A brief combining arguments on an appeal and cross-appeal to the Supreme Court shall not exceed 65 pages. A brief combining a reply and a response to a cross-appeal shall not exceed 25 pages in length. If the appellant is called upon to respond to more than one appellee's brief, the appellant shall be permitted up to five additional pages for each additional appellee's brief.

(iii) In cases where the death penalty has been imposed, upon motion made at least 20 days prior to the filing deadline, and upon good cause shown, the appellant's brief and the appellee's brief may be extended to no more than 150 pages, excluding the introduction, statement of points and authorities, exhibits and appendices. Upon similar motion, for good cause shown, made at least 5 days prior to the filing deadline, a reply brief may be extended to no more than 25 pages.

(c) Organization and contents-Appellant's brief. The organization and contents of the appellant's brief shall be as follows:

(i) A brief "INTRODUCTION" indicating the nature of the case, and not exceeding two simple sentences, such as, "This is a murder case in which the defendant appeals from a judgment convicting him of 1st –degree manslaughter and sentencing him to 20 years in prison," or "This is a case in which an insurance company appeals from a judgment construing its policy as applicable, and a co-defendant's policy as not applicable, to the plaintiff's accident claim. Plaintiff also appeals against the co-defendant."

(ii) A "STATEMENT CONCERNING ORAL ARGUMENT" indicating whether the appellant desires oral argument and why appellant believes that oral argument would or would not be helpful to the Court in deciding the issues presented. This Statement should be no longer than one brief paragraph. The appellant's statement is not binding on the Court and does not preclude a party's right to file a motion to reconsider the Court's ruling that oral argument will be dispensed with. Failure to include a statement concerning oral argument will be treated as indicating that appellant does not desire oral argument in the appeal.

(iii) A "STATEMENT OF POINTS AND AUTHORITIES," which shall

set forth, succinctly and in the order in which they are discussed in the body of the argument, the appellant's contentions with respect to each issue of law relied upon for a reversal, listing under each the authorities cited on that point and the the respective pages of the brief on which the argument appears and on which the authorities are cited.

(iv) A "STATEMENT OF THE CASE" consisting of a chronological summary of the facts and procedural events necessary to an understanding of the issues presented by the appeal, with ample references to the specific pages of the record, or tape and digital counter number in the case of untranscribed videotape or audiotape recordings, or date and time in the case of all other untranscribed electronic recordings, supporting each of the statements narrated in the summary.

(v) An "ARGUMENT" conforming to the statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.

(vi) A "CONCLUSION" setting forth the specific relief sought from the appellate court.

(vii) An "APPENDIX" with appropriate extruding tabs containing copies of the findings of fact, conclusions of law, and judgment of the trial court, any written opinions filed by the trial court in support of the judgment, the opinion or opinions of the court from which the appeal is taken, and any pleadings or exhibits to which ready reference may be considered by the appellant as helpful to the appellate court. The first item of the appendix shall be a listing or index of all documents included in the appendix. The index shall set forth where the documents may be found in the record. The appellant shall place the judgment, opinion, or order under review immediately after the appendix list so that it is most readily available to the court. Except for matters of which the appellate court may take judicial notice, materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs. In workers' compensation cases the appendix shall include the opinions of the Administrative Law Judge, the Workers' Compensation Board and the Court of Appeals.

(viii) Any "INDEX" the appellant may wish to provide.

(d) Organization and contents-Appellee's brief. The organization and contents of the appellee's brief shall be as follows:

(i) A "STATEMENT CONCERNING ORAL ARGUMENT" responsive to appellant's statement indicating why appellee believes that oral argument would or would not assist the Court in deciding the issues presented.

(ii) A "COUNTERSTATEMENT OF POINTS AND AUTHORITES" similar to the statement required of the appellant by paragraph (4)(c)(iii) of this Rule.

(iii) A "COUNTERSTATEMENT OF THE CASE" stating whether the appellee accepts the appellant's Statement of the Case and, if not,

setting forth the matters the appellee considers essential to a fair and adequate statement of the case in accordance with the requirements of paragraph (4)(c) (iv) of this Rule.

(iv) An "ARGUMENT" conforming to the appellee's Statement of Points and Authorities and to the requirements of paragraph (4)(c)(v) of this Rule with reference to record references and citations of authority.

(v) An "APPENDIX" with appropriate extruding tabs containing copies of any papers or exhibits, not included in the appellant's brief to which ready reference may be considered by the appellee as helpful to the appellate court. The first item of the appendix shall be a listing or index of all documents included in the appendix. The index shall set forth where the documents may be found in the record.

(vi) Any "INDEX" the appellee may wish to provide.

(e) Organization and contents--other briefs. Other briefs permitted by these Rules shall have a "STATEMENT OF POINTS AND AUTHORITIES" conforming to paragraph (4)(c)(iii) of this Rule, shall state the purpose of the brief and the particular issues to which it is directed and shall contain an ARGUMENT consistent with the requirements of paragraph (4)(c)(v) of this Rule. The brief shall conclude with a statement of the relief sought, if pertinent, and may include an appendix or an index as in the instance of the briefs mentioned in paragraphs (4)(c) and (4)(d) of this Rule. Reply briefs shall be confined to points raised in the briefs to which they are addressed, and shall not reiterate arguments already presented.

(f) Organization and contents--Briefs of five pages or less. The requirements of this Rule with respect to a "STATEMENT OF POINTS AND AUTHORITIES" shall not apply to any brief of five pages or less.

(g) Form of citations. All citations of Kentucky Statutes shall be made from the official edition of the Kentucky Revised Statutes and may be abbreviated "KRS." The citation of Kentucky cases reported after January 1, 1951, shall be in the following form for decisions of the Supreme Court and its predecessor court: Doe v. Roe, ___S.W.2d ___or ___S.W.3d ___ (Ky. [date]), or for reported decisions of the present Court of Appeals, Doe v. Roe, ___S.W.2d ___ or ___S.W.3d ___ (Ky. App. [date]). Case names may be italicized or underlined.

(5) Service of briefs on adverse parties and courts from which appeals have been taken.

Before filing any brief in the appellate court a party shall serve, in the manner provided by CR 5.02, a copy of it on each adverse party to the appeal and on the judge whose decision is under review. In criminal cases both the defendant and the attorney general also shall serve copies of their briefs on the Commonwealth's attorney of the district in which the case was tried.

(6) Certificate required.

Every brief shall bear on the front cover a signed statement, in accordance with Rule 5.03, by the attorney or party that service has been made as required by this Rule, which statement shall identify by name the persons so served. Except for briefs on appeals from the Court of Appeals to the Supreme Court, the statement shall further certify that the record on appeal has been returned to the clerk of the trial court or that it was not withdrawn by the party filing the brief. The name or names of the attorneys submitting a brief and responsible for its contents shall appear following its "Conclusion."

(7) Amicus curiae briefs.

A brief for an amicus curiae shall not be filed except on order of the appellate court pursuant to a motion specifying with particularity the nature of the movant's interest, the points to be presented, and their relevance to the disposition of the case. Payment of the filing fee specified in Rule 76.42(2)(a) shall be required with a motion for leave to file an amicus curiae brief and said motion shall be filed within fifteen (15) days of the filing of appellant's brief. An amicus curiae brief shall not exceed fifteen (15) pages, shall not contain appendices and shall be tendered with the motion.

(8) Penalties.

(a) A brief may be stricken for failure to comply with any substantial requirement of this Rule 76.12.

(b) If the appellant's brief has not been filed within the time allowed, the appeal may be dismissed.

