

FAMILY LAW GUIDELINES

For Family Law Practice in Johnson County, Kansas

Johnson County Bar Association

Family Law Bench Bar Committee

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Johnson County Bar Association

These Guidelines are the product of the collaborative efforts of the members of the Johnson County Bar Association's Family Law Bench Bar Committee. The Committee includes judges, lawyers and others interested in the field of family law and the reduction of acrimony and dispute in the area of family law litigation. The persons listed below are members of the Committee who are either in the private practice of law or persons otherwise involved in the area of assistance to divorcing families.

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SECTION I
PARENTING ARRANGEMENTS
Introductory Comment

This first section of the *Family Law Guidelines*¹ concerns parenting plans and parenting arrangements. Parenting arrangements are always subject to change by the court in the interests of the child, even after resolution.

Parents should adopt a parenting plan that clearly and appropriately sets out their rights and responsibilities for their child, as well as the times their child is to spend with each parent. In developing any parenting plan, parents should consider the child's age, needs, and other factors peculiar to the child. Parents should be aware that children perceive time differently than do adults. Parenting Plans should provide regular and predictable parenting time for both the parents and the child. Ideally, children should not be separated from either parent for more than a few days. An Agreed Parenting Plan is deemed in the child's best interests.

1.1 Legal Custody. "Legal custody" is the right of a person acting as a parent, to make decisions about matters of health, education and welfare for a child.

1.2 Joint Legal Custody. It is presumed to be in the child's best interests that the parents jointly share in the care and custody of their child. "Joint legal custody" means that both parents have equal rights and responsibilities for the child and that neither parent's rights are superior. In accordance with their joint responsibilities, the parents consult with each other on issues affecting their child and they try to agree upon the best decision for their child on major issues. Major issues for parental decision-making include, but are not

¹ The *Family Law Guidelines* is the work of the Family Law Bench-Bar Committee of the Johnson County Bar Association. The Committee is comprised of lawyers, judges, and mental health professionals with a strong interest in family law. Although helpful in reaching resolution by settlement or decree, the *Family Law Guidelines* are not binding and have not been adopted by the Court. The *Family Law Guidelines* are designed to provide a framework for negotiation and a suggested manner of resolving the difficult issues that arise in family law cases. The *Guidelines* represent a consensus of the Committee. Individual judges and lawyers may have different opinions about *Guidelines* provisions. The *Family Law Guidelines* should not substitute for critical analysis of each individual case. Nevertheless, the *Guidelines* have proven to be a valuable resource in helping resolve divorce, child custody, paternity, and other family law cases.

limited to, issues concerning the child's education, health and medical issues (except when an emergency prevents immediate consultation, in which case the other parent is notified as soon as reasonably possible), transportation between the parent's homes, religious training and other important matters affecting the child.

1.3 Access to Health and Educational Records. As joint legal custodians, both parents have equal rights to access, inspect, and obtain their child's medical and educational records.

1.4 Problem-Solving. When disagreements occur regarding arrangements for the child, both parents shall make every effort to openly discuss options to resolve disputes and solve problems. If conflicts continue, options such as educational classes, mediation, and counseling should be considered as methods of resolving those conflicts.

1.5 Parenting Arrangements for Infants (Birth-to-12 months of age). Because infants perceive time differently than adults, parenting time with infants should be on a consistent routine, with frequent contact throughout the entire week for generally shorter periods than older children. Ideally, neither parent should be separated from their infant child for more than three days. The following guideline is the suggested minimum for one parent's parenting time with infants. Time not designated for that parent will be time spent with the other parent:

(A) Weekday Parenting Time. Two blocks of not less than three-hours every week (e.g., Tuesday and Thursday from 5:00 p.m. until 8:00 p.m.); and

(B) Weekend Parenting Time. One block of not less than eight-hours every weekend on either Saturday or Sunday; and

(C) Holiday Parenting Time. Holiday parenting times should be consistent with the regular weekly parenting time throughout the year (i.e., two blocks of three hours and to eight hours consistent through the week), unless appropriate for the particular family.

(D) Overnights. If the parents are both regularly involved in providing day-to-day care for the infant child, then they should consider extending parenting time to overnights, if appropriate.

***Committee Comment.** If the infant child has older siblings, the parents should agree to a parenting plan that provides for parenting time with each parent as a family unit. It is usually appropriate for the parenting plan to provide a single parenting time schedule for all children in the family.*

1.6 Parenting Arrangements for Toddlers (12 months to approximately 36 months of age).

Because toddlers perceive time differently than adults, parenting time with toddlers should be on a consistent routine throughout the entire week for generally shorter periods than for older children. Ideally, neither parent should be separated from their infant child for more than three days. Absent other agreement, the following guideline is the suggested minimum for one parent's parenting time with toddlers. Time not designated for that parent will be time spent with the other parent:

(A) Weekday Parenting Time. Two block of not less than three-hours every week (e.g., Tuesday and Thursday from 5:00 p.m. until 8:00 p.m.); and

(B) Weekend Parenting Time. One block of not less than eight hours every weekend on either Saturday or Sunday; and

(C) Holiday/Summer Parenting Time. Considering the child's age and maturity, alternate holiday parenting time should begin. If the toddler is spending overnights with both parents, the standard holiday schedule should normally be utilized. If appropriate for the toddler and the family, the parents should consider some extended summer parenting time.

(D) Overnight Parenting Time. If both parents have provided regular day-to-day care for their toddler child, they should implement or increase overnight parenting time, considering their toddler's needs, anxiety, the previous history of previous overnight parenting, and the need for consistent parent-child interactions.

***Committee Comment 1.** As children grow older, their needs and abilities will dictate modifications of the parenting plan. It is important to have a gradual transition from one stage to the next in keeping with the individual child's age and maturity. For younger children, separation anxiety and consistency should be the highest criteria in determining access. Younger children need frequent, short, and consistent contact. As the child grows older and becomes more mature the access can be less frequent, longer, but still must be consistent. All research indicates that particularly for young children, consistency of access is more important than frequency.*

***Committee Comment 2.** If the toddler child has other siblings, the parents should consider a plan that allows the children to have parenting time with each parent as a family unit. It will usually be appropriate for the parenting plan to provide for a single plan that is applicable to all children of the family.*

1.7 Parenting Arrangements for Children Ages 37 months and Up. Absent other agreement, the following is suggested as a minimum plan for one parent's parenting time.

Time not designated for that parent will be time spent with the other parent:

(A) Alternating Weekends. This period should begin after school, after daycare or at 5:00 p.m. Friday and continue until 8:00 p.m. on Sunday or until school, day care or 8:00 a.m. (if the child is not in school or day care) on Monday morning. If during the school year, school is not in session on the day before or the day after

a weekend, the weekend shall be extended to include the additional day. If the extra day is Friday the weekend shall begin on Thursday at 5:00 p.m. If the extra day is a Monday, the weekend shall end on Monday at 8:00 p.m. (unless the weekend normally ends on Monday morning in which case it would end on Tuesday morning).

(B) Weekday Parenting Time. At least one evening each week (on a day mutually agreed by the parents or, if no agreement, on Wednesday) beginning either after school, after daycare or at 5:00 p.m. in the evening and continuing until 8:00 p.m. that evening or until school, day care or 8:00 a.m. (if the child is not in school or day care) the next morning.

1.8 Holiday Parenting Time Schedule. Absent other agreement, holidays should be shared as follows:

(A) Spring Break. The parents should consider alternatives to share Spring Break. Spring Break shall begin when school is let out for the extended break (this may include in-service days) and shall continue until the commencement of school (after the extended break and any additional in-service days);

(1) If the parents do not typically travel for Spring Break, the child should reside with each parent during one-half of the Spring Break. The parent normally having the child during the first weekend of Spring Break shall have the child the first half of Spring Break.

(2) If the parents typically travel for Spring Break, the parents should alternate the weeks of Spring Break with Mother in even-numbered years and with Father in odd-numbered years;

(B) Mother's Day. The child shall spend Mother's Day from 9:00 a.m. until 8:00 p.m. or until school, day care or 8:00 a.m. Monday (if the child is not in school or day care) with the child's mother;

(C) Memorial Day. The child shall spend the Memorial Day weekend from Friday immediately after school, after daycare or 5:00 p.m. until Monday at 8:00 p.m. or until school, day care or 8:00 a.m. Tuesday (if the child is not in school or day care) with Mother in even-numbered years and with Father during in odd-numbered years;

(D) Father's Day. The child shall spend Father's Day from 9:00 a.m. until 8:00 p.m. or until school, day care or 8:00 a.m. Monday (if the child is not in school or day care) with the child's father;

(E) Fourth of July. The child shall spend the Fourth of July holiday from after school, after daycare or 5:00 p.m. on July 3 until 8:00 p.m. on July 5 with Mother in even-numbered years and with Father in odd-numbered years;

(F) Labor Day. The child shall spend Labor Day weekend from Friday immediately after school, after daycare or 5:00 p.m. until Monday at 8:00 p.m. or until school, day care or 8:00 a.m. Tuesday (if the child is not in school or day care) with Father in even-numbered years and with Mother in odd-numbered years;

(G) Halloween. Every effort should be made to share time between the parents every year. In the event the parents cannot agree, the child shall spend a minimum of three hours on Halloween evening with Mother during even-numbered years and with Father during odd-numbered years;

(H) Thanksgiving. The parents shall consider alternatives to share the Thanksgiving holiday:

- (1)** From after school, after daycare or 5:00 p.m. until Friday evening at 5:00 p.m. with Father during even-numbered years and with Mother during odd-numbered years; The parent that does not have the holiday shall always have the weekend following Thanksgiving Day;
or

(2) From after school, day care or 5:00 p.m. the day school is dismissed until 8:00 p.m. Sunday or until school, day care or 8:00 a.m. Monday (if the child is not in school or day care);

(I) **Winter Break.** The child shall spend from after school, after daycare or 5:00 p.m. on the day that school is dismissed for vacation until 10:00 p.m. on December 24 with Father during even-numbered years and with Mother during odd-numbered years. The child shall spend from 10:00 p.m. on December 24 until 8:00 p.m. on December 30 with Mother during even-numbered years and with Father during odd-numbered years;

(J) **New Year's Eve and New Year's Day.** The child shall spend from December 30 at 8:00 p.m. until 8:00 p.m. on the evening before school resumes or until the beginning of school, day care or 8:00 a.m. on the day school commences with Father during even-numbered years and with Mother during odd-numbered years;

(K) **Religious Holidays.** In appropriate circumstances the family may consider the following division of religious holidays:

(1) **Christian Religious Holidays.** The following holiday schedule may be followed for families of Christian faith:

(I) **Easter Sunday.** The child shall spend Easter Sunday (from Saturday night at 5:00 p.m. until Sunday at 8:00 p.m. or until school, day care or 8:00 a.m. Monday (if the child is not in school or day care)) with Father during even-numbered years and with Mother during odd-numbered years.

