

FAMILY LAW GUIDELINES

For Family Law Practice in Johnson County, Kansas

Johnson County Bar Association

Family Law Bench Bar Committee

Revised December 2005

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* concerns parenting plans and parenting arrangements, along with occasional comments by the Committee. 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.

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.

The *Family Law Guidelines* should not be a substitute for critical analysis of an individual case. Nevertheless, the Guidelines have proven to be a valuable resource in helping resolve divorce, child custody, paternity, and other family law cases. It should always be kept in mind that parenting arrangements are subject to the continuing jurisdiction of the District Court of Johnson County, Kansas.

The Committee suggests the following language to be included as part of a

Permanent or Temporary Parenting Plan for the minor child:

1.1 Joint Legal Custody. The parents agree that they are both fit and proper persons to have joint responsibility for the care of the minor child. It is in the best interest of the child that the parents jointly share in the care of the child. The term "joint legal custody" means that both parents have equal rights and responsibilities with their child and that neither parent's rights are superior. In accordance with their joint responsibilities, the parents shall consult with each other with respect to major decisions affecting the child and attempt to come to agreement on matters affecting the child. Such major decisions include the child's education, religious training, health, medical decisions (except when an emergency prevents immediate consultation), arrangements for transfers from one parent to another, and other important matters affecting the child. Each parent shall have the right to inspect and receive medical and educational records of the child.

1.2 Parenting Arrangements for Infants (Under 18 months of Age). The parents should adopt a parenting plan in which time with the child and responsibility for the child is determined. A plan agreed to by the parents is deemed to be in the child's best interest and should consider the particular needs of an infant. In developing a parenting plan for an infant the parents should be especially conscious of the fact that infants perceive time differently than either adults or children older than five years of age. Because of the difference in perception of time by infants consideration should be given to more frequent, but shorter contact, on a routine and consistent basis throughout the entire week with the

non-residential parent. The following is suggested as the minimum plan for sharing parenting time for infant children:

- (A) **Weekday Parenting Time.** Two contacts each week for a period of not less than three-hour blocks (e.g., Tuesday and Thursday from 5:00 p.m. until 8:00 p.m.);
- (B) **Weekend Parenting Time.** One six-hour block every weekend on either Saturday or Sunday.
- (C) **Holiday Parenting Time.** Unless appropriate for a particular family, holidays should be consistent with the regular weekday/weekend time (i.e. two to six hours as appropriate).
- (D) **Overnights.** If both parents have been regularly involved in providing day to day care for the infant child, the parents should consider extending the parenting time to overnights when appropriate.

***Committee Comment.** If the infant child has older siblings, the parties should consider a plan that allows the children to have parenting time with both parents 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.*

1.3 Parenting Arrangements for Toddlers (18 months to approximately 3½ to 4 years of age). Both parents have an obligation to jointly adopt a parenting plan in which time with the child and responsibility for the child is determined. A plan agreed to by the parents shall be considered in the child's best interest and should consider the particular

needs of a toddler. In developing a parenting plan for a toddler the parents should be aware that, although older than infants, toddlers perceive time differently than either adults or children older than five years of age. Because of the difference in perception of time by toddlers consideration should be given to more frequent, but shorter contact, on a routine and consistent basis throughout the entire week with the non-residential parent. The following is suggested as a minimum plan for parenting time sharing:

- (A) **Weekday Parenting Time.** Two contacts each week for a period of not less than three-hour blocks (e.g., Tuesday and Thursday from 5:00 p.m. until 8:00 p.m.);
- (B) **Weekend Parenting Time.** One six-hour block every weekend on either Saturday or Sunday.
- (C) **Overnight Parenting Time.** There should be increased overnight parenting time with special consideration given to the needs of the toddler and the prior history of overnight parenting time. Special consideration should be given to evidence of “separation anxiety” and consistency in determining the extended parenting time schedule. If both parents have been regularly involved in providing day to day care for the toddler child, overnights should be implemented unless circumstances and the needs of the toddler dictate otherwise.
- (D) **Holiday/Summer Parenting Time.** The parents should, considering the age and maturity of the child, begin to alternate holidays. If the toddler has overnight parenting time 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.