(c) If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

CR 76.14 Prehearing conference – Deleted

CR 76.15 Special appeals of the Court of Appeals – Deleted

CR 76.16 Oral arguments

(1) Oral arguments on the merits will be heard in all cases appealed from the circuit court unless the appellate court directs otherwise on its own motion or on motion of one or more of the parties to the appeal. CR 76.12(4) provides fro the parties to include in their brief statements concerning the need for oral argument in the appeal. In any case where the court orders on its own motion that oral argument shall be dispensed with, any party shall have ten (10) days from the date of the order in which to object and ask for reconsideration. No opinion shall be rendered until the time has expired for making such objection and motion for reconsideration, or if such objection and motion is made, until it can be decided.

(2) In an oral argument the party upon whom the burden rests shall have the right to open and close. Unless otherwise directed each side will be allowed 15 minutes. Visual aids based on the record may be used at oral argument with leave of the court.

(3) Counsel representing an amicus curiae shall not participate in the oral argument without specific permission by the appellate court granted on motion.

(4) A person who is not an attorney at law will be permitted to make an oral argument only with special leave of the court.

(5) (a) In death penalty cases in which the appellant has been granted permission to file a brief exceeding fifty (50) pages, appellant shall file and serve upon appellee not later than fourteen (14) days before oral argument a notice of issues that appellant intends to argue orally, with specific reference to the argument number and page numbers of each issue in appellant's brief. If appellant fails to do so, without good cause, appellant's oral argument shall be limited to answering questions from the Court.

In death penalty cases, appellant shall file any motion for leave to cite supplemental authority for oral argument not later than fourteen (14) days

before oral argument, unless good cause is shown for a later filing. In death penalty cases, appelee shall file any motion for leave to cite supplemental authority for oral argument not later than ten (10) days before oral argument or ten (10) days after service of appellant's designation of issues for oral argument, whichever is earlier, unless good cause is shown for a later filing.

(b) In all cases before the Supreme Court to which paragraph (5)(a) of this Rule does not apply, appellant or cross-appellant shall file and serve upon each appellee or cross-appellee not later than ten (10) days before oral argument a notice of issues in the order to be argued that the appellant or cross-appellant intends to argue orally, with specific reference to the argument number and page numbers of each issue in the appellant's or cross-appellant's brief. If the appellant or cross-appellant fails to do so, without good cause, the appellant's oral argument or the portion of the cross-appellant's oral argument devoted to issues raised in the cross-appeal shall be limited to answering questions from the court.

CR 76.18 Transfer of appeal from Court of Appeals to Supreme Court – Deleted

CR 76.20 Motion for discretionary review

(1) General.

A motion for discretionary review by the Supreme Court of a decision of the Court of Appeals, and a motion for such review by the Court of Appeals of a judgment of the circuit court in a case appealed to it from the district court, shall be prosecuted as provided by this Rule 76.20 and in accordance with the Rules generally applicable to other motions. Such review is a matter of judicial discretion and will be granted only when there are special reasons for it.

(2) Time for Motion.

(a) A motion for discretionary review by the Court of Appeals of a circuit court judgment in a case appealed from the district court shall be filed within 30 days after the date on which the judgment of the circuit court was entered, subject to the provisions of Rule 77.04(2) and Criminal Rule 12.06(2).

(b) A motion for discretionary review by the Supreme Court of a Court of Appeals decision shall be filed within 30 days after the date of the order or opinion sought to be reviewed unless (i) a timely petition under Rule 76.32 or (ii) a timely motion for reconsideration under Rule 76.38(2) has been filed or an extension of time has been granted for that purpose, in which event a motion for discretionary review shall be filed within 30 days after the date of the order denying the petition or motion for reconsideration or, if it was granted, within 30 days after the date of the opinion or order finally disposing of the case in the Court of Appeals.

(c) The failure of a party to file a Motion for Discretionary Review within the time specified in this Rule, or as extended by a previous order, shall result in a dismissal of the Motion for Discretionary Review.

(3) The Motion.

The motion shall designate the parties as Movant(s) and Respondent(s), shall not exceed fifteen (15) pages in length, unless otherwise authorized by the Court, and shall contain the following:

(a) The name of each movant and each respondent and the names and addresses of their counsel,

(b) The date of entry of the judgment sought to be reviewed, or the date of final disposition by the Court of Appeals, as the case may be,

(c) A statement of whether a supersedeas bond, or bail on appeal, has been executed,

(d) A clear and concise statement of (i) the material facts, (ii) the questions of law involved, and (iii) the specific reason or reasons why the judgment should be reviewed; and

(e) If the motion is addressed to the Supreme Court, a statement that the movant does not have a petition for rehearing or motion for reconsideration pending in the Court of Appeals,

(f) A statement showing whether any other party to the proceeding has a petition for rehearing or motion for reconsideration pending in the Court of Appeals.

(4) Record on Motion.

There shall be filed with each motion photocopies of the final order or judgment, any findings of fact, conclusions of law and opinion of the trial court, and any opinion or final order of the appellate court, including any decision on any petition for rehearing or motion for reconsideration. In administrative agency cases, copies of the findings of fact, conclusions of law and award or order of the administrative agency shall be filed. No other record on the motion shall be required unless the court to which the motion is addressed so orders.

(5) Response to Motion.

Each respondent may file a response to the motion within 30 days after the motion is filed. Said response shall not exceed fifteen (15) pages in length, unless otherwise authorized by the Court. No reply to a response shall be filed unless requested by the Court.

(6) Form, Signing, and Number of Copies Required.

The motion and the response shall be either printed or reproduced by an acceptable duplicating process, and shall be signed by each party or his counsel in his individual name, which signature shall constitute a certification that the statements of fact therein are true. Ten copies shall be filed for a motion in the Supreme Court, and five in the Court of Appeals.

(7) Service of Motion and Response.

Before filing, the motion and the response shall be served on the other parties and on the clerk of the court whose decision is sought to be reviewed, and such service shall be shown as provided in Rules 5.02 and 5.03.

(8) Submission.

The motion shall be submitted to the court for consideration when the response is filed or when the time for filing such response has expired, whichever is sooner.

(9) Disposition of Motion.

(a) If the motion is denied the decision shall stand affirmed, and if a supersedeas bond has been executed, damages for delay shall be recoverable pursuant to KRS Chapter 26A. The denial of a motion for discretionary review does not indicate approval of the opinion or order sought to be reviewed and shall not be cited as connoting such approval.

(b) If the motion is in the Supreme Court and is granted, the times prescribed in Rule 76.12(2) for the filing of briefs shall be computed from the date of the entry of the order granting the motion, the movant being regarded as the appellant and the respondent as the appellee.

(c) If the motion is in the Court of Appeals and is granted, the appeal shall be perfected in the same time and manner as if it were an appeal as a matter of right, unless otherwise directed by the court. Evidence designated under Rule 75.01 must be transcribed. The time prescribed by Rule 73.08 for preparation and certification of the record, and by Rule 75.01 for designation of the evidence or other proceedings requiring transcription, shall be computed from the date of the order granting the motion.

(d) A motion for discretionary review in the Supreme Court will not be ruled upon during the pendency of a petition for rehearing or motion for reconsideration in the Court of Appeals. If a party files a timely petition for rehearing or motion for reconsideration in the Court of Appeals after another party has filed a motion for discretionary review in the Supreme Court, the clerk shall withhold submission of the latter pending final disposition of the case in the Court of Appeals.

(e) A ruling by the Court of Appeals granting or denying a motion for discretionary review will not be reconsidered by the Court of Appeals. A ruling by the Supreme Court granting or denying a motion for discretionary review will not be reconsidered by the Supreme Court. A motion for reconsideration, however styled, shall not be accepted for filing by the clerk of the Supreme Court or Court of Appeals.

(f) Copies of the order shall be sent forthwith by the clerk of the appellate court to counsel for each party and to the clerk of the court whose decision is sought to be reviewed.

(10) Costs.

Payment of the filing fee specified in Rule 76.42(2)(a) shall be required with the motion.