(ii) **Christmas.** The Christmas Eve and Christmas Day schedule is reflected in the Winter Break schedule set forth above.

(2) **Jewish Religious Holidays**. The following holiday schedule may be followed for families of Jewish faith. Unless otherwise stated the holiday should be considered to begin the evening before the holiday and end the evening of the holiday:

- (i) Purim. The child shall spend Purim with Mother during even-numbered years and with Father during odd-numbered years.
- (ii) Rosh Hashanah. The child shall spend Rosh Hashanah with Father during even-numbered years and with Mother during odd-numbered years. The parents should agree upon the definition of the holiday as it may be observed as a single day or over two days depending upon the practices of the family.
- (iii) Yom Kippur. The child shall spend Yom Kippur with Mother during even-numbered years and with Father during odd-numbered years.
- (iv) Alternate Nights of Hanukkah. The child shall spend alternate nights of Hanukkah beginning with the first night, with Father having the first night during even-numbered years and with Mother having the First Night during odd-numbered years.
- (v) The First Night of Passover. The child shall spend the first night of Passover with Father during odd-numbered years and with Mother during even-numbered years. The holiday time shall end before the beginning of the second night.
- (vi) The Second Night of Passover. The child shall spend the second night of Passover with Mother during odd-numbered years and with Father during even-numbered years. The holiday time shall end at the conclusion of the second day.
- (vii) Simhat Torah. The child shall spend the first day(s) of Simhat

Torah with Father during odd-numbered years and Mother during even-numbered years. The child shall spend the final day(s) of Simhat Torah with Mother during odd-numbered years and Father during even-numbered years. The parents should agree upon the definition of the holiday as it may be observed as a single day or over two days depending upon the practices of the family.

(viii) Sukkot. The child shall spend the first day(s) of Sukkot with Father during even-numbered years and Mother during odd-numbered years. The child shall spend the final day(s) of Sukkot with Mother during even-numbered years and Father during odd-numbered years. The parents should agree upon the definition of the holiday as it may be observed as a single day or over two days depending upon the practices of the family.

(ix) Shavuot. The child shall spend the holiday with Father during odd-numbered years and with Mother during even-numbered years. The parents should agree upon the definition of the holiday as it may be observed as a single day or over two days depending upon the practices of the family.

(3) Islamic Religious Holidays. The following holiday schedule may be followed for families of Muslim faith:

(i) Eid al-Fitr. The child shall spend this holiday celebration with Mother during even-numbered years and Father during odd-numbered years.

(ii) Eid al-Hadr. The child shall spend this holiday celebration with Mother during odd-numbered years and Father during even-numbered years.

- (4) **Other Religious Holidays**. Religious holidays or celebrations other than those referenced above should be shared or alternated similarly to that provided in the above schedule.
- (L) **Parent's Birthday**. The child should spend part of the day with the respective parent on that parent's birthday;
- (M) **Child's Birthday**. The child shall spend the child's birthday with Father during even-numbered years and with Mother during odd-numbered years. During such years, the child shall spend the day before or the day after the child's birthday with the other parent;
- (N) **Conflict Between Weekend and Holiday Parenting Time**. Whenever there is a conflict between weekend and holiday parenting time, the holiday parenting time shall apply. The parents are encouraged to compensate for missed weekends so that a parent will not go more than two weekends without having weekend parenting time;
- (O) **Conflict Between Holiday Parenting Time and Birthday Celebrations**. When there is a conflict between birthday and holiday time, the holiday schedule shall apply. However, the parents should be flexible in allowing the birthday to be celebrated either the weekend before or the weekend after the holiday period.

1.9 Summer Schedule. The parents shall consult with one another to discuss a schedule for the summer months, which shall be finalized on or before March 1st of each year.

Committee Comment: *The committee suggests that the parents select a summer plan that is appropriate for their unique family. These options are not necessarily stated in the order of preference.*

[1] *continuation of the parenting plan that is in effect during the remainder of the year;*

[2] *two or three extended periods of time with each parent in the months of June, July, and August;*

[3] *sharing the summer equally with each parent; or*

[4] *an extended period with the non-residential parent from June 10 until August 1.*

1.10 Extended Time Periods. With 30 days advance notice and consultation with the other parent, each parent may arrange to take one annual extended time period with the child not exceeding ten (10) consecutive days. Such time shall not be scheduled during the other parent's holiday time and, for school aged children, shall not be scheduled while school is in session absent agreement of the parents. Every effort should be made to not interfere with the other parent's weekend parenting time.

1.11 Special Considerations for Older Children. Both parents have the obligation to jointly adopt a parenting plan in which time with the child and responsibility for the child is determined. With older children, special consideration should be given to the child's school, social and work schedules as well as the wishes of the older child. Any parenting plan agreed to by the parents should be determined in consultation with the older child and for the older child's overall best interest. The schedule for parenting time should allow the child to have regular and consistent contact with both parents while not unduly limiting or affecting the child's work, school or reasonable social activities. Although the child's wishes and desires should enter into any schedule of parenting time, those wishes are not controlling. The schedule for parenting time should be more flexible and less structured than for children of other ages.

1.12 Special Considerations for Children with Special Needs. Special considerations should be given when adopting a parenting plan for a child with special needs, as the schedules recommended herein may conflict with the child's best interests. Any parenting

plan agreed to by the parents should be determined in consultation with the child's treating specialist or other court-appointed professionals.

1.13 Contact With Both Parents. The child shall be encouraged to have contact with both parents and shall be allowed frequent time with each parent, including physical contact, correspondence, telephone conversations, and other means of interaction. Each parent shall make every effort to follow through with the scheduled arrangement.

1.14 Right of First Refusal. If a parent has scheduled time with the child, it is that parent's responsibility to provide or locate appropriate supervision for the child if the time is to be missed or rescheduled. Whenever reasonably possible if a parent cannot be with the child during a regularly scheduled parenting time, that parent should give the other parent the opportunity to care for the child instead of hiring babysitters or finding friends or other family members to watch the children. In considering the reasonableness of the situation, the parents should consider the amount of time the parent will be away, the distance between the parents, the age of the child and other factors considered relevant by the parents.

1.15 Current Address and Telephone. Each parent shall supply the other with their current residential and employment address and telephone number and shall advise the other parent of any changes that may occur. Such notice should be made promptly, but in any event, it shall be made in writing within five days before the change or otherwise in compliance with statutory requirements (see section 1.152 below). Each parent should give the other the telephone number where that parent can be reached if an emergency situation should arise.

Committee Comment: *The Committee recommends that the agreement or order should specify advising of each parent's current work address and telephone number. If child support is paid through the District Court Trustee, that office should also be notified of any change in address or telephone number.*

1.16 Notification of Intent to Change Child's Residence. Each parent shall give the other written notice by restricted mail, return receipt requested, at his or her last known address not less than thirty (30) days prior to changing the residence of the child or removing the child from the state of Kansas for a period of time in excess of ninety (90) days, as required by K.S.A. § 60-1620 as amended.

1.17 Telephone Contact Between Parent and Child. The parent who is not exercising parenting time should have the ability to contact the child at reasonable hours of the day or evening without interference from the other parent - especially on those weekends when that parent is not with the child. The reasonableness of the time is dependent upon the age of the child but should not normally occur after 9:00 p.m. for any child. Absent extraordinary circumstances, a parent should not make repeated phone calls or texts to a child or children in a single day. Attempted phone contact with a child should not be used as an opportunity by either parent to discuss with the other parent issues unrelated to the child. When telephone contact is attempted to be made with the child, the child should have either direct access to the telephone or the telephone should be given directly to the child with a minimal amount of conversation between the parents unless necessary for discussion of matters related to that contact. The parent with whom the child is then with should not refuse to answer the phone, turn off the phone or put a call block on the line in order to deny the other parent telephone contact with the child. If the child is not home when the parent calls, the parent with whom the child is then with should encourage and facilitate a return phone call by the child as soon as is reasonably possible under the circumstances.

1.18 Mail Contact Between the Parent and Child. The parent with whom the child is not then with and the child should have unlimited ability to contact each other by use of either regular United States mail, or electronic mail, if such an account is available. The parent with whom the child is not then with should provide self-addressed stamped envelopes for the child to use.

1.19 Transportation.

(A) Responsibility for Transportation of Child. Unless otherwise stated in the order or agreed by the parents, it shall be the responsibility of the parent to pick up the child at the beginning of their parenting time. If the shortest distance between the parents' residences exceeds 25 miles one way, the parents should consider other arrangements to share the transportation responsibilities.

EXAMPLE: The children are with Mother for parenting time. Father is scheduled for parenting time with their child on the upcoming weekend. Father would pick up the child at Mother's house on Friday evening. Mother would pick up the child at Father's house on Sunday evening.

(B) Notice of Transportation Difficulties. In the event the parent either picking up or dropping off the child is unavoidably detained, for reasons not reasonably foreseeable by that parent in advance, that parent shall advise the other as soon as possible of the delay and the expected time of arrival. The parents should be flexible and cooperative in dealing with traffic delays, workplace emergencies, and the like. Each parent should be considerate of the other's plans and endeavor to avoid delays in picking up or dropping of the child whenever possible.

1.20 Notice of Change in Schedule. Every effort should be made to follow the parenting time schedule. Unless an emergency arises, each parent shall give the other parent at least three days advance notice if he or she is unable to exercise parenting time with the child. Special consideration shall be given in emergency situations to insure that the needs of the child are adequately met. In such situations, the parent unable to spend time with the child is not necessarily entitled to compensatory or "make-up" time. Any change in the schedule must be agreed upon by both parents.

1.21 Late Fees. In the event that a parent is late picking up a child from daycare or is otherwise unable to pick up a child at daycare and late pick up fees are assessed, the parent responsible for the late pick up shall also be responsible for the late fees incurred.

1.22 Long Distance Parenting. When there is a significant geographical distance separating the two parents, the agreement or order should contain the following:

(A) Regular telephone and/or web cam contact between the child and the distant parent.

(B) Longer period of contact with the distant parent during school holidays.

(C) The possibility of extended summer residency (for school age children).

(D) The parent with whom the children usually reside shall send school records, school calendars, school photographs, activity schedules, report cards, standardized test results, etc. on a frequent basis to the distant parent. Distant parents should avail themselves of opportunities to obtain information directly through school websites, email newsletters and the like.