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 parties should consider a plan that allows the children to have parenting time with both parents 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.*

1.4 Parenting Arrangements for Children Ages Four and Up. Both parents have the obligation to jointly adopt a parenting plan where time with the child and responsibility for the child is determined. A plan agreed to by the parents shall be considered in the child's best interest. The following is suggested as a minimum plan for parenting time sharing:

(A) **Alternating Weekends.** This period shall begin either after school, after

daycare or at 6:00 p.m. Friday and continue until 7:00 p.m. on Sunday or until 8:00 a.m. 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 6:00 p.m. If the extra day is a Monday, the weekend shall end on Monday at 7:00 p.m. (unless the weekend normally ends on Monday morning in which case it would end on Tuesday morning).

(B) **Weekday Parenting Time.** The non-residential parent shall have parenting time with the child 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 6:00 p.m. in the evening and continuing until 8:00 p.m. that evening or until 8:00 a.m. the next morning

1.5 Holiday Parenting Time Schedule.

(A) **Spring Break.** If the parents do not typically travel for Spring Break, the child should reside with each parent during one-half of the Spring Break, with the transfer to occur on Wednesday evening at 7:00 p.m. The parent normally having the child during the first weekend of Spring Break shall continue to have the child until the Wednesday transfer. 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. with the child's mother;
- (C) Memorial Day.** The child shall spend the Memorial Day weekend from Friday immediately after school, after daycare or 6:00 p.m. until Monday at 7:00 p.m. 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. with the child's father;
- (E) Fourth of July.** The child shall spend the Fourth of July holiday from after school, after daycare or 6:00 p.m. on July 3 until 9:00 a.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 at 6:00 p.m. until Monday at 7:00 p.m. with Father in even-numbered years and with Mother in odd-numbered years;
- (G) Halloween.** 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 child shall spend Thanksgiving holiday from Wednesday after school, after daycare or 6:00 p.m. until Friday evening at 7:00 p.m. with Father during even-numbered years and with Mother during odd-numbered years.

(I) Winter Break. The child shall spend from after school, after daycare or 6:00 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 7:00 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 7:00 p.m. until 7:00 p.m. on the evening before school resumes 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 6:00 p.m. until Sunday at 7:00 p.m.) 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.

(3) 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. There shall be no adjustment for “missed” weekends due to interruption by holiday parenting time. The parents are, however, 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.

1.6 Summer Schedule. Before May 1 of each year, the parents shall consult with one another to discuss a schedule for the summer months.

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.

1.7 Vacation Periods. With 30 days advance notice and consultation with the other parent, each parent may arrange to take a vacation with the child for a period of time not exceeding 14 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.

1.8 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.

1.9 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. 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.

1.10 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.

1.11 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 1.12 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.*

1.12 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.

1.13 Telephone Contact Between Parent and Child. The parent with whom the child is not then living 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 9:30 p.m. for any child. Absent extraordinary circumstances, a parent should not make repeated phone calls 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.

1.14 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.

1.15 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 scheduled to have parenting time with the child to pick up the child. The other parent shall pick up the child at the end of the scheduled parenting time. It shall be the responsibility of each parent to

have the child ready at the time that the child is to be picked up. 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.

1.16 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.

1.17 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.

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

- (A) Weekly telephone 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.

1.19 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.

1.20 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 non-residential 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 non-residential 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.

1.20 Phase-In of Parent-Child Contact in Certain Cases. Contact between Parent and child shall be phased in gradually in cases (such as those under the Kansas Parentage Act) in which a parent seeking contact is not already closely acquainted with the child.

