

SECTION III
DIVISION OF PROPERTY
Introductory Comment

This third section of the *Family Law Guidelines* relates to the division of property.¹ 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 support. *Beck v. Beck*, 208 Kan. 148, 149, 490 P.2d 628 (1971). Maintenance and

¹ 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.

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 un-compounded 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.

(I) 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.