1.23 Prescription Medication. If a child is prescribed medication by a licensed health care provider, the parent filling the prescription shall see that the child has an adequate supply of medication together with appropriate instructions prior to any transfer to the other parent's care. The other parent shall be responsible for insuring that the child is given the medication according to the prescription while in that parent's care.

1.24 Extra Curricular Activities. The parents shall consult with one another and agree in advance before enrolling the child in any extra curricular activities. The activities include, but are not limited to sports, music, and dance. It is recommended that if the child is participating in particular activities at the time the agreement or order is entered that those activities be specifically referenced as approved activities. The parents should agree to take the child to his or her activities provided that there is no reasonable schedule conflict that makes participation in the activity on a particular day impractical or impossible.

1.25 Reasons That Are Not Valid for Denying Contact. Children benefit greatly from having a good relationship with both parents. Time with each parent is the child's right. Reasons that **are not valid** excuses for denying contact include the following:

- (A) The child is sick (unless the other parent is provided with the specific nature of the illness and is given an opportunity to see the child).
- (B) The child had to go somewhere else.
- (C) The child is not home.
- (D) The other parent is behind in the child support obligation.
- (E) The child wants to stay home.
- (F) The parent does not want the child to go.
- (G) The weather is bad.
- (H) The child has no clothes to wear.

SECTION II
SERVICES FOR DIVORCING AND OTHER FAMILIES
Introductory Comment

This second section of the *Family Law Guidelines* discusses the services available in Johnson County, Kansas to help families who are in the process of divorce, paternity, or child custody matters.

The *Family Law Guidelines* is the work of the Family Law Bench-Bar Committee of the Johnson County Bar Association. The Committee is composed of lawyers, judges, and mental health professionals who share a strong interest in family law.

There is a wide range of services currently available to divorcing families in Johnson County. Included are some criteria for selecting the appropriate resource when the Court or the family feels that a referral is necessary.

In making a wide variety of services available, the District Court of Johnson County continues to be in the forefront of jurisdictions across the country in helping families. These services are of benefit to the Court and the families who are struggling to make decisions about their children. These services range from very low intrusion into the family to more intrusive methods. The least intrusive intervention should be considered first. This minimizes court involvement and allows families to build their own resources. More intrusive methods may need to be considered when warranted by the complexity of the problem in a particular case. Providing the right service, at the right time, to the right family should be the goal of all concerned. As time goes on, the Court and private sector may provide an even wider range of services which will benefit children.

2.1 Education and Support Groups. The least intrusive intervention is enrolment in an educational class to supply information to families to help them better understand divorce and its impact on children. Local Court Rule requires all divorcing families with children under the age of eighteen to attend the **GRASP** program (General Responsibilities As Separating Parents). This program is provided by the Johnson County Mental Health Center and currently meets every Monday (closed on certain holidays) at the Johnson

County Mental Offices at 6000 Lamar, Mission, Kansas. For further information, contact the Education Secretary at the Johnson County Mental Health Center (913)826-1566. There is a small fee for this program.

District Court Services also provides a less intensive educational program called **Solid Ground** which is a voluntary or court-ordered educational experience for newly separated, divorced, or never married parents who are raising children in two homes. It teaches: what further court involvement means for their families and the effect of the adversarial process on their children, about alternatives to litigation, such as mediation, family counseling and developing an effective parenting relationship, and building blocks for an effective and respectful cooperative parenting relationship. The program includes workbooks, cooperative parenting information and planning materials. The sessions are usually on the first (1st) and third (3rd) Wednesday evenings from 5:15 until 7:15pm. For more information contact Domestic Court Services at 18505 W. 119th Street, Olathe, KS, (913) 715-7400. A fee is charged for this service.

District Court Services also provides a more intensive educational program called **Higher Ground**. A fee is charged for this service. Higher Ground is a court-ordered skill-based parent education program for high conflict families which teaches how ongoing conflict between parents and repeated court involvement hurts children, how to develop a child and future focused mind set and set realistic expectations as separated parents, how to respect each other's differences and communicate effectively and methods to defuse conflict, manage emotions and make mutual decisions for the benefit of children whose parents are involved in domestic disputes. A court order is required to attend the program and the parents must provide a copy of the order to Court Services to register. The program consists, generally of one (1) orientation and five (5) sessions of 2¼ hours each usually on the first (1st), third (3rd) and fifth (5th) Tuesday evenings of each month from 5:15-7:15pm at Johnson County Court Services and includes written materials and parent workbooks, presentations with videos and expert guest speakers, small group discussion and skill practice with large group debriefing. For more information contact Domestic Court

Services at 18505 W. 119th Street, Olathe, KS, (913) 715-7400.

Other educational programs and support services are available throughout the county both in the public and private sector. The Committee urges all parents who find themselves in the domestic court system to learn about those programs and take advantage of those that are most appropriate for the individual family.

2.2 Mediation. Mediation is the use of an impartial third party to help facilitate the parents' communication and to give parents the opportunity to make their own decisions. This intervention is not very intrusive because it attempts to empower the parents to become less dependent on the Court. Johnson County Local Court Rules require that mediation be used when parents have contested issues regarding custody, access, and parenting. Much of the mediation is done by the staff at **Domestic Court Services**, 18505 W. 119th Street, Olathe, KS, (913) 715-7400. A small fee is charged for this service. Mediation is also available in the private sector from attorneys and mental health professionals who have been trained in mediation.

2.3 Counseling. At times, mediation may not be effective because of high emotion or unresolved issues between the parents. In these situations, counseling or therapy may be necessary to deal with the root causes of these problems. This intervention can involve individuals, both parents, the children, or whole families. This may be appropriate if the process involves a longer time commitment than would be practical for mediation. We are fortunate to have many excellent resources in our community that provide counseling and therapeutic services including public agencies, psychologists, and social workers in the private sector. We hope that families will return to mediation following their counseling.

2.4 Court Appointed Special Advocates (Divorce CASA). Several years ago, trained volunteers began to be assigned to children caught in difficult divorce situations. The volunteers are a voice for the child and function as a resource to gather objective information for the Court. A trained volunteer is assigned to work one-on-one with the child and to gather objective information from all parties. The CASA volunteer also helps create a support system for the family by making them aware of existing community resources.

The volunteer helps focus attention on the needs of the child, monitors court orders, and reports findings and concerns in a written report to the court. As the child's advocate, the CASA volunteer challenges all parties to focus on the child's best interest, strives to improve communication between parties, and seeks to empower families by suggesting resources and alternatives. A CASA volunteer provides ongoing data about a case as opposed to an evaluation, which tends to be a "snapshot" of the family. This is a very limited resource reserved for only a few cases at any one time. The CASA office is located at 6901 Shawnee Mission Parkway, Suite 112, Overland Park, Kansas; Telephone (913)715-4040.

2.5 Guardian Ad Litem (GAL). The Guardian Ad Litem is a Court-appointed legal representative for the child. This may be most appropriate for older children or for children whose parents are so dysfunctional that the child needs legal protection. There are cost factors to consider for the family. The Court attempts to select a GAL who has some background and experience in child development and divorce dynamics.

2.6 Evaluations. There are some families where a professional needs to make an assessment of the family dynamics to help review what is best for the children. This can be accomplished through either a child custody evaluation (home study) or psychological evaluation:

(A) Child Custody Evaluations. Child Custody Investigations (home study) are available through Domestic Court Services or by private social workers or psychologists in the community who have received training in divorce dynamics. This involves clinical interviews, home visits, and collateral contacts. There is a written assessment available to the Court and to the attorneys. The Court may select to narrow the focus of a child custody evaluation to specific issues unique to the case, such as only interviewing the children, or evaluating collateral contacts or any other specific information the judge requests. Domestic Court Services can be ordered to prepare a Family Assessment which is similar to a private Child Custody Evaluation. A fee is charged for this service.

(B) Psychological Evaluations. A psychological evaluation's focus is more concentrated on the psychological and emotional functioning of the individuals. These evaluations need to be done by trained and credentialed individuals.

In some situations it may be best to do both a child custody evaluation and a psychological evaluation of the same family. It may be best for the Court to appoint the evaluator and have one professional assess the whole family to avoid a "battle of the experts."

2.7 Supervised Parenting Time/Visitation. In special cases, the Court may feel there is a need to supervise the contact between a parent and a child. This may occur when there are issues of physical, sexual, or emotional abuse. There may also be a need for this service when the Parent and child have been separated for extended periods of time and there is a benefit to a more controlled and gradual reintegration. Supervised visitation is a court ordered program that provides the opportunity for safe, supportive and consistent contact for children and their parents. The program ensures children's safety, while also addressing the court's need for objective information offers education classes and peer relationships that provide emotional support to parents matches trained community volunteers with each child or sibling group facilitates visits that focus on the best interests of the children. Volunteer advocates observe parent-child interactions and submit written reports to the court. A court order is required for families to receive supervised visitation services. Parents must provide a copy of the order to Court Services to register for the program. A fee is charged for this service. The fees include the service and written materials and parent workbooks, small group discussion and skill practice with large group debriefing. Both parents are required to attend the educational program. Classes and visits generally take place on Tuesday evenings each month from 5:45-6:45pm and 6:45-7:45pm at Johnson County Courthouse, 100 Kansas Ave, Olathe.

As an alternative to the Supervised Visitation Program provided through Court Services, the parties can select a private service provider, a family member or an interested individual approved by the court to supervise visits.

2.8 Supervised Exchange. The Supervised Exchange Program is a court-ordered program that allows parents to make safe exchanges for their children. Program benefits include shared parenting time, reduced stress for parents and children, security, and neutral third party documentation. A court order is required to participate in this program provided by Domestic Court Services. Parents must attend separate orientation interviews with the Court Services Staff within two days of the court order. A fee is charged for this service. Supervised exchanges occur at the Court Services office at 18505 West 119th Olathe, KS 66061. The exchange center is open Wednesdays, Fridays and Sundays from 5:00 – 9:00 p.m.

As an alternative to the Supervised Exchange Program provided through Court Services, the parties can select a private service provider, a family member or an interested individual approved by the court to supervise the exchanges.

2.9 Social and Rehabilitation Services (SRS). This state agency has the responsibility to investigate child neglect and physical, sexual, or emotional abuse. If the investigation reveals serious concerns in one of these areas, the District Attorney's office may file a Child in Need of Care (CINC) petition. SRS can also recommend or require services to the family.

2.10 Case Management. The Court may order the appointment of a Case Manager in a high conflict case. A Case Manager is a neutral lawyer, mental health care worker, social worker, or other qualified person who is charged with assisting the parties by providing a procedure, other than mediation, which facilitates negotiation of a plan for parenting the child. If the parties are unable to reach agreement, the Case Manager makes recommendations to the Court for resolution of the dispute. These recommendations will become Court orders unless modified by the Court. Case managers must be qualified under state law prior to appointment. Case Management is controlled by statute. (K.S.A. 23-1001 et seq.).