CR 76.21 Cross-motion for discretionary review

(1) If a motion for discretionary review is granted, the respondent shall then be permitted ten days thereafter in which to file a cross motion for discretionary review designating issues raised in the original appeal which are not included in the motion for discretionary review but which should be considered in reviewing the appeal in order to properly dispose of the case.

(2) This cross motion for discretionary review will be practiced in conformity with Rule 76.34, motion practice in appellate courts. Each cross respondent may file a response to the cross motion within 10 days after the cross motion is filed No reply to a cross response shall be filed unless requested by the court. Ten copies of any cross motion or cross response shall be filed in the Supreme Court, and five in the Court of Appeals.

(3) The filing of a cross motion for discretionary review shall suspend the running of time for briefing discretionary review as heretofore granted, and the full time for briefing shall be computed from the date of the order granting or denying the cross motion for discretionary review.

(4) If the cross motion for discretionary review is granted, the moving party shall brief the new issues thus raised in this brief responding to the brief on behalf of the original movant, and the original movant shall then be permitted to reply to these further issues in the reply brief permitted by Rule 76.12.

CR 76.22 Motion to advance

Appeals may be advanced for good cause shown.

CR 76.24 Substitution of parties

(a) Death of a Party. If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the appellate court, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the appellate court. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the appellate court may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the trial court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the appellate court in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by his personal representative, or, if he has no personal representative, by his attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the appellate court in accordance with this substitution.

(b) Substitution for Other Causes. If substitution of a party in the appellate court is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(c) Public Officers; Death or Separation from Office.

(1) When a public officer is a party to an appeal or other proceeding in the appellate court in his official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the failure to enter such an order shall not affect the substitution.

(2) When a public officer is a party to an appeal or other proceeding in his official capacity he may be described as a party by his official title rather than by name; but the court may require his name to be added.

CR 76.25 Review of Workers' Compensation Board decisions

(1) General.

Pursuant to Section 111(2) of the Kentucky Constitution and SCR 1.030(3), decisions of the Workers' Compensation Board shall be subject to direct review by the Court of Appeals in accordance with the procedures set out in this Rule.

(2) Time for Petition.

Within 30 days of the date upon which the Board enters its final decision pursuant to KRS 342.285(3) any party aggrieved by that decision may file a petition for review by the Court of Appeals and pay the filing fee required by CR 76.42(2)(a)(xi). Failure to file the petition within the time allowed shall require dismissal of the petition.

(3) Number of Copies.

An original and four (4) copies of the petition shall be filed with the Clerk of the Court of Appeals. The petition shall conform in all respects to CR 7.02(4) and be secured on the left side. Petitions shall be covered in red. Responses shall be covered in blue.

(4) Petition.

The petition shall designate the parties as appellant(s) and appellee(s) and shall

contain the following:

(a) The name of each appellant and each appellee and the names and addresses of their respective counsel. The appellant shall specifically designate as appellees all adverse parties and the Workers' Compensation Board.

(b) The petition shall state the date of the entry of the decision by the administrative law judge and the date of entry of the final decision of the Workers' Compensation Board.

(c) Each petition shall begin with a table of points and authorities stating the issues to be raised. The petition shall contain a clear and concise statement of (i) the material facts, (ii) the questions of law involved, and (iii) the specific reason(s) why relief from the Board's decision should be granted by the Court of Appeals. The petition shall be prepared with the expectation that it will be the only pleading filed by the appellant in the appeal.

(d) Copies of the following documents shall be attached to the original and each copy of the petition filed in the Court of Appeals: (i) the decision of the administrative law judge, (ii) the final decision of the Workers' Compensation Board, and (iii) a set of the briefs filed with the Board by the appellant and each appellee. If review is sought of a decision on a motion to reopen, copies of the motion to reopen, any responses thereto, and decisions on that motion by the administrative law judge and the Board shall be attached.

(e) The petition shall clearly state whether there is or is not any other action concerning the injury pending before any other state or federal court or administrative body.

(5) Record.

Upon receipt of the petition, the clerk of the Court of Appeals will request that the original record of the Workers' Compensation Board be prepared by the board in conformity with CR 75.07(9) and (10), certified within a maximum of sixty (60) days, and transported forthwith to the office of the Clerk of the Court of Appeals.

(6) Response to Petition.

Each appellee may file an original and four copies of a response to the petition within 20 days of the date on which the petition was filed with the Court of Appeals. No reply to the response shall be filed without leave of Court.

(7) Certification.

The petition and the response shall be signed by each party or his counsel and that signature shall constitute a certification that the statements therein are true and made in good faith.

(8) Service of Petition and Response.

Before filing, a copy of the petition and any response shall be served on counsel of record, or on any party not represented by counsel, and on the Workers' Compensation Board. Such service shall be shown by certificate on the petition or response when filed in the Court of Appeals pursuant to CR 5.02 and CR 5.03. In any case in which the constitutionality of a statute is questioned, a copy of the petition and response shall be served on the Attorney General of the Commonwealth by the party challenging the validity of the statute. The Attorney General may file an entry of appearance within ten (10) days of the date of such service. If no entry of appearance is filed, no further pleadings need be served on the Attorney General.

(9) Cross-Petition; Response.

(a) Any party designated as an appellee may file a cross-petition within twenty (20) days following filing of the petition. The cross-petition shall state the name of each cross-appellant and each cross-appellee and the names and addresses of their respective counsel. The cross-petition shall contain a clear and concise statement of the issues which the cross-appellant seeks to raise and any material facts relevant to those issues not presented in the petition.

(b) Any cross-appellee may file a response to the cross-petition within twenty (20) days of the filing of the cross-petition.

(c) The original and four copies of the cross-petition and response shall be filed with the Clerk of the Court of Appeals.

(d) Cross-petitions and responses shall be signed in accordance with paragraph (7) of this Rule, and shall be served in accordance with paragraph (8) of this Rule, with colored covers and binding in accordance with paragraph (3) of this Rule.

(10) Submission.

The petition, any responses, cross-petitions, and the record shall be submitted to the Court of Appeals for review, and the matter shall proceed further as directed by order of the Court of Appeals. The court may order the filing of briefs under CR 76.12 or direct that the appeal be submitted for decision based only upon the petition and response.

(11) Disposition.

After the Court of Appeals issues a decision, the Clerk of the Court of Appeals shall send a copy of the decision of the Court of Appeals to counsel for each party and to the Workers' Compensation Board.

(12) Procedure for Further Review.

Further review may be sought in the Supreme Court of a final decision or final order of the Court of Appeals in a Workers' Compensation matter, and shall be prosecuted in accordance with the rules generally applicable to other appeals pursuant to CR 76.12 and CR 76.36.

CR 76.26 Submission of Appeals

Appeals will be submitted for consideration on the merits by the appellate court when all briefs have been filed or when the time for such filing has expired, whichever is sooner. No paper filed or tendered after submission will be considered unless filed with leave of court.

CR 76.28 Opinions

(1) Written Opinions.

(a) Appellate court opinions and orders may be announced orally but shall be reduced to writing and, except for unanimous actions of the Supreme Court, shall list the names of the members concurring or dissenting and indicate the name of any member who did not participate in the decision.

(b) Opinions and orders finally deciding a case on the merits shall include an explanation of the legal reasoning underlying the decision.

(2) Time of Announcement.

Unless otherwise determined by the Supreme Court, opinions of the Supreme Court will be released for publication on Thursdays. Opinions of the Court of Appeals shall be released on Fridays. However, if a Friday is a state holiday, the Court of Appeals, at the discretion of the Chief Judge may render opinions on

the last working day before the holiday. The time of publication shall be 10:00 A.M. prevailing Frankfort time.

(3) Distribution of Copies.

Promptly after an opinion is handed down the clerk shall send a copy to the trial judge, to any intermediate court which made a decision in the case, and to each attorney in the case. Copies shall be furnished to other persons as directed by the court.

(4) Publication.