1.21 Shared Custody Direct Expense Plan. If a family has adopted a parenting plan that includes an equal or nearly equal sharing of the children's time and direct expenses, the family must adopt a formal method to share and account for the direct expenses of the children. A suggested plan is attached to these guidelines as Appendix A.

1.22 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.

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* are 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.

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.

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

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, with 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 educational classes 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 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)831-2550.

District Court Services also provides a more intensive educational program called

Higher Ground which is designed to assist parents in improving their co-parenting and communication skills. For more information contact Domestic Court Services at 1255 E. 119th Street, Olathe, Kansas 66061 [Telephone (913)324-6900]. A fee is charged for this service.

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**, 1255 E. 119th Street, Olathe, Kansas 66061 [Telephone (913)324-6900]. 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. The volunteers can also monitor orders made by the Court and summarize case progress. 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.

CASA also provides a program designed to help children and their parents through the family reorganization process that is triggered by separation and divorce. This program is known as **Kids Voice**. The program is normally held for one evening a week for six consecutive weeks. Information can be obtained through the CASA office.

The CASA office is located at 100 E. Park, Street, Suite 8, Olathe, Kansas; Telephone (913)397-0322.

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.

(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 CASA Supervised 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. **CASA** provides a structured sixteen (16) week supervised visitation program which takes place at the courthouse on Tuesday evenings. In addition to the one hour visitation, parents are required to attend an education/support class. A report is submitted to the court at the eighth and sixteenth weeks of the program. See section 2.4 for contact information.

As an alternative to the **CASA** Supervised Visitation Program, the parties can select a family member or interested individual approved by the court to supervise visits.

2.8 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.

2.9 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.).

2.10 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

Crisis Lines: (913)384-3535

Mental Health Center: Mission:(913)831-2550 & Olathe: (913)782-2100

Mental Help Line - non crisis (913)281-1234

Crisis/Abuse/Shelters

Homeless Shelter Access: (816)474-4599

SafeHome Crisis Line: (913)262-2868

MOCSA Rape Crisis :(816)531-0233

Child Abuse/Neglect: (800)922-5330

Child Abuse Hotline: (800) 592-3738

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)281-7950

Food & Utilities

Mid-America Assistance Coalition: (816)561-3339

Health Care

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

Health Partnership: (913)648-2266

Supervised/Monitored Exchanges

Kaw Valley Supervised Exchange Program: (913)621-3523

Safe Passages: 913/522-1125 or 816/803-1476

Other Service Providers

Catholic Social Services: (913)621-5058

Heart of America Family Services (Kansas City Office): (913)342-1110

Heart of America Family Services (Johnson County Office): (913)642-4300

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Jewish Family and Children Services: (913)327-8250
Social Security Administration: (800)722-1213
SRS/Food Stamps/Medical Card: (913)826-7300
Wyandot Mental Health Center, Inc.: (913)831-9500

SECTION III

DIVISION OF PROPERTY

Introductory Comment

This third section of the *Family Law Guidelines* relates to the division of property. The *Family Law Guidelines* are 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.

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 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 *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.

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 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.

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.

(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.

SECTION IV

VALUATION OF PROPERTY

Introductory Comment

This fourth section of the *Family Law Guidelines* relates to the valuation of property in a divorce action. The *Family Law Guidelines* are 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.

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.

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

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 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, 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. The date for the valuation of fair market

value of the assets for purposes of division of net worth should be determined at the pretrial conference if the parties cannot agree on a valuation 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 when the Petition is filed and the parties handled their financial affairs independently after they separated physically),
- (2) Date of Filing. The date the Petition was filed (particularly appropriate if the parties have been separated less than one year and if orders were entered upon filing for the support of one of the parties by the other or 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 *pendente lite* additions have been made to the assets by only one party. Also most appropriate if value of assets can be determined by reference to published market information and value of assets is not particularly volatile.)