2.11 Other Resources. Many other resources are available in the community for divorcing and troubled families. A few of those resources are listed below:

Johnson County Mental Health

Mental Health Centers: Mission:(913)831-2550 & Olathe: (913)715-7700

After Hours (24 hour) Line: (913)268-0156

Crisis/Abuse/Shelters

Homeless Shelter Access: (816)474-4599

SafeHome Crisis Line: (913)262-2868

MOCSA 24 Hour Crisis Line: (816)531-0233; Office : (816)931-4527

Child Abuse/Neglect: (800)922-5330

Child Abuse Hotline: (800) 922-5330

Rose Brooks Center: (816)861-6100

Johnson County D. A. Domestic Violence Advocate: (913)715-3320

Youth Crisis Hotline (24 Hours): (888)233-1639

Drug & Alcohol Resources:

24 Hour Adult Detox: (913) 897-6101

Adolescent Treatment: inpatient: (913) 782-0283; outpatient: (913) 782-2100

Regional Alcohol & Drug Assessment: (913) 789-0951

Kansas SRS Alcohol and Drug Abuse Services: (800)586-3690

Health Care

Johnson County Health Dept. (913) 826-1200 & (913) 894-2525

Health Partnership Clinic: (913) 648-2266

Mercy & Truth Medical Mission (913) 248-9965

Other Service Providers (Food, Housing, Utilities, etc.)

Catholic Charities (Johnson County Offices): Overland Park Office (913) 433-2101; Olathe Office (913) 782-4077; Mental Health Counseling (913) 433-2061; Family Support (913) 384-6608

The Family Conservancy: (913) 342-1110

Jewish Family and Children Services: (913) 327-8250

Social Security Administration: (800)722-1213

SRS/Food Stamps/Medical Card: (888) 369-4777

Wyandotte Mental Health Center, Inc.: (913) 233-3300

Johnson County Area Agency on Aging: (913) 894-8811

University of Kansas Medical Center Landon Center on Aging: (913) 588-1203

American Red Cross - Greater Kansas City Chapter: (816) 931-8400

Kansas SRS Job Center: (785) 296-3777

Mid-America Assistance Coalition: (816) 561-2727

Kansas SRS Food Stamps: (913) 826-7300

Housing Information Center (Johnson County): (913) 829-4584

SECTION III
DIVISION OF PROPERTY
Introductory Comment

This third section of the *Family Law Guidelines* relates to the division of property.² The *Family Law Guidelines* is the work of the Family Law Bench-Bar Committee of the Johnson County Bar Association. The Committee is composed of lawyers, judges, and mental health professionals who share a strong interest in family law.

The first step in making a property division is to determine all of the assets and liabilities owned by the parties. The laws of Kansas make it clear that all property belonging to either or both of the parties, irrespective of how it was acquired or how it is titled, is subject to division by the Court at the time of divorce.

These guidelines, though discretionary in nature, do make a distinction between mutual (marital) and individual (non-marital) property. The definition of mutual (marital) property is set forth at paragraph 3.2(a) and the definition of individual (non-marital) property is set forth at paragraph 3.3(a).

The tax effects related to the division of property in family law cases should be considered and the committee would recommend practitioners consult the applicable section or sections of the Internal Revenue Code, other resources on taxes, and/or experts in the area of tax calculations and effects.

3.1 Division of Net Worth vs. Maintenance. A division of property operates retrospectively to adjust the rights of the parties to property already accumulated and accrued property not yet received, while maintenance is prospective and deals with future

² Although helpful in reaching settlement, the *Family Law Guidelines* are not binding and have not been adopted by the Court. The *Family Law Guidelines* are designed to provide a structure for negotiation and a suggested manner of resolving the difficult issues that arise in family law cases. The Guidelines represent a consensus of the Committee. They should provide a framework for making an equitable division of net worth in the usual case. Individual judges and lawyers may disagree regarding various provisions of the Guidelines. The *Family Law Guidelines* should not be a substitute for critical analysis of an individual case. They have proven to be a valuable resource in helping resolve divorce, child custody, paternity, and other family law cases. They can provide both parties in a divorce case a general understanding of what he or she can reasonably expect to receive from the marital estate.

support. *Beck v. Beck*, 208 Kan. 148, 149, 490 P.2d 628 (1971). Maintenance and division of property are separate and distinct concepts, but neither can be intelligently fixed by itself without giving appropriate consideration to the other. *Almquist v. Almquist*, 214 Kan. 788, Syl. ¶ 6, 522 P.2d 383 (1974).

3.2 Mutual Property.

(A) Definition. The following property is considered mutual and is subject to division:

- (1) any and all property acquired during the marriage through the efforts of one or both of the parties, including retirement benefits accumulated during the marriage;
- (2) gifts from one spouse to the other before or after the marriage;
- (3) the appreciation, rents, profits, dividends, interest, and earnings of any individual property during the marriage; and
- (4) property rights accrued by either or both of the parties during the marriage and not yet received (unless received as a result of gift or inheritance).

(B) Division. As a general rule, the net worth in all mutual property will be divided equally between the parties. In making the division of property between divorcing spouses, the Court exercises its discretion in employing the criteria set forth by the legislature of the State of Kansas in K.S.A. 60-1610(b), as amended:

- (1) Ages of the parties;
- (2) Duration of the marriage;
- (3) Property owned by the parties;
- (4) Present and future earnings;
- (5) Time, source and manner of acquisition of property;
- (6) Family ties and obligations;
- (7) Allowance or disallowance of maintenance;

- (8) Dissipation of assets;
- (9) Tax consequences of the division; and
- (10) Any other factors the court considers relevant and/or necessary to make an equitable division.

The foregoing factors have been enumerated in a series of Supreme Court cases with the exception of “dissipation of assets” added by the Legislature in 1986 and “tax consequences” added by the Legislature in 1998. The cases of *In re Marriage of Sedbrook*, 16 Kan. App. 2d 668, 827 P.2d 1222 (1997) and *In re Marriage of Cohee*, 26 Kan. App. 2d 756, 994 P.2d 663 (1999) should be consulted with regard to the issue of fault as it relates to the division of net worth.

(C) Appreciated Value of Individual Property. The definition of individual property and theories of tracing are fully set forth below at paragraph 3.3 and will be utilized in implementing and interpreting this section.

Any appreciation in value of individual property during the marriage will be considered a mutual asset and subject to division. The amount of appreciation will be the difference in the entry value on the date the property was received and its value on the divorce valuation date. See also *In the Matter of the Marriage of Hair*, 40 Kan. App. 2d, 475, 193 P.3d (Kan App. 2008).

EXAMPLE: Husband owns real property at the time of the marriage. It will be necessary to determine its value on both the date of the marriage and the property division valuation date for the divorce. The increase in equity value during the marriage is marital equity and subject to equitable division.

(D) Effect of Record Ownership. The actual record owner of a particular asset or liability should not affect the division of the net worth of the parties.

It is the manner of the acquisition of the asset or liability, as opposed to its record ownership, which determines whether it is mutual property or individual property, and therefore should either be divided between the parties or restored to one of them.

EXAMPLE: Husband buys a new car with marital funds, registering it in his name alone. One of the parties then files for divorce. The car is mutual property even though Wife is not a registered owner of the vehicle.

(E) Effect of Greater Earnings by One Party During the Marriage.

There should be no effect upon the division of property due to the greater dollar earnings of one party during the marriage.

EXAMPLE: Husband is employed outside the home and Wife has not had monetary earnings. At the end of a five-year marriage, the parties have a net worth of \$40,000.00, all of which is directly traceable to the earnings of Husband. The net worth would nonetheless be mutual and divided \$20,000.00 to each party.

(F) Division of Net Worth in Cash in Lieu of in Kind. If it is necessary to accomplish the division of property partly or wholly in cash in order to achieve an equitable division of net worth, the cash portion should be paid forthwith. If an immediate cash payment is financially impossible and payments have to be made on an installment or other deferred basis, then:

- (1)** the payments should bear an equitable rate of interest (e.g., current statutory judgment interest rate) compounded to correspond to the payment periods as opposed to simple uncompounded interest over the entire period of the obligation (preparation of an amortization schedule is advised); and

- (2) the entire sum should be paid over as short a period of time as practicable (perhaps with a balloon payment) because of the effect of inflation on the unpaid principal balance.

Because of the possible dischargeability in bankruptcy of the unpaid portion of the debt to the spouse, the obligee should be provided a security interest in property retained by the obligor, if possible.

Maintenance payments should not be affected by the installment payments (except possibly the interest portion) because the installments represent a division of the property of the parties, not earnings or other income.

(G) Dissipation of Assets. If one party is guilty of dissipation of mutual assets, the amount of that dissipation should count toward that party's share of the parties' marital net worth. On the other hand, losses in business or investment ventures, however speculative, should not be regarded as "dissipation" and should be borne equally by both parties.

EXAMPLE: The parties would have had a mutual net worth of \$100,000.00 but have, instead, a net worth of \$80,000.00 due to Husband's gift to his girl friend of \$10,000.00, and speculative stock market losses of \$10,000.00. The stock market losses should not count against Husband, but the gift to his girl friend should, resulting in a division of the \$80,000.00 net worth of \$45,000.00 to wife and \$35,000.00 to Husband.

(H) Effect of Individual Debts Paid During the Marriage. Where mutual assets or income earned during the marriage are used to satisfy the premarital debts of a party, the amount of the debt at the time of the marriage (to the extent satisfied during the marriage) should be distributed as an asset to the debtor as a part of the debtor's ultimate share of the mutual assets division.

(l) Examples of Proper Division of Certain Assets and Liabilities.

The following examples are offered to assist in the distinction between mutual property and individual property and the proper treatment of each.

EXAMPLE 1: A married couple has a net worth of \$50,000.00, all in mutual assets and liabilities. The net worth is as follows: a) a house with an equity of \$15,000.00; b) a car used by wife having a value of \$5,000.00; c) furniture and other personal property in the residence having a value of \$5,000.00; d) a car used by husband having a value of \$5,000.00; e) a retirement benefit of husband having a present, after-tax value of \$7,000.00; and f) stocks and bonds in the amount of \$13,000.00. Each party should receive an equal division of the \$50,000.00 net worth, or \$25,000.00. In this case, the wife might receive a), b) and c), and the husband could receive d), e) and f).