(a) When a motion for discretionary review under Rule 76.20 is filed with the Supreme Court, the opinion of the Court of Appeals in the case under review shall not be published until the Supreme Court rules on the motion for discretionary review or until the Court permits the motion to be withdrawn. Unless otherwise ordered by the Supreme Court, upon entry of an order denying the motion for discretionary review or granting withdrawal of the motion, the opinion of the Court of Appeals shall be published if the opinion was designated "To Be Published" by the Court of Appeals. Upon entry of an order of the Supreme Court granting a motion for discretionary review the opinion of the Court of Appeals shall not be published, unless otherwise ordered by the Supreme Court. All other opinions of the appellate courts will be published as directed by the court issuing the opinion. Every opinion shall show on its face whether it is "To Be Published" or "Not To Be Published."

(b) The court rendering an opinion that is to be published shall provide a copy of it forthwith to the reporter for West Publishing Company. Except for those that are not to be published, opinions of an appellate court shall be released for publication by its clerk.

(c) Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. Opinions cited for consideration by the court shall be set out as an unpublished decision in the filed document and a copy of the entire decision shall be tendered along with the document to the court and all parties to the action.

(5) Withdrawal of Opinions.

Parties to an appeal may not by agreement dismiss an appeal and have an opinion withdrawn after it has been issued.

CR 76.30 Effective date of opinions

(1) Scope of Rule.

This Rule 76.30 applies to any final decision of an appellate court styled an "Opinion." A decision styled an "Opinion and Order" is an order, and is governed by Rule 76.38.

(2) Finality.

(a) An opinion of the Supreme Court becomes final on the 21st day after the date of its rendition unless a petition under Rule 76.32 has been timely filed or an extension of time has been granted for that purpose. An opinion of the Court of Appeals becomes final on the 31st day after the date of its rendition unless a petition under Rule 76.32 or a motion for review under Rule 76.20 has been timely filed or an extension of time has been granted for one of those purposes.

(b) In the event of a timely motion for review under Rule 76.20, the opinion becomes final immediately upon denial of the motion.

(c) In the event of a timely petition under Rule 76.32, (i) if it is in the Supreme Court and is denied, the opinion becomes final immediately upon such denial, but if the petition is granted and a new or revised opinion is rendered, the new or revised opinion becomes final on the 21st day after the date of its rendition unless otherwise ordered, or unless a further petition under Rule 76.32 has been timely filed or an extension of time has been granted for that purpose; (ii) if it is in the Court of Appeals and is denied, the opinion becomes final on the 31st day after the date the petition was denied unless a motion for review under Rule 76.20 has been timely filed; (iii) if it is in the Court of Appeals and is granted, and a new or revised opinion rendered, the new or revised opinion becomes final on the 31st day after the date of its rendition unless otherwise ordered, or unless a further petition under Rule 76.32 or a motion for review under Rule 76.20 has been timely filed or an extension of time has been granted for one of those purposes.

(d) Unless otherwise ordered, (i) in no event shall an opinion become final pending final disposition of a timely petition under Rule 76.32 or a timely motion for review under Rule 76.20; and (ii) in every case it shall become final when no such motion or petition has been filed within the time allowed for that purpose.

(e) When an opinion has become final, the clerk of the appellate court that rendered it shall forthwith send to the clerk of the trial court and, if the opinion results from a review of the decision of another appellate court, to the clerk of that court also, a copy of the opinion with an endorsement stamped thereon showing the date upon which it became final, whereupon the clerk of the trial court shall forthwith file the opinion as enclosed in the original record and note the filing on the proper docket. In the event a final opinion directs that an administrative agency, board, or commission conduct further proceedings with respect to such action, the clerk of the trial court shall forthwith remand the action to the administrative agency, board, or commission before which said action originated without further order of the trial court.

(f) No mandate shall be required to effectuate the final decision of an appellate court, whether entered by order or by opinion.

CR 76.32 Petitions for rehearing

(1) When authorized.

(a) A party adversely affected by an opinion of the Supreme Court or Court of Appeals in an appealed case may petition the Court for (i) a rehearing or (ii) a modification or extension of the opinion, or both, and the opposing party may file a response. When final disposition of an appeal is made by an order, or an "opinion and order," the party adversely affected may move for a reconsideration as provided by Rule 76.38(2), but a petition for rehearing is not authorized.

(b) Except in extraordinary cases when justice demands it, a petition for rehearing shall be limited to a consideration of the issues argued on the appeal and will be granted only when it appears that the court has overlooked a material fact in the record, or a controlling statute or decision, or has misconceived the issues presented on the appeal or the

law applicable thereto.

(c) When it is desired to point out and have corrected any inaccuracies in statements of law or fact contained in an opinion of the court, or to extend the opinion to cover matters in issue not discussed therein, and the result reached in the opinion is not questioned, a party may request a modification or extension.

(d) In the event a petition for rehearing is granted, a party adversely affected by the new opinion may petition for a rehearing, modification or extension under the same rules governing the original petition for rehearing, modification or extension, but unless the court directs otherwise there shall be no response to the second or any further petition for rehearing.

(e) A party who has moved for a discretionary review by the Supreme Court under Rule 76.20 shall not be authorized to file a petition for rehearing of the same case in the Court of Appeals unless the order or opinion sought to be reviewed is revised or set aside pursuant to a petition for rehearing filed by another party, in which event the pending motion for discretionary review shall be dismissed without prejudice to a subsequent motion for discretionary review of the order or opinion finally disposing of the case in the Court of Appeals. The filing of a subsequent motion for discretionary review following a dismissal without prejudice under this paragraph (e) shall not require payment of another filing fee under Rule 76.42(2)(a)(iv).

(2) Time for filing.

A petition for rehearing, modification or extension shall be filed within 20 days after the date on which the opinion was issued, and any response thereto shall be filed within 20 days after the date on which the petition was filed. The failure of a party to timely file the petition shall result in the appeal becoming final.

(3) Form.

(a) All petitions and responses shall be in the form prescribed by Rule 76.12(4), but with covers colored as follows: Petition--Green; Response-- Gray.

(b) Every petition shall bear the style of the court's opinion, shall indicate in the caption whether it is presented by the appellant or appellee, and shall include a copy of the opinion of which complaint is made.

(c) Petitions for rehearing and responses shall be limited to 10 pages each, exclusive of copies of the opinion.

(4) Number of copies.

Petitions and responses in the Court of Appeals shall be filed in quintuplicate. In the Supreme Court ten copies shall be filed.

(5) Service and certification.

Every petition and response shall be served as required by Rule 76.12(5) for briefs and shall bear on the front cover a signed statement, in accordance with Rule 5.03, by the attorney or party that service has been made as required by this rule, which statement shall identify by name the persons so served. The name or names of the attorneys submitting a petition for rehearing, extension or modification or response thereto, and responsible for its contents, shall appear at its conclusion.

(6) Disposition.

(a) *In the Supreme Court.*

A petition for rehearing will be assigned to a justice other than the one who prepared the opinion.

(b) *In the Court of Appeals.*

A petition for rehearing will be assigned to a member of the panel that decided the case, other than the member who prepared the opinion.

(7) Costs.

Payment of the filing fee specified in Rule 76.42(2)(a) shall be required with a petition for rehearing or modification or extension of an opinion.

CR 76.33 Intermediate relief in the appellate court

(1) When Authorized.

At any time after a notice of appeal or a motion for discretionary review pursuant to Rule 76.20 has been filed, a party to the appeal or motion may move the appellate court for intermediate relief upon a satisfactory showing that otherwise he will suffer immediate and irreparable injury before a hearing may be had on the motion.

(2) Record Required.

Unless the record on appeal has been transmitted to the appellate court, a motion pursuant to this rule shall be accompanied by a partial record pursuant to CR 75.10.

(3) Costs.

Payment of the filing fee specified in Rule 76.42(2)(a) shall be required with the motion.

CR 76.34 Motions

(1) Applicability of Other Rules.