For entry values (sometimes necessary for mutual/independent determinations):
the earlier of:

- (1) the date of the parties' marriage, or

(2) the date they commenced living together.

(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.

(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.

(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. For example, 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.

Another method of division is the public auction. If the parties cannot agree

on the value or the division of the personal property, for example, they 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.

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.

Yet another approach is for one party to make up two lists of the personal property and the other party 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) since it avoids the necessity of valuing the particular plan in question. However, if it is necessary to value this type of asset, the following rules should be considered:

(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.
- (2) The "after-taxes monthly benefit" amount 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 that stream of 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 recipient of the retirement 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 are not totally accumulated during the marriage, then 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 (whichever is earlier). To determine the “mutual portion,” the “current present value” should then be reduced by the “beginning value.”

If the participant was not vested (thus making a monthly benefit calculation impossible), or if other factors preclude the ability 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 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 NOTE: 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 to begin, as soon as he or she starts receiving his or her monthly retirement benefits in the future, 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' present 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 from the plan are determined ("defined") by the contributions made before 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 there would be a 10% penalty for withdrawing the benefits prior to age 59 ½ (without rolling the benefits over into an IRA), the fair market value of the benefits should not be further reduced by that 10% 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" but are not eligible for five-year forward averaging, and should therefore be valued as "defined contribution" plans subject to ordinary income tax.

(E) KPERS Accounts. Kansas Public Employee Retirement System accounts are "defined benefit" plans in which only the employee's contribution is shown on the annual account reports. 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, and are not subject to Kansas income tax.

(F) Private Annuity Contracts. Annuity contracts (typically issued by insurance companies) generally provide no "lump sum" payout option and do not qualify for five-year forward averaging. 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.

Annuities, like other retirement benefit plans, 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.

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.

4.7 Commercial Properties. Experts should be consulted in determining the value of

commercial properties.

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 NOTE: 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:

(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 either

(a) an alternate selection process could be undertaken (using a coin toss to see who gets the first selection), and thereafter each party alternating selections with, perhaps, sets and related items grouped together as one choice, or

(b) one party making up two lists of the personal property and the other party

then given his or her choice of one of the two lists.

(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 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.

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 do not have any asset value since they are nothing more than expectancies 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.

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, absent expert testimony, should range between a multiple of 1.0 and 1.75 times the book value of the financial institution (including one-half of the loan loss reserves) and between 4.0 and 14 times after-tax earnings of the financial institution.

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 ($\frac{1}{2}$ of accrued value) and Wife should receive \$20,000 ($\frac{1}{2}$ 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 as the grantor

may at any time amend or revoke the trust.

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. *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 economic losses, and future 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 on a sum received in settlement of a personal injury case would be calculated in determining maintenance.*

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.

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

Introductory Comment

This fifth section of the *Family Law Guidelines* relates to the issue of maintenance. The *Family Law Guidelines* are 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.

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.

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

5.1 Purpose. Generally, the purpose of maintenance is to rectify an economic imbalance in earning power and standard of living in light of the particular facts of each case, with the primary factors to be considered being the needs of one spouse and the other spouse's ability to pay.

5.2 Factors to Consider. The needs of one spouse and the ability to pay should be the paramount considerations. These considerations and additional factors set out in Kansas case law and K.S.A. 60-1610(b)(2) are normally considered when determining if maintenance is awarded, and if it is awarded that it be in an amount that is fair, just and equitable under all the circumstances.