EXAMPLE 2: A married couple has a net worth of \$63,000.00, made up of the assets described in the first example, plus a certificate of deposit inherited by wife from her mother during the marriage. At the time of the inheritance the certificate of deposit had a value of \$10,000.00; it has now accrued \$3,000.00 of interest and is worth \$13,000.00. The calculation is as follows: each party will get one half of the \$50,000.00, as in Example 1. Each party will also get one half of the increase in the value of the certificate (the \$3,000.00 interest earned after it was inherited is mutual property); Wife will have restored to her the \$10,000.00 entry value of the certificate, which is individual property. Wife should receive

\$36,500.00 (\$25,000 + \$10,000 + \$1,500) and Husband should receive \$26,500.00 (\$25,000 + \$1,500).

EXAMPLE 3: At the time of the parties' marriage husband had liabilities such that his net worth was a minus \$5,000.00, all of which was paid off during the marriage. Wife's net worth was \$0 (she had either no assets or her assets were equal to her liabilities). At the time of the divorce, the parties net worth is \$15,000.00. Husband should receive \$5,000.00 of this net worth and wife should receive \$10,000.00.

EXAMPLE 4: At the time of the parties' marriage wife had assets worth \$10,000.00 and husband had liabilities such that his net worth was minus \$5,000.00. At the time of the divorce, the parties' net worth is \$25,000.00. Wife should receive \$15,000.00 of the net worth and the remaining \$10,000.00 should be divided equally between the parties. The resulting division of \$20,000.00 to Wife and \$5,000.00 to Husband has the effect of taking into account the individual net worth of both parties prior to the marriage and dividing equally the increase in their net worth after the marriage.

3.3 Individual Property.

(A) Definition. Individual property is defined as follows:

- (1)** The entry value of property owned by either party prior to the marriage, and brought into the marriage; and/or
- (2)** The entry value of property received during the marriage by will or inheritance from the party's family member. It is the relationship of the donor(s) to the party in the marriage and not

the designated donee or intent at the time of the gift that will determine the non-marital/individual status of the property; and/or

- (3) The entry value of the property received during the marriage by gift from someone other than the spouse or children of the parties. It is the relationship of the donor(s) to the party in the marriage and not the designated donee or intent at the time of the gift that will determine the non-marital/individual status of the property.

(B) Restoring Individual Property. As a general rule, individual property will not be divided, but restored to the party for or by whom it was acquired before consideration of the division of mutual property. The individual property should be restored at its entry value. Entry value is the value of the particular individual asset at the time that the parties were married or the asset came into the marriage. However, the court may determine the entry value of the property at the time the parties commenced living together if the parties commingled their earnings, jointly acquired assets, and/or shared expenses prior to marriage consistent with the manner that marital expenses were shared. The length of the parties' relationship and/or marriage may determine the degree to which any individual property is restored.

(C) Effect of Sale of Individual Assets Where Proceeds Are Used for the Purchase of Other Assets. When Individual assets are sold and the proceeds are used to purchase other assets, or when individual assets are traded for other assets, the new assets should be considered individual to the extent of the value of the original individual assets.

EXAMPLE 1: Wife inherits a ranch and transfers ownership to herself and husband jointly. The ranch is

individual property as to its entry value and mutual property as to any increase in value after inheritance.

EXAMPLE 2: Individual property presently worth \$15,000.00, but having an entry value of \$12,000.00, is sold and the \$15,000.00 proceeds, along with \$5,000.00 in additional mutual assets, are used to purchase a \$20,000.00 asset. The new asset would be treated as \$12,000.00 individual and \$8,000.00 mutual property.

(D) Effect of Sale of Individual Assets Where Proceeds are Not Used for the Purchase of New Assets. When individual assets have been liquidated and the proceeds used for living expenses or for purposes other than the purchase of new assets, the resolution of the matter will in part depend on whether there are existing mutual assets that could be reasonably traced or identified as acquired from the individual assets. The overall equities should be considered in determining how much, if any, of the value of liquidated individual assets should be restored to the party originally owning them out of the existing mutual assets of the parties, or the individual assets of the other party. Some factors to be considered are:

- (1) What was done with the liquidated individual assets?
- (2) Who benefitted from the use of the liquidated assets?
- (3) The degree to which both parties agreed to the use of the liquidated assets.
- (4) The degree to which the mutual assets (or the individual assets of the other party) were preserved by the use of the liquidated assets.

3.4 Debts.

(A) Unsecured Debt. When possible, unsecured debts should be paid from the parties' assets. If there are not sufficient assets to cover the parties' unsecured debts, the debts should be divided equitably in light of the circumstances of the case.

(B) Secured Debt. Secured debts should usually be assumed and paid by the party receiving the asset that secures the debt. The party with the responsibility for paying the secured debt should hold the other party harmless from any liability thereon. Effort should be made by the responsible party to remove the other party from ongoing legal liability by requiring the responsible party to refinance, sell the secured property within a specified period, or otherwise remove such liability.

(C) Debt Incurred After Filing. It is presumed that debt incurred after filing should be paid by the party incurring the debt. If the debt is considered a necessary living expense, it may be reasonable to divide the debt between the parties equitably. One factor in this determination should be whether temporary maintenance was paid or received. The parties should generally be expected to pay normal living expenses and payments from their regular incomes and not expend marital assets for living expenses in the pre-divorce period.

3.5 Effect of Bankruptcy. The parties should keep in mind the possibility of one of the parties filing for bankruptcy. Bankruptcy can affect the division of property in three ways: the presence of the automatic stay, the discharge of debts, and the avoidance of certain liens. It is recommended to consult legal experts practicing in the area of bankruptcy law with respect to individual case analysis.

3.6 **Presentation of Suggested Division.** By statute and case law the court is required to make a determination as to whether the division of property proposed by the parties in settlement or at trial is equitable. (See *In re Marriage of Kirk*, 24 Kan. App. 2d 31 (1997)). In order to determine this fact, the court needs information about the assets and liabilities of the parties. Each party in a contested matter, or at least one party in a settled case, should prepare a balance sheet or some synopsis of the assets and liabilities of the marriage along with a proposed division. The synopsis should generally value the properties and demonstrate to the court which properties are to be retained by which party. A fully completed Domestic Relations Affidavit, including the sections on property, should be sufficient for most purposes. Social Security Numbers, financial account numbers and birth dates should only be included in the form dictated by Kansas Supreme Court Rule No. 123.

SECTION IV
VALUATION OF PROPERTY
Introductory Comment

This fourth section of the *Family Law Guidelines* relates to the different methods that may be used in the valuation of property in a divorce action. The *Family Law Guidelines* is the work of the Family Law Bench-Bar Committee of the Johnson County Bar Association. The Committee is composed of lawyers, judges, and mental health professionals, and others who share a strong interest in family law.³

4.1 Determination of the Fair Market Value of Particular Assets. While it is obviously best to have all of the assets of the parties appraised by experts, appraisals may not be cost-effective as a practical matter, especially if the parties cannot agree upon a single appraiser for each asset, and each party hires one or more appraisers.

4.2 General Principles in Determining the Fair Market Value of Assets.

(A) Capital Gain. In evaluating assets where there is unrecognized capital gain, the fair market value of such assets should be reduced by the amount of federal and state capital gain tax which would be due were the asset sold or exchanged (unless the party affected has set aside to him or her assets with essentially equal offsetting capital losses).

(B) Minority Discounts. Where the parties own a minority interest in a given asset (50% or less), the fair market value of the asset should be

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determined, the fair market value of the entire asset reduced to the percentage ownership of the parties, and that figure further reduced by a minority discount ranging from 15% to 40%. Discounts for minority interests should be eliminated if (i) the majority interest in the asset is held by member of the parties' family, or (ii) the party has a contractual relationship with entities representing more than 50% of the ownership of the asset in question which requires any of the contracting parties wishing to sell its ownership to not be able to do so unless all of the ownership interest of the contracting parties is sold at the same time for the same price.

(C) Vesting Schedule. The vesting schedule for ownership of assets (in particular, retirement benefits) should be disregarded and the entire value of the asset assumed to be vested, unless the party is able clearly to establish that he or she will not remain in service (or otherwise continue in a given position) to continue the further vesting of his or her retirement benefits. If necessary, a contingency provision in the parties' agreement could provide that in the event the further vesting of rights to a given asset is interrupted before 100% vesting occurs, adjustments would be made at the time of the termination of the vesting prior to 100% which adjusts the division of property accordingly.

EXAMPLE: Husband has retirement benefits having an after-tax present value as of the date of the parties' divorce of \$50,000. Husband has been in service with his employer for seven years and, according to the vesting schedule is 70% vested. Instead of viewing Husband's interest in the asset as \$35,000 (70% of \$50,000), Husband's interest should be considered to be the full \$50,000 unless Husband is able to establish that he intends to leave his employment prior to any

further vesting. If, after the division of property is done, taking into account the retirement benefit as having a \$50,000 interest, it develops that husband does, in fact, terminate his employment prior to further vesting, the parties' separation agreement (or court order) could provide that wife would owe to Husband the sum of \$7,500 (one-half of the \$15,000 "miscalculation" of the value of Husband's retirement benefit).

(D) Selecting the Date of Valuation. Because the court can consider fluctuations in the market value of the parties' assets during the divorce proceedings (to avoid saddling one party with a disproportionate share of the "lemons" and the other with more of the "oranges"), the "valuation" date should not be regarded as the date on which the values of the assets or debts are to be "set in stone." It is more accurate to regard the valuation date as an "inventory date" on which the parties' assets and debts are identified and enumerated, subject to subsequent valuation decisions, having regard for a whole host of factors including the source of the asset, market value fluctuations, taxes, casualty losses, appreciation, additional contributions to an asset, and the like.

The valuation date should be determined by the court at the pretrial conference if the parties cannot agree on an appropriate date. Generally, one of three dates is selected:

- (1) Date of Separation.** The date of separation – particularly appropriate if the parties have been separated more than a year before the filing of the petition, If the parties handled their financial affairs independently after they separated physically,
- (2) Date of Filing.** The date the petition was filed – particularly appropriate if orders were entered upon filing of the petition for the

support of one of the parties by the other, or where such support has been paid voluntarily, or

(3) Date of Divorce. The date of the divorce (most appropriate where there was no long-term separation before filing, no long delay in getting to trial, and no significant post-filing additions have been made to the assets by only one party. Also most appropriate where the value of assets and debts can be determined by reference to published market information and value of assets is not particularly volatile.)

For entry values (where some of the assets held on the valuation date were owned by one of the parties prior to the marriage or cohabitation of the parties) use the earlier of:

- (1)** the date of the parties' marriage, or
- (2)** the date the parties commenced living together, and sharing financial benefits, such as maintaining a joint checking account for their incomes, listing each other as life insurance beneficiaries, etc.

(E) Division of Appreciated Assets. Frequently, dividing an appreciated asset equally between the parties will avoid a dispute concerning the amount of appreciation or the current value. This technique can also be used to divide assets whose values tend to fluctuate greatly, and where the selection of the date of valuation may favor the party who gets the asset (or the one who doesn't), such as volatile stocks.

