

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.¹

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 determined, the fair market value of the entire asset reduced to the percentage ownership of the parties,

¹ The Guidelines should not be a substitute for critical analysis of an individual case. The Guidelines have proven to be a valuable resource in helping resolve divorce, child custody, paternity, and other family law cases.

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 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 disagree regarding various provisions of the Guidelines.

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.