The Kansas Supreme Court has enumerated a wide range of factors that may be considered in arriving at the amount of maintenance to be paid by one spouse to the other. These factors, as set forth in *Williams v. Williams*, 219 Kan. 303, 548 P.2d 794 (1976) - as to factors (A) through (I), and *Martin v. Martin*, 5 Kan. App. 2d 670, 623 P.2d 527 (1981) - adding factor (J), are:

- (A) Fault (severely restricted as a factor by *In re Marriage of Sommers*, 246 Kan. 652 [1990]; See also *In re Marriage of Cohee*, 26 Kan. App. 2d 756 [1999]);
- (B) Ages of the parties;
- (C) Present and prospective earning capacities of the parties;
- (D) Property owned by the parties;
- (E) Length of the marriage;
- (F) Parties' needs;
- (G) Time, source, and manner of acquisition of the property;
- (H) Family ties and obligations;
- (I) Parties' overall financial situation;
- (J) Contribution or sacrifice by one party to aid other party's education or

career.

Additional factors to consider in appropriate situations include the dissipation of assets, retraining or educational needs of the parties, the number of years a party has been absent from the job market, and the parties' skills and ability to re-enter the job market.

5.3 General Rules Regarding Maintenance. These guidelines will not attempt to address all of the foregoing separate considerations. They are each relevant from time to time in specific cases. However, the Committee feels that in setting maintenance (as with all other financial matters in a terminating marriage) the parties, their attorneys and the Court are better served by dealing with the objective current economic situation than by such subjective considerations as each party's perception of the other's relative fault in the marriage, each party's relative economic contribution to the marriage, and the like. With this in mind, these guidelines address only the major issue involved in setting maintenance - the relative incomes of the parties.

5.4 Determination of Parties Income. When determining the gross incomes of the parties it may be necessary for the Court to consider historical information, the seasonal nature of employment and the standard of living to which the parties have become accustomed. Income may be imputed to either party, if appropriate. If a party is deliberately unemployed or underemployed, although capable of working full time, income may be imputed by considering the potential and probable earnings based on historical earnings of the parties. If, in the division of property, the spouse paying or proposed to be

paying maintenance received as part of his or her division of property a business which had, as a portion of its value, good will (see § 4.9), the parties should consider the propriety of dividing as property the good will of the business and simultaneously setting maintenance based upon the earnings created by the good will divided.

5.5 Amount of Maintenance - No Minor Children. For parties with no minor children, maintenance should be determined by calculating 25% of the difference between the gross incomes (or earning capacities) of the parties up to a difference of \$50,000.00 per year. Any child support or maintenance actually paid in other domestic relations actions should be deducted from the paying parties income before calculating support under this section. For a difference in excess of \$50,000.00 per year, add 22% of the excess.

EXAMPLE: Husband earns \$90,000.00 per year and Wife earns \$10,000.00.

The amount of maintenance to be paid from Husband to Wife would be \$1,592.00 per month, calculated as follows:

- a) *25% of the first \$50,000.00 difference = \$12,500.00 per year
÷ 12 months = \$1,041.67 per month;*
- b) *22% of the \$30,000.00 remaining difference = \$6,600.00 per
year ÷ 12 months = \$550.00 per month;*
- c) *The total of \$1,042.00 + \$550.00 = \$1,592.00 per month.*

Committee Comment: *When calculating the amount of maintenance to be paid, the parties may also consider amounts actually paid for child related*

expenses such as post secondary education, extraordinary medical costs and other expenses related to the care and welfare of children. Care should be taken to ensure that the expenses are or will actually be paid. The parties should also consider the length of time the paying spouse is obligated to pay the child related expenses in relation to the term of maintenance to be paid. The parties should reserve jurisdiction to the Court to modify the support appropriately.

5.6 Amount of Maintenance - Parties With Minor Children. The Kansas Supreme Court, in its guidelines for child support, requires that maintenance be determined before the calculation of child support.

For parties with minor children, maintenance should be determined by calculating 20% of the difference between the gross incomes (or earning capacities) of the parties. Any child support or maintenance actually paid in another domestic relations action should be deducted from the paying party's income before calculating support under this section. See preceding subsection for an example of the calculation.