The impact of unpaid taxes on the appreciation in value should be a factor in the valuation.

(F) Ignoring as "Mutual" Additions Made During Proceedings. Where the parties have separately managed their respective finances (incomes,

investments, etc.) during the proceedings, additions made by one party to an otherwise mutual asset (e.g., a 401(k) plan) during the proceedings should be regarded as "individual" assets not subject to division. Note that "separate management" of finances may be concluded from such factors as the payment of temporary support, even though no change has occurred in the actual management of a particular asset.

(G) Alternative Methods of Division. Where assets are difficult to value, or cannot be divided by the "value and split" approach, an alternative approach may be helpful.

- (1) **Alternate Selection**. Household goods and furnishings can be divided by "alternate selection." The parties can flip a coin to see who goes first, and then each can alternately select an item. Other multiple-item groups of property, like Savings bonds, can also be divided in this fashion if they are first grouped by denomination and then selected in chronological order (oldest first) with the parties alternating in making selections.
- (2) **Private Auction**. The parties can agree (or the Court can order) a private auction of the disputed items, allowing the parties to bid on any items they particularly desire to retain, with the proceeds of the auction to be added to the other assets and divided.
- (3) **Public Auction**. The parties can agree (or the Court can order) a public auction of the disputed items, leaving the parties free to bid on any items they particularly desire to retain, with the proceeds of the auction to be added to the other assets and divided.

- (4) **“You cut the pie; I’ll pick.”** Another balancing approach is to let one party set the value on a disputed item and allow the other party elect whether to "buy or sell" the item at that price to the party who set the value.
- (5) **Two Lists.** Yet another approach is for one party to make up two lists of the personal property and the other party is then given his or her choice of one of the two lists.

4.3 Parties' Residence; Other Non-commercial Real Estate. To arrive at the equity value of real estate (other than commercial real estate, discussed later), the fair market value should be reduced by the remaining mortgage balance(s) against the property and by the costs of sale (typically the real estate commission of 5-7% plus 1% closing costs). The rationale behind the deduction of sale costs is that, because the property will be sold at some point, those costs will ultimately have to be paid and therefore reduce the value of the property to the recipient.

4.4 Thrift and Retirement Plans (Civil, Government, and Military). The simplest method of dealing with these assets is equal division through a Qualified Domestic Relations Order (QDRO). This approach avoids the necessity of valuing the particular plan in question. However, if it is necessary to value this type of asset, the following should be considered (and caution may suggest that a tax professional should be consulted regarding the specific tax implications and calculations):

(A) Defined-Benefit Retirement Plans. A "defined benefit plan" is one in which the amount of the contributions to the plan are determined ("defined") by the benefit desired upon retirement. Defined benefit retirement plans must provide a normal benefit in the form of a life annuity or, in the case of married participants, a joint survivor annuity. These plans must also provide a pre-retirement survivor annuity for a surviving spouse of a vested participant who dies before normal retirement age. Defined benefit retirement plans can be valued by the following procedure:

- (1) The presently vested monthly (or other unit of time) benefit should be reduced by the amount of the federal and state income taxes which the recipient will likely have to pay. The taxes should be estimated using the anticipated retirement income of the recipient, not the current working income of the recipient.
- (2) The "after-tax monthly benefit" from the plan should then be discounted over the life expectancy of the recipient from the date the recipient will become eligible to receive the retirement benefits through his or her actuarial life expectancy, to determine the "present" value of the stream of benefit payments on the date of retirement.
- (3) The date-of-retirement present value of the monthly benefits should then be further discounted for the period of time between the valuation date and the date on which the retiree will commence receiving the benefits, to determine the current "present value" of the stream of payments; and
- (4) The current "present value" of the benefits should be further discounted by the probability that the recipient will die before the age where his or her retirement benefits will commence.
- (5) If the retirement plan benefits have not been accumulated entirely during the marriage, a "beginning value" should be calculated using the vested monthly (or other unit of time) benefit which existed on the date of the parties' marriage (or the date they commenced living together and co-mingling their incomes). To determine the "mutual portion" of the benefits, the "current present value" should then be reduced by the "beginning value."

If the participant was not vested at the time of the marriage or cohabitation, or if other factors make it impossible to determine the

“beginning value” monthly benefit, then the “current present value” of the retirement plan should be reduced only by the actual contributions made to the plan prior to the parties’ marriage or premarital cohabitation.

Under no circumstances should the “reserve jurisdiction method” be combined with the “present cash value method” because doing so drastically understates the marital portion of the retirement plan.

The discount factor used in steps 2) and 3) should be equal to the present yield on United States Treasury notes or bonds that mature in the same number of years as the number of years involved in the individual calculations.

COMMITTEE COMMENT: *The above approach has been referred to by the Kansas Court of Appeals as the "present cash value method." The Court has also approved an alternative evaluation method ("the reserve jurisdiction method") which amounts to ordering the employee, as soon as he or she starts receiving his or her monthly retirement benefits in the future, to begin paying a certain portion of those monthly benefits to his or her former spouse (irrespective of whether the spouse has remarried or not, since the plan benefits are being divided as a part of the parties' marital net worth as opposed to maintenance), with the portion being one-half of a fraction, the numerator of which is the number of years the parties were married while the employee was employed by the employer paying the retirement benefits, and the denominator of which is the total number of years the employee was a*

participant in the retirement plan. In re Marriage of Harrison, 13 Kan. App. 2d. 313, 769 P.2d. 678 (1989).

(B) Defined-Contribution Retirement Plans. A "defined contribution plan" is one in which the amount of the benefits available from the plan are determined ("defined") by the contributions made to the plan before retirement. Such plans typically have an "account" to which contributions are deposited, and from which benefits are paid following retirement. Common varieties of the "defined contribution" plan include 401(k) plans, "Thrift" plans, and Keogh or "HR10" plans. Note that a defined contribution plan does not have to offer an annuity option upon retirement. The plan may make a lump sum distribution the only benefit form. Defined contribution retirement plans can be evaluated by the following procedure:

(1) If the plan offers only an annuity payout option. If the plan offers only an annuity option, the plan would be valued as if it were a "defined benefit" plan using the "present cash value" method.

(2) If the plan also offers a lump sum payout option. If the defined contribution retirement plan has a lump sum payout option available upon retirement, the fair market value of the plan is:

(a) the current total of the contributions (both company and employee) without any discount (unless the fund is earning a return substantially less than current market rates of return, in which case the value should be discounted accordingly),

(b) reduced by the state and federal income taxes which will be applicable to the lump sum at the time it is distributed to the employee (five-year forward averaging should be used to calculate the taxes if the plan qualifies for such tax treatment on lump sum distributions).

While ordinarily there would be a 10% penalty for distribution of the benefits prior to age 59 ½ (unless the benefits are "rolled over" over into an IRA), the penalty does

not apply where the distribution is to an alternate payee through a Qualified Domestic Relations Order. In valuing the fair market value of the benefits where no division or distribution to the nonparticipant spouse is contemplated no early withdrawal penalty should be applied because it is highly unlikely that the owner of the benefits would elect a course of action which would create the penalty.

EXAMPLE: Husband has a purchase money retirement plan having a present fair market value of \$80,000 and on which there are annual earnings of approximately 8 percent. There would be no discount because the rate of return is reasonably close to a current market rate of return, but the total benefits would be reduced by the federal and state income taxes calculated thereon based on a five-year forward averaging computation, which would be \$13,560 in tax, leaving a net of \$66,440.

(C) Thrift Plans. Thrift plans are, and should be evaluated as, "defined contribution" plans.

(D) IRA Accounts. Individual Retirement Accounts are "defined contribution plans" and should be valued subject to ordinary income tax.

(E) KPERS Accounts. Kansas Public Employee Retirement System accounts are a hybrid with aspects of both "defined benefit" and "defined contribution" plans. Only the employee's contributions are shown on the annual account reports (similar to a defined contribution plan account). The employer's contribution is unstated, although indirectly reflected in the monthly benefit projections shown on the account report which are based, in part, on the employee's contribution, and, in part, on the portion of the retirement benefits which are funded by the state. These plans (and others in which the employer's contributions to the monthly benefit are not stated) should be valued using the "present cash value" method for "defined benefit plans." Note that KPERS benefits are subject to division by QDRO (the KPERS statutory form, not the typical ERISA form of QDRO), and are not subject to Kansas income tax.

(F) Private Annuity Contracts. Annuity contracts (typically issued by insurance companies) generally do not provide a "lump sum" payout option. A portion of the employee's contributions may have already been taxed, but the earnings on the employee's contributions, and some or all of the contributions themselves may be subject to taxation as the benefits are received. For recipients born before January 2, 1936, some or all of the benefit may be subject to favorable 5-year or 10-year income tax averaging calculations.

Like other retirement benefit plans, annuities can be divided by either (1) an after-tax in-kind division as each annuity payment is received (which can be done as a division of property if after-tax values are used, or as maintenance, using a pretax value), but the benefits are then limited to the lifetime of the participant in the plan, or (2) the after-tax present value of the annuity can be determined (see "defined benefit" plan evaluation, above) and that present value added to the parties' total net worth for current (as opposed to payment-over-a-period-of-time) division.

An alternate valuation approach is to determine the cost on the valuation date of purchasing a "single premium" annuity with the same monthly benefits and plan features, and using that cost as the "present value" of the benefits.

4.5 Oil Interests. Experts should be consulted in determining the value of oil interests.

4.6 Residential Rental Property. Experts should be consulted in determining the value of residential rental property, particularly during times of volatility in the real estate market. One starting point is the fair market value determined by the Johnson County Assessors office, although splitting the cost of an appraiser mutually selected by the parties can also be used.

4.7 Commercial Properties. Experts should be consulted in determining the value of commercial properties. Appraisal reports can be obtained and will usually reflect several approaches to valuation such as the income approach, replacement cost approach, and market value (if comparable sales information is available).

4.8 Non-Professional Business Entities. In the event that a non-professional business entity, such as a closely-held corporation, small partnership interest or sole proprietorship, is saleable as a going concern, such interests should be valued using a capitalization rate of the average of the past three to five years after-tax income. In general, the capitalization rate is the percentage return that an investor would expect to receive on his investment in the business; the riskier the business, the higher the rate. The appropriate capitalization rate may also be determined by examining the capitalization rate (the inverse of the price/earnings ratio) at which publicly-traded stocks in similar entities are currently being traded. The value produced by capitalizing the after-tax income should be multiplied by the percentage of ownership interest held if less than 100%. Other factors affecting the valuation include the trend of the business income over recent accounting periods, whether the ownership interest held is a minority interest, and the general nature of the business.