Rules 5.01, 5.02, 5.03, 5.05, 6.04, 6.05 and 7.02 shall apply to all motions other than motions for transfer to the Supreme Court and motions for discretionary review, except that the movant shall not specify a time for hearing in the motion or notice unless the time has been set as provided by paragraph (4) of this Rule 76.34.

(2) Response.

The opposing party may file a response, accompanied by a certificate of service, within 10 days after the date the motion was served or within the time otherwise designated by the court.

(3) Number of Copies.

Five (5) copies of motions and responses in the Court of Appeals shall be filed. Except as otherwise required by Rule 65.09(1), Rule 74.02(1), Rule 76.20(6) and Rule 76.37(11), five (5) copies of motions and responses in the Supreme Court shall be filed, unless the Court directs otherwise.

(4) Hearing and Disposition.

(a) Except for motions that call for final disposition of an appeal or original action in the appellate court, any member of the court designated by the Chief Justice or Chief Judge may hear and dispose of any motion; and

(b) Any intermediate order of a procedural nature pending final disposition of a proceeding pending in an appellate court may be issued on the signature of any judge of that court.

(5) Oral Arguments.

No motion will be heard on oral argument except by prearrangement with an authorized representative of the appellate court or with the judge to whom the motion is addressed or has been assigned.

(6) Motion to Dismiss Appeal or Cross-Appeal.

(a) In addition to any other relief provided by these Rules, an adversary party may move to dismiss an appeal or cross-appeal because it is not within the

jurisdiction of the appellate court or because it has not been prosecuted in conformity with the Rules; and

(b) Timely filing of a motion to dismiss shall suspend the running of time for procedural steps otherwise required with regard to the appeal and any cross- appeal in the same proceeding, and the time will continue to run as provided by Rule 76.12(2) after the date an order is entered denying the motion or passing it to the merits.

CR 76.36 Original proceedings in appellate court

(1) Petition for relief.

Original proceedings in an appellate court may be prosecuted only against a judge or agency whose decisions may be reviewed as a matter of right by that appellate court. All other actions must be prosecuted in accordance with applicable law. Original proceedings in an appellate court may be prosecuted upon the payment of the filing fee required by CR 76.42(2)(a) and the filing of a petition setting forth:

(a) The name of each respondent against whom relief is sought;
(b) The style and file number of the underlying action before the respondent(s);
(c) The facts upon which petitioner claims entitlement to relief;
(d) The relief sought;
(e) A memorandum of authorities in support of the petition.

A copy of the petition shall be served on each respondent and each real party in interest as defined in this Rule, Section (8), and shall bear proof of service as required by Rule 5.03. Immediately upon the filing of the petition, the clerk shall mail to each respondent and real party in interest notice of the date the petition was filed.

(2) Response.

The party against whom relief is sought and real party in interest as defined in this Rule, section (8), may within 20 days after the date of filing of the petition file a response, bearing proof of service as required by Rule 5.03, accompanied by a memorandum of authorities in support of his defense.

(3) Number of copies.

Petitions and responses shall be filed in quintuplicate.

(4) Intermediate relief.

If the petitioner requires any relief prior to the expiration of 20 days after the date of filing the petition he/she may move the court on notice for a temporary order on the ground that he/she will suffer immediate and irreparable injury before a hearing may be had on the petition.

(5) Evidence.

Evidence in support of or against the petition, other than that which may be attached to the petition and response in the form of exhibits, affidavits, and counter-affidavits, will be permitted only by order of the court, and it shall be in the form of affidavits or depositions taken in accordance with the Rules applicable to proceedings in trial courts. Oral testimony will not be heard in the appellate court.

(6) Submission and disposition.

Original actions will be submitted for decision when the response is filed or the time for filing it has expired, whichever is sooner, unless otherwise ordered by the court.

(7) Appeals to the Supreme Court.

(a) An appeal may be taken to the Supreme Court as a matter of right from

a judgment or final order in any proceeding originating in the Court of Appeals.

(b) The notice of appeal and the filing fee required by CR 76.42(2)(a)(i) shall be filed with the Clerk of the Court of Appeals within 30 days after the date the judgment or order appealed from was entered and shall conform to the requirements of Rule 73.03. A cross-appeal may be taken in the time and manner specified by Rule 74.01 except that the notice of cross-appeal and filing fee shall be timely filed by the Clerk of the Court of Appeals.

(c) To perfect the appeal the appellant shall, within thirty (30) days after filing a notice of appeal, file with the Clerk of the Supreme Court a brief setting forth argument for reversal or modification of the judgment or order from which the appeal is taken. In workers' compensation cases, briefing shall proceed according to CR 76.12.

(d) When the appeal has been perfected and entered in the docket book the clerk of the Supreme Court shall forthwith mail notice of the date of such entry to the attorneys for the parties.

(e) To perfect a cross-appeal, within 30 days after the mailing of the clerk's notice mentioned in the preceding subparagraph (d) of this Rule 76.36(7), or within 30 days after expiration of the time allowed for the appellant to perfect the appeal, whichever is the sooner, the party taking the cross-appeal shall file with the clerk of the Supreme Court a brief setting forth the arguments for reversal or modification of the judgment or order from which the cross-appeal is taken and against the relief sought by the appellant.

(f) Briefs in response to an appeal or cross-appeal shall be required. Such briefs shall be filed in accord with the provisions of CR 76.12(2)(a) and (b). Where an appeal is taken against a judge in the Court of Justice and concerns performance of an official act, the party appealing shall serve notice on the real party in interest as defined in this Rule, section (8), who shall then be required to file a brief on behalf of the judge against whom the appeal or cross-appeal is taken; provided, however, no attorney shall be required or permitted to file such a brief where to do so would conflict with the interest of his or her client.

(g) Ten (10) copies of the briefs shall be filed. Briefs need not be printed.

(h) The clerk of the Court of Appeals shall transmit all or any portion of the original record of the proceedings to the Supreme Court when so requested by the clerk of that court.

(8) Real party in interest.

For the purpose of this rule only, the term "real party in interest" is any party in the circuit court action from which the original action arises who may be adversely affected by the relief sought pursuant to this Rule.

CR 76.37 Certification of question of law

(1) Power to answer.

If there are involved in any proceeding before the Supreme Court of the United States, any Court of Appeals of the United States, any District Court of the United States, the highest appellate court of any other state, or the District of Columbia, questions of law of this state which may be determinative of the cause then pending before the originating court and as to which it appears to the party or the originating court that there is no controlling precedent in the decisions of the Supreme Court and the Court of Appeals of this state, the

Kentucky Supreme Court may answer those questions of law when certified to it by the originating court, or after judgment in the District Court upon petition of any party to the proceeding.

(2) Method of invoking.

This Rule may be invoked by an order of any of the courts referred to in paragraph (1) of this Rule upon the court's own motion or upon the motion of any party to the cause.

(3) Contents of certification order.

A certification order shall set forth

(a) the questions of law to be answered;

(b) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose;

(c) the names of each appellant and appellee; and

(d) the names and addresses of counsel for each appellant and appellee.

(4) Preparation of certification order.

The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or such portion of the record before the certifying court as it deems necessary to a determination of the questions certified to it.

(5) Costs of certification.

Fees and costs shall be the same as in civil appeals docketed before the Supreme Court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification and each party shall pay its share of the filing fee within the 30-day period allowed by paragraph (6) of this Rule for filing of briefs.

(6) Briefs and argument.

Each of the parties desiring to be heard shall within 30 days after the date of the order of the Kentucky Supreme Court accepting certification file with the clerk of the Supreme Court 10 copies of a brief setting forth his arguments. Oral arguments will not be required or permitted unless so ordered by the Supreme Court.

(7) Opinion.

The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties.

(8) Power to certify.