Committee Comment: *When calculating the amount of maintenance to be paid, the parties may also consider amounts actually paid for child related expenses such as post secondary education, extraordinary medical costs and other expenses related to the care and welfare of children. Care should be taken to ensure that the expenses are or will actually be paid. If the*

duration of child support is short relative to the duration of maintenance to be paid, the parties should consider making appropriate adjustments which may include, but is not limited to, using the 25% multiplier, the 22% multiplier or adjusting the support upward at such time as the child support terminates.

5.7 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.

5.8 Duration of Maintenance. The parties should specify the period of time over which maintenance is to be paid, as well as events which will cause the maintenance to be terminated earlier. Maintenance should terminate upon the first happening of the following events:

- (A) death of either party;
- (B) remarriage of the maintenance recipient;
- (C) cohabitation of the maintenance recipient (see *In re Marriage of Wessling* 12 Kan.App.2d 428, 747 P.2d 187 [1987] for definition of "cohabitation");
- (D) the maintenance recipient's residence with a non-relative adult in a marriage-like relationship for substantially consecutive periods of time in excess of thirty days (for purposes of this section, a marriage like relationship may

include homosexual relationships). For purposes of this section these individuals should be sharing financial responsibilities and functioning economically together ;

- (E) the passage of x years - where x is equal to:
- (1) for marriages of five years or less: the number of years of the marriage divided by 2.5, or
 - (2) for marriages of more than five years: two years plus one-third of the number of years of marriage in excess of five years.

EXAMPLE 1: Where the parties have been married for four years: Divide the years of the marriage by 2.5 ($4 \div 2.5 = 1.6$). The length of maintenance would be 1.6 years or 19 months.

EXAMPLE 2: Where the parties have been married for 17 years:

- (a) Subtract 5 from the years of the marriage $(17 - 5 = 12)$
- (b) Divide the result of step (a) by 3 $(12 \div 3 = 4)$
- (c) Add 2 to the result of step (b) $(4 + 2 = 6)$

The length of maintenance would be 6 years.

EXAMPLE 3: Where the parties have been married for 30 years:

- (a) *Subtract 5 from the years of the marriage* $(30 - 5 = 25)$
- (b) *Divide the result of step (a) by 3* $(25 \div 3 = 8.33)$
- (c) *Add 2 to the result of step (b)* $(8.33 + 2 = 10.33)$

The length of maintenance would be 10.33 years or 124 months.

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 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 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.

Please refer to K.S.A. 60-1610 (2) concerning limits on a trial court regarding the duration of maintenance where the obligation is imposed by the Court rather than by agreement.

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

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.

5.11 Rules that Must be Complied with when Dealing with Maintenance. Kansas Supreme Court Rule 164 must be complied with in that, “(a) In divorce, annulment, and separate maintenance cases, a Domestic Relations Affidavit as set forth in the appendix of the Kansas Child Support Guidelines shall be prepared by counsel and furnished to the court; (b) in contested cases, the affidavits shall be exchanged by counsel before trial.”

Supreme Court Rule 139 requires that “(a) Applications for *ex parte* orders which include requests for temporary support and all motions to modify existing support orders shall be accompanied by a Domestic Relations Affidavit. The form of the affidavit is set forth in the appendix of the Kansas Child Support Guidelines. (b) A copy of the *ex parte* order and Domestic Relations Affidavit shall be served promptly on the individual to whom it is addressed. (c) All support payments of child support or alimony, either temporary or

permanent, shall be made to the clerk of the district court or court trustee. (d) No *ex parte* order for support will be issued without this required affidavit. (e) Any party challenging a support order of the court or facts contained in the Domestic Relations Affidavit shall file a similar affidavit at the time of filing the party's response, answer or motion for modification. (f) A party filing a motion to modify an existing order of support shall serve a copy of the Domestic Relations Affidavit along with the motion to modify an existing support order or the facts contained in the movant's affidavit shall file and serve a similar affidavit prior to the hearing on the motion to modify."

All local rules of the Johnson County District Court should be reviewed and followed.