COMMITTEE COMMENT *The income of a corporate business entity should be restated before capitalization to include in the after-tax income any "excess" salary taken by the owner and other personal benefits that a proposed buyer would likely not view as a proper expense of the business.*

Conversely, the income of a non-corporate business entity (a partnership or sole proprietorship) should be restated before capitalization to exclude a reasonable amount as a salary for the owner since his "salary" has not been expressed as a business expense in determining the after-tax income of the business.

Most closely-held business entities are in fact saleable as going concerns as opposed to being saleable only for their "book" or liquidated value, although small construction businesses and corporations essentially formed to hold real property or securities are examples of closely-held entities which are not saleable as going concerns.

4.9 Professional Business Entities. Professional entities, whether corporations, partnerships, or sole proprietorships, should be valued with reference to good will, but only

to the extent that the good will is marketable for that particular profession. K. S. A. 23-201(b). The valuation should also include all other assets and liabilities of the business, including accounts receivable (properly discounted for bad debts and time of collection, and income-tax reduced), equipment, supplies, and other tangible assets (properly depreciated and appreciated), and cash (income-tax reduced).

In the case of accounts receivable, there is often a confusion between future income concepts (maintenance payments) and current property concepts (division of current net worth). Since accounts receivable are already earned (no future effort is required to produce the income), accounts receivable are current assets (as opposed to future income) and should be part of a division of net worth calculation. Maintenance calculations should not be affected (reduced) by the fact that the accounts receivable have been included as part of the division of net worth.

In the event that there is a shareholder's agreement that provides a reasonable formula for a buy-out of the parties' interest in the corporation, that formula should be used. Check to see if there are any other deferred compensation rights provided by employment contracts or shareholder/partner agreements.

Since the value of a professional degree or license to practice professionally is not counted as an asset per se, the debts incurred in obtaining such degree or license should not be counted as liabilities.

4.10 Over withholding for Federal and State Income Taxes. The anticipated refunds from federal and state income tax returns should be treated as an asset by either estimating their value by calculation or dividing equally in kind.

4.11 Household Goods, Furniture, Furnishings, Appliances, Supplies, Jewelry, furs, Silver, China, Crystal, Antiques, Oriental Rugs, and Fine Art. Courts are generally disinclined to devote substantial amounts of time to the determination of the present value (or division) of "normal" household furnishings. Consequently, the valuation and division of household furnishings must often be accomplished by the parties and their counsel. Several alternative approaches may be used (see 4.2(G), above), and the following options:

(Option 1) Even Division. If an even division of the personal property in kind is desired and the parties are unable to agree upon the in-kind division, then any of the methods in Section 4.2(G) (supra) can be used, or if an even division is not practical, then

(Option 2) Value in Hands of Non-Dealer. The household goods, furniture, etc. should be evaluated at 50 percent (50%) more than the fair market value of the property in the hands of a non-dealer (unless the owner of the personal property happens, by chance, to be a dealer in such goods, in which case the valuation should be the fair market value of the property, as used property, in the hands of a dealer). The rationale behind this application is simply a compromise between the position of the party to whom the personal property will be set aside (rightly contending that the true fair market value of used personal property is a small fraction of its original retail cost) and the individual to whom the personal property will not be set aside (contending that the personal property should be given an insurance or replacement value since that individual often will have to go out and purchase similar personal property at full replacement/retail cost).

EXAMPLE: Wife receives, pursuant to a divorce, household goods, the value of which from original purchase invoices and insurance schedules is \$10,000. The actual amount of cash for which wife could sell the assets, however, is \$3,000. Therefore, the value for purposes of the divorce is \$4,500 (150% of \$3,000).

Committee Comment: *Both approaches set forth above are for purposes of settlement. If the matter is litigated, the property should be appraised so that evidence regarding actual value can be presented to the Court.*

4.12 Social Security. Social Security benefits may be considered in the division of property under certain circumstances (see *In the Matter of the Marriage of Brane*, 21 Kan. App. 2d 778, 77 P.2d 625 (1995)). In the event that the marriage has lasted ten years or

longer, an unemployed spouse will receive Social Security benefits unless the unemployed spouse remarries before age 60.

4.13 Promissory Notes and Contracts for Deed. Promissory notes and contracts for deed should be valued at their unpaid principal balance (plus accrued interest) unless:

- (A) there is considerable risk attendant to the receipt of the payments, or
- (B) the promissory note or contract for deed in question provides for a higher or lower than prevailing market rate of interest. In the case of a higher than prevailing market rate of interest, the unpaid principal balance should be valued at a premium which will have the effect of discounting the interest to the market rate. In the case of a lower than prevailing market rate of interest, the unpaid principal balance should be discounted by an amount which will have the effect of raising the interest to the market rate.

4.14 Options. The division and valuation of stock options are a particularly difficult problem. Great care should be exercised in their valuation. The parties and counsel should consider retaining the assistance of experts in the valuation of stock options and the possible tax consequences of their division. Options should be evaluated as a future concept. The only way to know with certainty if a given option has value is to wait to see what happens to the fair market value of the asset under option during the period of time that the option is effective. Accordingly, options should be dealt with separately from the division of the rest of the parties' net worth. In appropriate circumstances the parties may also choose to reserve jurisdiction to the Court to make further orders regarding the options at a more appropriate time in the future. If one party holds the undivided options after the decree while waiting for the actual exercise and division of proceeds (perhaps because the options can only be held by an employee of the issuer), that party should be designated as custodian of the option rights with a fiduciary responsibility to the other party.

4.15 Future Interests. Future interests which are irrevocably owned by a party at the time of the divorce should be evaluated by the value of the future interest discounted by

the actuarial amount of time before the party is likely to receive the asset (e.g., the life expectancy of a prior interest holder, such as a life tenant) and by the probability that the party will die before receiving the asset. In appropriate circumstances the parties may also choose to reserve jurisdiction to the Court to make further orders regarding the property at a more appropriate time in the future.

4.16 Expectancies. Expectancies, such as potential inheritances, do not have any asset value since they are nothing more than “great expectations” in which the party does not have a vested interest. Accordingly, except in extraordinary circumstances, the fact that a party has an expectancy should not be considered in establishing a division of net worth. In appropriate circumstances the parties may also choose to reserve jurisdiction to the Court to make further orders regarding the property at a more appropriate time in the future.

4.17 Assets Impossible to Yet Value. In appropriate circumstances the parties may also choose to reserve jurisdiction to the Court to make further orders regarding certain property that may, at the time of resolution, be actually or nearly impossible to value. The parties may determine that a valuation of the property may be more appropriate at a time in the future.

4.18 Insurance. If the policy is term insurance without cash value, there is no asset value. If it is a whole life policy, the value is cash value, plus other accruals and if it is universal life, the value is cash value, minus unpaid loans and accrued interest thereon. Some policies assess penalties for early surrender, and the only value available is the “surrender value.” Note that some portion of the “cash” or “surrender” value may be subject to taxation at ordinary income tax rates. The company issuing the policy should be consulted and requested to issue a “surrender value statement” for the date of valuation.

4.19 Property and Casualty Insurance Agencies. Property and casualty insurance agencies should be valued at from one to 2.5 times one year's annual gross income from commissions (as opposed to investment or other income).

4.20 Bank and Savings and Loan Stock. The value of stock ownership in banks and savings and loans has become more speculative in recent years. No “rule of thumb” can be stated and expert analysis and appraisal opinions should be sought.

4.21 Trusts. There are generally two types of trusts which will need to be addressed in connection with division of assets in divorce:

(A) Grantor-type trusts (Revocable and Amendable). The beneficiary spouse has control and basically 100 percent interest in the trust assets and income therefrom and has the right to revoke and/or amend such trust (i.e., a self-declaration trust: revocable trust wherein a spouse is the Grantor, Grantee and beneficiary of such trust). Assets in such trust should be divided between the spouses in the same manner as assets not in trust.

Example A: Husband has a self-declaration revocable trust having assets in the amount of \$200,000 at the time of the parties' marriage. Seven years later, at the time of the parties' divorce, the assets in the trust are worth \$240,000. Husband should retain trust assets of \$200,000 and \$20,000 (½ of accrued value) and Wife should receive \$20,000 (½ of accrued value).

Example B: Husband and Wife jointly create a Grantor type trust or they both create individual trusts for Federal Estate tax planning purposes subsequent to the marriage. Any individual trust asset (assets brought into the marriage by one party and placed in the trust) should be set aside to the party who brought such individual assets into the marriage or received same by way of gift or inheritance from a family member (regardless of how property is title or deeded) and any accrued value therefrom and all mutual assets should be divided equally between the parties.

(B) Non-Grantor type trust. Trusts of which spouse is beneficiary, but which

has been set up by someone other than a spouse. If the trust is revocable and the person who set up the trust is living, then no assets of such trust should be subject to division between the divorcing spouses; the interest is speculative because the grantor may amend or revoke the trust at any time.

EXAMPLE A: Husband's grandfather sets up a trust in which Husband is named as beneficiary, but the grandfather is still living and the trust is revocable. The assets of the trust should not be addressed in making a division of property between Husband and his Wife in pending divorce action.

EXAMPLE B: If the trust is irrevocable (i.e., the grantor has died and the trust is set up for benefit of the beneficiary), then the interest of the beneficiary, and the value of such interest should be evaluated on a case by case basis. The following factors should be considered: what interest the beneficiary has, the valuation of the interest, under what conditions the beneficiary gets income and/or principal, whether the distributions are mandatory or discretionary with the Trustee. By way of example, Husband's grandfather set up a trust in which Husband was named as beneficiary; Grandfather died one year before the Petition for Divorce was filed and the trust is now set up with a portion of the interest paid to Husband as income each year (should be considered additional income to Husband for child support and maintenance calculations) with the principal to be paid out in 10 years when Husband turns 50 years of age (a mandatory distribution). The current value of the trust corpus is \$350,000. All of such property shall be set aside to the Husband and Wife has no interest therein.

4.22 Personal Injury Settlement and Judgments. Personal injury settlements should be considered mutual property for purposes of division of net worth, but that does not

necessarily compel an equal division of the proceeds. *In re Marriage of Powell*, 13 Kan. App. 174, 766 P.2d 827 (1988). A logical approach would be to set aside entirely to the injured party the future (post-divorce) economic and non-economic losses, while dividing equally between the parties the balance of the settlement or judgment (such as non-economic loss to date, economic loss to date, etc.).

Committee Comment: *The earnings likely to be earned on the investment of a sum received in settlement of a personal injury case would be included in determining future income for maintenance purposes.*

4.23 Club Membership and Private Club Memberships.

(A) Transferable Memberships. The value of private memberships that are transferrable for consideration should be the amount of that consideration.