The Supreme Court on its own motion or the motion of any party may order certification of questions of law to the highest court of any state or the District of Columbia when it appears to the certifying court that there are involved in any proceeding before the court questions of law of the receiving state or district which may be determinative of the cause then pending in the certifying court and it appears to the certifying court that there are no controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving state.

(9) Procedure on certifying.

The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state or district.

(10) Certification of law by the Commonwealth.

A request by the Commonwealth of Kentucky pursuant to Section 115 of the

Constitution of Kentucky for a certification of law shall be initiated in the Supreme Court. The request shall be initiated within thirty (30) days of a final order adverse to the Commonwealth. The Commonwealth shall initiate the certification procedure by motion requesting the Supreme Court to accept the question(s) for review. The motion shall contain the same elements as provided in this Rule, section (3), for a certification order. The motion shall be served and response permitted in conformity with the rules applicable to motion practice in the Supreme Court. If the motion is sustained, thereafter the case shall proceed in the same manner as any other appeal.

(11) Ten (10) copies of the certification order from another court or the request for certification by the Commonwealth, and the response, if any, shall be filed with the Clerk of the Supreme Court.

CR 76.38 Effective date and reconsideration of orders

(1) Effective date.

Unless otherwise directed, all orders of an appellate court, including those in original proceedings under Rule 76.36, are effective upon entry and filing with the clerk. A decision or ruling styled an "Opinion and Order" is an order.

(2) Reconsideration.

Unless otherwise provided by these Rules or ordered by the court, a party adversely affected by a decision rendered by order may within 10 days after the date of its entry move the court to reconsider it. On ex parte motion the court may suspend the effectiveness of such order pending disposition of the motion to reconsider. The timely filing of a motion to reconsider an order granting or denying a motion to dismiss shall suspend the running of time to the same extent as provided by Rule 76.34(6)(b) with respect to the filing of a motion to dismiss.

(3) Paragraph (2) of this Rule 76.38 shall not apply to orders granting or denying interlocutory relief under Rule 65.07 or Rule 65.08, to orders granting or denying transfer under Rule 74.02, to orders granting or denying discretionary review under Rule 76.20, or to orders granting or denying a petition for rehearing under Rule 76.32, which orders will not be reconsidered.

(4) Orders granting or denying reconsideration under this Rule will not be reconsidered.

CR 76.40 Time

(1) Computation and extension.

The computation of any period of time under these rules shall be governed by Rule 6.01. Extensions of time, unless restricted by the applicable rule, may be obtained as provided by Rule 6.02. Parties may not by agreement extend time without leave of court.

(2) Timely filing.

To be timely filed, a document must be received by the Clerk of the Supreme Court or the Clerk of the Court of Appeals within the time specified for filing, except that any document shall be deemed timely filed if it has been transmitted by United States registered (not certified) or express mail, or by other recognized mail carriers, with the date the transmitting agency received said document from the sender noted by the transmitting agency on the outside of the container used for transmitting, within the time allowed for filing.

CR 76.42 Costs

(1) Costs taxable.

Except for a filing fee, no costs shall be taxed in proceedings in the Supreme Court and Court of Appeals unless depositions are taken in an original action as authorized by Rule 76.36(5), in which event the reporter's fees for taking and transcribing the depositions shall be charged to the unsuccessful party.

(2) Filing fees.

(a) Filing fees for docketing the following in the Court of Appeals or in the Supreme Court shall be:

(i) Appeal, cross appeal or certification of law $150

(ii) Appeals or cross-appeals from Circuit Court, 75 Family division, to the Court of Appeals from orders Determining:

(a) Paternity

(b) Dependency, neglect or abuse

(c) Domestic violence

(d) Juvenile status offence

(iii) Motion for transfer 150

(iv) Motion or cross-motion for discretionary review 150

(v) Petition for rehearing, modification or extension of opinion 150

(vi) Motion for leave to file amicus curiae brief 150

(vii) Motion for extension of time for certification of record, for 150 intermediate relief, or for dismissal of an adversary party's appeal, if the filing fee has not been paid theretofore

(viii) Motion for relief under Rules 65.07 or 65.09 150

(ix) Original proceeding 150

(x) Motion for reconsideration of a final order or "Opinion and 150 Order" under Rule 76.38

(xi) Petition or cross-petition for review of a decision by the 150 Workers' Compensation Board

(b) If prior to its perfection an appeal has been docketed for purposes of a motion for extension of time for certification of the record on appeal, for intermediate relief, or for dismissal of an adversary party's appeal, no further filing fee shall be required in order to perfect or make any other motion pertaining to that appeal during its pendency. No filing fee shall be payable in a criminal proceeding in which the appellant or appellants are represented by the Public Defender. No filing fee shall be payable by the Commonwealth, but in civil actions it shall be liable for reimbursement of costs as provided by paragraph (3) of this Rule to the same extent as any other unsuccessful party. Judicial officers of the Court of Justice who are litigants in their official capacities shall not be liable for reimbursement or for the payment of filing fees except as may be required by the Supreme Court in actions arising under Rule 4 (Judicial Retirement and Removal Commission).

(3) Collection.

Forthwith upon the final disposition of any action in an appellate court, the clerk shall send the parties a statement of what portion, if any, of the filing fee or fees mentioned in paragraph (2) of this Rule 76.42 shall be reimbursed by one party to the other, to the end that the costs of each appeal or original action shall be borne by the unsuccessful party or parties. Liability for reimbursement of costs may be enforced on motion without necessity of an independent proceeding.

CR 76.43 Number of documents required for docketing

Required number of documents for docketing in the Court of Appeals and/or Supreme

Court shall be:

	Supreme Court	Court of Appeals	Rule References
(a) Motion Interlocutory Relief		5	67.07 and 65.08
(b) Motion Interlocutory Relief	10		65.09
(c) Briefs	10	5	76.12
(d) Petition for Rehearing & Responses thereto	10	5	76.32
(e) Prehearing Conference Statement	N/A	1	76.03
(f) Position Statement (Special Appeals)	N/A	5	76.05
(g) Motion to Transfer & Responses thereto	10	N/A	74.02
(h) Motion for Discretionary Review & Responses thereto (including Cross Motion)	10	5	76.20
(i) Petition for Review Workers' Compensation Proceedings	N/A	5	76.25
(j) Motions/Responses (unless the court directs otherwise), except: Motion to Transfer, Motion for Discretionary Review, Certification of Law and CR 65.09	5	5	76.34 (including 76.38 Reconsideration)
(k) Original Proceedings (Mandamus/Prohibition) and Responses thereto	10	5	76.36
(l) Certification of Law	10	N/A	76.37

CR 76.44 Stay pending review by United States Supreme Court

The taking of an appeal to the Supreme Court of the United States or the filing in that court of a petition for review on a writ of certiorari does not affect the finality of an opinion or final order. An order staying execution or enforcement of an opinion on final order may be entered upon motion under the following conditions and circumstances and for the periods designated:

(a) When an appeal is taken to the Supreme Court of the United States by the filing of a notice of appeal with the clerk of an appellate court as required by Rule 10 of the Rules of the Supreme Court of the United States and otherwise in accordance with Part IV of the Rules of that court, a stay during the pendency of the appeal may be granted on motion by any judge of the appellate court from which the appeal is taken, and shall be granted on motion by any judge of the appellate court from which the appeal is taken, and shall be granted in appeals involving a sentence of

death. The stay may be conditioned upon the giving of security to be fixed and approved by the judge that the appeal will be duly perfected and prosecuted as required by the Rules of Supreme Court of the United States, and if the stay is to act as a supersedeas, a supersedeas bond shall be required in accordance with Rule 18 of the Rules of the Supreme Court of the United States and;

(b) When a party desires to make application for a writ of certiorari, a stay may be granted by any judge of the appellate court for such specified number of days not exceeding 90, as may reasonably be required to enable the writ to be obtained, and may be conditioned upon the giving of adequate security as specified in Title 28, Section 2101 (f), U.S. Code.