EXAMPLE: If a Country Club membership is currently transferrable at a price of \$30,000, the value of such a membership would be \$30,000.

(B) Nontransferable Memberships. In situations where the spouse who will be receiving the membership intends, and actually carries through with, reapplying and purchasing a new membership, the value should be equal to the current initiation fee. In the event neither party wants the membership, it should be regarded as having no value.

EXAMPLE: If the current initiation fee for the Country Club is \$15,000, although it is nontransferable, the spouse receiving the membership would not be able to sell the membership if he or she quit the club. Nonetheless, the other spouse will be applying and paying \$15,000 to join. Therefore, the effect of having a full \$15,000 value placed on the current membership is that after the other spouse pays the initiation fee for his or her membership, both parties will end up with memberships and both will end up with the same net worth.

In situations where the spouse who will not be receiving the new membership

does not intend to reapply and pay the initiation fee for a new membership, the nontransferable membership should be valued at one-half of the current cost to apply, simply as a compromise between the argument of the spouse who is receiving membership (that since it is nontransferable, it has no value) and the argument of the spouse not receiving the membership (that if the spouse who is retaining the membership were to apply to the club currently, the cost would be the full initiation fee).

EXAMPLE: If the current initiation fee for the Country Club - which is nontransferable - is either \$0 or \$25,000, the compromise halfway in between would be a value of \$12,500 for the membership.

SECTION V MAINTENANCE

This fifth section of the *Family Law Guidelines* relates to the issue of spousal support (maintenance).¹ The *Family Law Guidelines* is the work of the Family Law Bench-Bar Committee of the Johnson County Bar Association. The Committee comprises lawyers, judges, and mental health professionals who share a strong interest in family law.

5.1 Purpose. Maintenance is neither a right nor an entitlement in Kansas. The Court exercises broad discretion in determining both the amount and duration of spousal maintenance. Generally, the purposes of maintenance are two-fold: (1) to help mitigate an economic imbalance in future earning power in light of the particular facts of each case, and (2) to assist in rehabilitation of one spouse's ability to support himself/herself in the future. The primary factors to be considered in this analysis are the needs of one spouse and the ability of the other spouse to pay. The underlying principle of maintenance is that it is transitional in nature and is not intended to constitute a permanent lifestyle.

5.2 Factors to Consider. The Kansas Statutes [K.S.A. 60-1610(b)(2)] allow courts great latitude with respect to the award of maintenance, providing that the Court "may" award maintenance in an amount that the Court finds to be "fair, just and equitable under all of the circumstances." Kansas courts may not order more than 121 months of maintenance, regardless of the length of the marriage, although the Court may reserve jurisdiction to extend maintenance for an additional period. Such extensions are rare.

In determining whether there should be maintenance, and if so, the amount and

¹ Although helpful in reaching resolution by settlement or decree, the *Family Law Guidelines* are not binding and have not been adopted by the Court. The *Family Law Guidelines* are designed to provide a framework for negotiation and a suggested manner of resolving the difficult issues that arise in family law cases. The *Guidelines* represent a consensus of the Committee. Individual judges and lawyers may have differing opinions regarding various provisions of the *Guidelines*. The *Guidelines* should not be a substitute for critical analysis of each individual case. Nevertheless, the *Guidelines* have proven to be a valuable resource in helping resolve divorce, child custody, paternity, and other family law cases.

duration, the most important considerations should be the needs of one spouse and the ability of the other to pay. The initial inquiry is whether one spouse “needs” financial assistance from the other. There should be no presumption that spousal support should be paid or not paid, nor should there be an entitlement or expectation of a particular style or standard of living similar to what the parties experienced during the marriage. Maintenance serves the purposes of transitioning the parties into their respective futures and of cushioning the financial impact of one household becoming two.

If the asset division, the parties’ respective incomes, or other factors suggest that both parties will have the financial wherewithal to support themselves without payment of maintenance, then the Court will likely consider whether any maintenance is justified. The specific facts of each case must be carefully analyzed in making this threshold determination, and generally speaking, the longer the duration of the marriage, the greater is the justification for maintenance.

In those cases where one party does need transitional financial assistance, the inquiry shifts to whether the other is able to provide such assistance. If both parties are equally or nearly-equally needy, then it may be that no maintenance should be paid. One party may have significant need, but if the other party cannot reasonably be expected to assist, the unfortunate conclusion may be that there is no solution via maintenance.

Kansas courts have enumerated various factors and circumstances that may be taken into account in determining the need for and the amount and duration of maintenance. No attempt is made herein to list all such factors, and the Courts and attorneys should be mindful of recent changes in or additions to the relevant body of law. The following factors (among others) are relevant to the analysis:

- (1) The parties’ needs and overall financial situations;
- (2) The present and prospective earning capacities of the parties;
- (3) The length of marriage;

- (4) Property owned by the parties, regardless of source;
- (5) The ages of the parties;
- (6) The contributions or sacrifices by one party to aid the other party's education or career;
- (7) Rehabilitation issues:
 - (a) The retraining or educational needs of one or both of the parties,
 - (b) The number of years a party has been absent from the job market and the reason(s) for the absence,
 - (c) The parties' skills and ability to re-enter the job market, and
 - (d) Unusual or unique health or medical needs.

Fault of either party is not a factor for consideration in determining whether maintenance is justified or the amount or duration thereof, and maintenance should never be ordered for punitive purposes.

5.3 Determination of Earning Capacities. Usually each party's present gross income would be the same as his/her earning capacity. It may also be appropriate to consider historical information, the seasonal nature of employment, and the likelihood or not of continued income in the future. If appropriate, income may be imputed to either party. If either party is deliberately unemployed or underemployed, although capable of full-time employment, income may be imputed by considering the potential and probable earnings based on historical earnings of the parties, their educations, and unique skills or qualifications.

5.4 Amount and Duration of Maintenance. The following serves as a reasonable basis for determining the amount and duration of maintenance for either temporary (interim) or final orders:

- (1) Amount: Twenty percent (20%) of the difference between the respective gross earning capacities of the parties.
- (2) Duration: One-third of the total length of the marriage, to a maximum of one hundred twenty-one (121) months.

The parties should specify the period of time for which maintenance is to be paid, as well as events which would cause the maintenance to be terminated earlier. Maintenance should generally terminate on the first occurrence of any of the following:

- (A) the death of either party;
- (B) the remarriage of the maintenance recipient;
- (C) the cohabitation (as defined by the then-current Kansas law) of the maintenance recipient with a non-relative adult (regardless of gender) in a marriage-like relationship;
- (D) the maintenance recipient's living in a marriage-like relationship with an adult non-relative (regardless of gender) whether homosexual or heterosexual (for purposes of this provision a civil union or same-sex marriage obtained in a jurisdiction providing for such an arrangement shall be considered evidence of living together);
- (E) the expiration of the term of maintenance specified, so long as maintenance payments due therein have been paid.

In determining the length of the marriage, the period is calculated from the date of the marriage (or, if applicable, the date the parties commenced living together as a financially-unified household prior to marriage) until the date of the parties' separation. Credit should also be considered for the payor spouse for the period of time he or she pays any temporary maintenance after the separation of the parties until the time of the divorce. For example, if the calculation of time for maintenance results in a term of five years, and the parties have been separated for six months during which support has been paid by the

maintenance payor, the remaining term of maintenance would be 4.5 years.

5.5 Parties Nearing Retirement. Unique challenges are confronted in cases involving divorcing parties who are nearing retirement, especially where such cases involve long-term marriages. Special care should be given in analyzing the circumstances of such cases, and creative thinking will often be required in order to craft reasonable and realistic support plans. For example, consider the couple who have reached social security age and are ready and preparing for retirement after thirty-five years of marriage. It is generally neither reasonable nor realistic to expect one party to pay the other 120 months of support as suggested by these Guidelines. The same applies to the divorcing individual who has been a high-earning executive for many years but who is approaching retirement and whose income going forward will be a fraction of what he/she has been earning. In one sense, this analysis is merely a version of the “need and ability to pay” analysis, but such cases will inevitably result in difficult decisions and trade-offs.

In such circumstances, consideration should be given to establishing future spousal support as a percentage of future income. In this way, both the payor and payee share the upside and downside of future uncertainty of income. In such instances, income should generally not be income imputed or assumed to the payor, unless it can be shown that the payor is intentionally unemployed or underemployed for the sole purpose of depriving the payee of spousal support.

5.6 Parties with Variable Incomes. In many cases the parties’ incomes will be difficult to ascertain or will be highly variable. Those whose incomes are primarily from big-ticket commission sales or transactions (e.g., commercial real estate agents) are good examples. Careful analysis should be given to the facts in such cases, and consideration should be given to establishing maintenance payments based on reasonably-predictable income (“base income”), augmented by additional lump-sum maintenance payments if and when the payor receives income in excess of the base income via bonuses, commissions, etc.

Such potential scenarios are sufficiently variable that no single approach or rule would apply to every case, but the Committee endorses the idea of creative resolution of such cases based on a sharing of both the upside and downside risks.

5.7 Parties With Minor Children. With respect to maintenance, these Guidelines make no distinction between cases involving minor children and those that do not, and the maintenance calculation itself is the same whether or not there are minor children.

5.8 Duty to Disclose. If when the maintenance was calculated child related expenses were considered in reducing the paying parties income and/or support, the paying party should be obligated to advise the other party of any changes in the child related expenses within five days of the change so that a modification of the support may be requested, if appropriate. It may be necessary to reserve the right to increase support in the Marital Settlement Agreement or Decree of Divorce to give effect to this provision.

5.9 Method of Payment. Maintenance may be in a lump-sum, in periodic payments, or based on a percentage of future earnings. Other approaches may also be appropriate, depending on the circumstances. When considering alternative methods of payment, the tax consequences of the selected method of payment should be carefully considered.

5.10 Modification of Maintenance. If the parties agree in writing to the amount and/or duration of maintenance, such agreement cannot be modified by the Court unless jurisdiction is specifically reserved to the Court or both parties agree to such modification. If maintenance is determined by the Court upon hearing, at any time and upon reasonable notice to the party affected, the Court may modify the amounts or other conditions for the payment of maintenance originally awarded that has not already become due. The Court may not modify the original or subsequently modified award without consent of the party liable for maintenance if it has the effect of increasing or accelerating the liability for the unpaid maintenance beyond what was prescribed in the original decree. Thus, maintenance may be reduced but not increased beyond the original amount or term

ordered. Past due installments may not be modified.

Especially with maintenance of longer-term duration, maintenance generally should be made modifiable in accordance with the statute in the event of significant changes in circumstance in the future.