CR 76.46 Preservation and disposition of records

(1) Withdrawal from custody of clerk.

Records or parts thereof shall be taken from the custody of the clerk of the appellate court only under extraordinary circumstances and upon order of the court, except that unless otherwise directed by the Supreme Court the attorney general and public defender may be permitted by the clerk of an appellate court to have temporary custody of records in criminal and quasi-criminal cases for the purpose of preparing briefs.

(2) Transmittal from Court of Appeals to Supreme Court.

Upon the granting of a motion for review by the Supreme Court the clerk of the Court of Appeals shall forward the record on appeal to the clerk of the Supreme Court, together with the briefs and all other relevant papers on file in his office.

(3) Return to trial court.

Upon final disposition of an appeal the clerk shall return the original record to the clerk of the trial court. All other records shall be retained or microfilmed. Clearly legible microfilms may be retained in lieu of hard copies. Physical exhibits may be disposed of at any time as the court directs.

17

ETHICAL CONSIDERATIONS IN FAMILY LAW

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I. [17.1] From the Beginning – Establishing the Attorney-Client Relationship

A. [17.2] When to Accept or Reject a Case

The first issue which confronts attorneys in the practice of law is the decision of whether to accept or reject a given case. In Kentucky, that decision is guided by the Kentucky Rules of Professional Conduct and the comments thereto, contained in SCR 3.130.

It is well established that lawyers have a responsibility to make their services available so that all persons can have counsel to assist them in dealing with the legal system and to protect and assert their rights. This assumes, of course, that the attorney is competent to practice the case. SCR 3.130(1.1). The required level of competence to practice in the family law area does not require any "special training or prior experience," but does require adequate preparation. SCR 3.130(1.1) (Comments 2 & 6).

Competence aside, there are many reasons not to accept a case, including occasions when the representation will result in a violation of the Rules of Professional Conduct or other law or when a physical or mental condition materially impairs the attorney's ability to represent the client. SCR 3.130(1.16)(a). Also, bear in mind that pursuant to SCR 3.130(1.2)(b), lawyers do not have to accept their client's political or social views, but shall not counsel a client to engage or assist a client to engage in conduct that the lawyer knows is criminal or fraudulent. Further, lawyers are not ethically bound to continue in a representation they find to be repugnant or imprudent. SCR 3.130(1.2)(d), (1.16)(b)(1 & 2) and (1.16)(b)(3).

Last, but most certainly not least, when determining whether to accept or reject a representation, the attorney must ascertain whether there are any conflicts of interest involving a client that would affect the representation; whether there are any personal conflicts of interest that would affect the representation; and whether there are any philosophical or policy issues that would preclude representation. SCR 3.130(1.7), (1.8), (1.9) & (1.10).

B. [17.3] The Topic of Conflict Within the Rules of Professional Conduct

While the topic of conflict occupies six distinct rules within the Rules of Professional Conduct, only two of these (Rules 1.7 and 1.8) will be addressed here.

SCR 3.130(1.7), the general conflicts of interest rule, provides that no lawyer shall represent a client if that representation will be directly adverse to another client, unless the lawyer reasonably believes that the representation will not have an adverse effect and each client consents after full consultation. Further, a lawyer shall not represent a client if the representation of that client may be materially affected by the lawyer's responsibilities to another client, third parties

or by the lawyer's own interest. Again, such a representation may be acceptable if the lawyer reasonably believes the representation will not be adversely affected *and* the client consents after consultation.

Conflicts of interest between parties are of particular concern in the practice of divorce cases. This issue was addressed in a formal ethics opinion of the KBA (KBA E-290). The question asked in that opinion was whether an attorney could ever represent both sides in a "no-fault" divorce case. While refusing to impose a *per se* rule "prohibiting joint representation of both spouses in every 'no-fault' divorce case," the opinion did state that joint representation should be "the exception rather than the rule." Joint representation, when undertaken, must only take place after full disclosure and informed consent of all parties involved. *See also, Conflicts of Interest in the Simultaneous Representation of Multiple Clients*, 61 Tex. L. Rev. 211 (1982). Shedding further light on this issue is KBA Ethics Opinion E-226 which holds that a lawyer who represents both parties in a divorce proceeding is precluded from representation at a later time for either of the parties in the event of a subsequent disagreement.

KBA E-290 also provides that an attorney may represent both parties to an antenuptial agreement, with some qualifications. Namely, such joint representation should only be undertaken upon full disclosure of all potential problems inherent in such a representation and it is suggested that such consent be reduced to writing.

Another KBA opinion concerning possible conflicts of interest in the practice of family law can be found in KBA Ethics Opinion E-414. This opinion addressed the specific question of whether an attorney who handles child support enforcement matters "pursuant to an agreement with the Cabinet for Families and Children, Child Support Division, ha[s] an attorney-client relationship with the parties who seek the enforcement services such that a conflict of interest might exist with regard to future enforcement actions against that same party[.]" The KBA held that,

> …in the context of an attorney administering child support enforcement pursuant to Title IV-D of the Social Security Act, that attorney can be found to have an attorney-client relationship with the party seeking those enforcement services if that party has a reasonable belief or expectation that an attorney-client relationship exists.
>
> …
>
> To the extent that an attorney pursuing a child support enforcement matter wishes to ensure that no attorney-client relationship exists between that attorney and a party seeking child support enforcement services, the attorney must take steps that would make any belief in the existence of an attorney-client relationship unreasonable.

All of these opinions clearly represent the fact that lawyers engaged in the practice of family law must be especially careful in ensuring that their clients are fully apprised of the existence or inexistence of a lawyer-client relationship and of any and all conflicts or potential conflicts which may exist.

SCR 3.130(1.8) delineates prohibited transactions of the client. Amendments to the rule in 2009 added SCR 3.130(1.8)(j) which provides that "[a] lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them before the client-lawyer relationshiop commenced." This brought the provisions of 1.8 into conformity the ABA model rule.

II. [17.4] Fees – SCR 3.130(1.5)

A. [17.5] Reasonableness

It is well established that a lawyer's fee must be reasonable. There are several factors which should be considered when determining the reasonableness of a fee. These factors are enumerated in SCR 3.130(1.5). Time and labor required to perform a legal service, along with the novelty of the issues involved are to be considered. SCR 3.130(1.5)(a)(1). In addition, the practitioner should consider whether undertaking a case will preclude the acceptance of other employment opportunities, the fee customarily charged in the locality for similar legal services, and the experience, reputation and ability of the lawyer performing the service. SCR 3.130(1.5)(a)(2, 3, & 7).

Of particular importance in the family law area is the prohibition barring lawyers from entering into an arrangement for "any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony, maintenance, support or property settlement…." *See* SCR 3.130(1.5)(d)(1), KBA E-168 and KBA E-364. *But cf.* KBA E-205 and *Manning v. Edwards*, 205 S.W. 492 (Ky. 1924) (establishing that it is ethically permissible for a lawyer to enter into a contingent fee arrangement for collection of back child support or alimony.)

B. [17.6] Retainer Agreement

Retainer agreements or letters should be standard practice for all cases with particular attention and detail given to the fee arrangement. Non-refundable retainers, while not against ethical rules, must be in writing and signed by the client. KBA E-380.

III. [17.7] Attorney-Client Relationship

A. [17.8] Diligence

Lawyers have an affirmative duty to their clients to represent their interests with reasonable diligence and promptness. SCR 3.130(1.3). Further, a lawyer shall not intentionally fail to seek the lawful objective of his client and shall not intentionally prejudice or damage his client during the course of their professional relationship. *See* SCR 3.130(1.3) (Comment 1).

B. [17.9] Supervision

With regard to supervision, a lawyer bears the responsibility to ensure all lawyers in his or her firm conform to the rules of professional conduct. Specifically, a lawyer having direct supervisory authority over other lawyers and non-lawyers must make reasonable efforts to ensure conduct compatible with the professional obligations of the lawyer. SCR 3.130(5.3). A lawyer will be responsible for another lawyer's violation of the rules of professional conduct when, (1) he or she she ratifies the conduct involved; or (2) he or she she knows of the conduct "at a time when its consequences can be avoided or mitigated" and yet fails to undertake sufficient remedial action. SCR 3.130(5.3)(c)(2).

C. [17.10] Communication and Advice

Lawyers have a duty to ensure that their clients are reasonably informed about the status of their case and must promptly comply with all reasonable requests by the client for information. SCR 3.130(1.4)(a). Further, lawyers must clearly explain all matters to their clients to the extent reasonably necessary to permit the client to make an informed decision regarding representation and must advise clients about any problems that have arisen which are of the lawyer's making and which may be of significance to the client. SCR 3.130(1.4) and 3.130(8.3). Lawyers must also inform clients of settlement offers and must abide by their client's decision whether to accept or reject an offer of settlement SCR 3.130(1.2)(a).

Finally, when a client decides to pursue another course of action which is against the lawyer's advice, the lawyer has two possible courses of action. First, the attorney may seek to withdraw from the representation. Second, the attorney may proceed with the representation, but have the client execute an amendment to the original retainer agreement identifying the disagreement and redefining the scope of the lawyer's obligations. SCR 3.130(1.2)(c) and (1.16). So long as the conduct does not place the lawyer in an unethical situation, the lawyer may continue representing the client. SCR 3.130(1.6)(a)(1).

D. [17.11] Confidences and Disclosures

Attorney-client privilege is clearly an important issue in the practice of family law. The privilege is an evidentiary principle which controls attorney-client communications, testimony about which cannot be compelled. However, a confidential communication, by contrast, need not necessarily be privileged. Nearly all communications between attorney and client are confidential in nature while only those which meet the definition of the testimonial privilege are indeed privileged. While there are many gray areas concerning what attorney-client communications may and may not be disclosed by an attorney, there are a few areas in which disclosure is expressly allowed. These include:

a. Confidential communications with the consent of the client, but only after full disclosure to him or her. SCR 3.130(1.6)(a);

b. The intention of the client to commit a crime that is likely to result in imminent death or substantial bodily harm and the information necessary to prevent the crime. SCR 3.130(1.6)(b)(1); and

c. Confidences necessary to establish or collect the attorney's fee or for the attorney to defend himself or his employees or associates against an accusation of wrongful conduct. SCR 3.130(1.6)(b)(2).

As noted above, there are many gray areas concerning disclosure which are not easily addressed and which remain open questions, to be determined on a case-by-case basis. Some examples are:

a. Can the lawyer disclose information about the abuse of a client or the client's abuse of another person? SCR 3.130(1.6)(c). *See also,* KBA E-360 (addressing the duty of an attorney to report dependency, neglect or abuse of a child which the attorney learns of while representing a client).

b. Can the lawyer disclose his client's intent to abduct a child when your state's law makes such abduction a crime? SCR 3.130(1.6)(b)(1); SCR 3.130(1.6)(c).

c. Can a lawyer disclose his client's location? *See* KBA E-253 (addressing whether a lawyer may reveal the names and addresses of clients; also whether a lawyer may reveal the credit listing of clients).

d. Can the lawyer use false testimony or documentation after being so advised by the client? SCR 3.130(3.3); SCR 3.130(3.4); SCR 3.130(8.3)(c).

e. Can the attorney stand idly by while the client intentionally omits assets in discovery for hearing? SCR 3.130(3.3); SCR 3.130(3.4); SCR 3.130(8.3)(c).

f. Can the attorney advise his or her client to eavesdrop or wiretap telephonic communications?

g. What does the lawyer do when his client has or is about to give perjured testimony? SCR 3.130(1.6).

E. [17.12] Termination and Withdrawal – SCR 3.130-1.16

It is well established that the client may dismiss a lawyer for any reason or for no reason at all. Further, the attorney can do nothing to inhibit or interfere with this right of the client. SCR 3.130(1.16)(a)(3). The attorney may also end the attorney-client relationship of his own volition; such an action is permissible when continued representation would impose an unreasonable financial burden on the attorney, the client uses the attorney's services to perpetrate a crime or fraud, or when other good cause exists, *inter alia*. SCR 3.130(1.16)(b).

On other occasions, the Rules of Professional Conduct make an attorney's withdrawal from representation mandatory. These instances are set forth expressly in the Rules:

a. When dismissed by the client (SCR 3.130(1.16)(a)(3));

b. When it is obvious the client is bringing a legal action or conducting a defense or asserting a position merely for the purpose of harassing and maliciously injuring another person (SCR 3.130(1.16)(b)(3); SCR 3.130(1.16)(a)(1));

c. When the attorney knows or it is obvious that continued employment will result in a violation of a disciplinary rule (SCR 3.130(1.16)(a)(1));

d. When the attorney's mental or physical condition renders it unreasonably difficult to carry out the employment effectively (SCR 3.130(1.16)(a)(2)); and

e. When the attorney becomes involved as a possible witness in the case, either for or against the client (SCR 3.130(3.7); SCR 3.130(1.16)(a)(1)).

However, the attorney, unlike his client, is under a fiduciary duty to ensure that his withdrawal from representation of the client does not result in foreseeable prejudice to the rights of the client. The Rules of Professional Conduct set forth the reasonable steps required to ensure no such prejudicial effects occur. The attorney must give due notice that he has filed a motion to withdraw from representation; allow time for employment of other counsel; deliver to the client any papers and property to which the client is entitled; and finally, the attorney must promptly re-

fund any part of a fee paid in advance that has not been earned. SCR 3.130(1.16)(d) and SCR 3.130(1.15).

IV. [17.13] Advocacy Issues

A. [17.14] Forthrightness

In a lawyer's dealings with the courts, there is some conduct which is clearly precluded by the Rules of Professional Conduct. While not an exhaustive list, some examples include: (1) making a false statement of material fact or law to the court; (2) failing to disclose a material fact to the court when disclosure is necessary to avoid assisting or fraud being perpetrated upon the court; (3) failing to disclose to the court legal authority in a controlling jurisdiction known to the lawyer to be directly adverse to his position and not disclosed by opposing counsel; and, (4) offering evidence that the lawyer knows to be false. *See* SCR 3.130(3.3)(a)(1-3).

Further issues arise in the relationship between adverse parties to a litigation and the naturally standoffish nature of that relationship. Despite the adversarial relationship between the parties, the Rules of Professional Conduct require parties to be fair with one another during the course of litigation. For instance, claims made must not be frivolous nor may they be brought for the purpose of harassment or malicious injury. SCR 3.130(3.1); SCR 3.130(4.4). Further, lawyers may not alter, destroy or conceal evidence and may not counsel their clients to undertake similar conduct. SCR 3.130(3.4). Finally, when exercising the power of subpoena, notice must be given to all affected litigants. *See* CR 45.01; 45.04; 45.05; SCR 3.130(3.4)(c).

B. [17.15] Dealing with Represented and Unrepresented Parties

Three Rules of Professional Conduct draw a clear distinction between how lawyers are to communicate and interact with represented parties and those parties who remain *pro se* or have yet to procure counsel. For instance, lawyers cannot communicate directly with opposing parties who are represented by counsel. SCR 3.130(4.2). However, lawyers may freely communicate with unrepresented parties, with the caveat that when a lawyer knows or reasonably believes that the unrepresented person misunderstands a lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding. SCR 3.130(4.3). Further, a lawyer may not use means that have no substantial purpose other than to embarrass, delay or burden an unrepresented third party, must disclaim any suggestion that the lawyer is acting in the interest of the unrepresented party and must refrain from giving any advice to the unrepresented party, other than the advice to obtain counsel. SCR 3.130(4.4).

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