



JOHNSON COUNTY BAR
association

Johnson County Bar Association
Family Law Section
Financial Considerations

~Revised~

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PART I. DIVISION OF PROPERTY

Introduction

This section of the Family Law Guidelines relates to the division of property.¹ 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, no matter how the property was acquired or how the property is titled, is marital property at the time of the filing of a Petition for Divorce.

However, these guidelines, which are discretionary in nature, make a distinction between marital (marital) and individual (non-marital) property. The tax effects related to the division of property in family law cases should be considered and the Committee recommends that practitioners consult the applicable sections of the Internal Revenue Code, other tax resources, or experts in the area of tax calculations and effects.

The *Family Law Guidelines* are the work of the Family Law Bench-Bar Committee of the Johnson County Bar Association. These guidelines are not Kansas law, they are not court mandated, and they do not apply to every situation. They are suggestions created to help litigants and their attorneys to better evaluate and resolve their cases. The Committee does not intend these Guidelines to suggest how a court may rule on any given day.

These Guidelines:

- are a tool for litigants and their attorneys
- are not “the law”
- do not limit litigants, attorneys, or judges from creating a property division agreement that differs from these guidelines
- were developed based on current knowledge and practice
- are not helpful in all circumstances

¹The *Family Law Guidelines* is the work of the Family Law Section of the Johnson County (Kansas) Bar Association. The Section is made up of lawyers, judges, and mental health professionals who have a strong interest in family law. Although the *Guidelines* are helpful in reaching resolution by settlement or decree, they are not binding and they have not been adopted by the Johnson County District Court. The *Guidelines* represent Section consensus designed to provide a framework for negotiation and a suggested way to resolve difficult issues arising in family law cases. These *Family Law Guidelines* are not a substitute for critical analysis of any individual case. The *Guidelines* have proven to be a valuable resource to help resolve disputes over the past several decades,

PART I: DIVISION OF PROPERTY

SECTION A: Division of Net Worth

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). Spousal maintenance (spousal support) and division of property are separate and distinct concepts, but “neither can be fixed by itself without giving appropriate consideration to the other.” *Almquist v. Almquist*, 214 Kan. 788, 793, 522 P.2d 383 (1974).

All property owned by married persons, including the present value of any vested or unvested military retirement pay, whether acquired by either spouse before or after the marriage, and whether held individually or by the spouses in some form of co-ownership becomes marital property at the time of commencement by one spouse against the other of an action in which a final decree is entered for divorce, separate maintenance, or annulment. All property and debt possessed by either spouse is subject to equitable division by the Court as it deems appropriate under all of the circumstances.

Although Kansas courts have the power to divide any and all property owned by either or both parties, these guidelines seek to use a common sense method for dividing marital property and debt by designating it as “marital property” and “individual property” that follows a general understanding of most couples about how property should be divided when the relationship ends.

It is recommended that the parties agree soon after the Petition is filed on what form will be used for the marital balance spreadsheet so that there is one consistent format. Certain divisions have their own forms that should be used.

1.1: Marital Property.

(a) Definition.

The following property is considered marital 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 gift or inheritance).

(b) Division.

The Court exercises its discretion when dividing the net worth of the parties, and considers the following factors set forth by the legislature of the State of Kansas in K.S.A. 23-2802:

- (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.

Although Kansas courts are not required to equally divide the net marital estate, Courts frequently reach that result after considering the aforementioned factors and adjusting for any disparity between the parties. In the event a party contemplates filing a Petition for Divorce and expects to gain a financial advantage by alleging that the other party failed to perform a material marital duty or obligation (i.e. fault), the following case law should be thoroughly reviewed: *Powell v. Powell*, 231 Kan. 456, 648 P.2d 218 (1982), *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).

(c) Appreciated Value of Individual Property.

Any appreciation in value of individual property during the marriage is considered a marital asset and is subject to division. The amount of appreciation is the difference in the entry value on the date of marriage (or on the date the property was received if it acquired after marriage), and its value on the divorce valuation date. See also In *the Matter of the Marriage of Hair*, 40 Kan. App. 2d 475, 193 P.3d 504 (2008).

EXAMPLE: Husband has a retirement account at the time of the marriage. It is necessary to determine the account's value on both the date of the marriage and the property division valuation date for the divorce. An increase in equity during the marriage is marital equity and is 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 marital 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 marital property even though Wife is not a registered owner of the vehicle.

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

The fact that one spouse earned more income during the relationship is not a factor the Court should consider when dividing property.

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 generally be marital and divided, with each party receiving \$20,000.00.

(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 straightaway. If an immediate cash payment is financially impossible and payments must 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 rather than simple un compounded interest over the entire period of the obligation (preparation of an amortization schedule is advised); and
- (2) the entire sum should be paid within a period of time as brief as practicable (perhaps with a balloon payment) due to the effect of inflation on the unpaid principal balance.

To avoid the discharge of a marital obligation resulting from a divorce in a bankruptcy proceeding, every effort should be made to characterize the obligation as a domestic support obligation. In addition, endeavor to obtain a security interest in property retained by the obligor equal to the unpaid obligation to protect against possible discharge through bankruptcy proceedings.

Installment payments should have no effect on maintenance amounts due to being categorized as division of property rather than earnings or income.

(g) Dissipation of Assets.

If one party dissipates marital assets, the dissipated amount may count toward that party's share of the parties' marital net worth. In contrast, 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 marital net worth of \$100,000.00, but instead have a net worth of \$80,000.00 due to Husband's gift to his girlfriend of \$10,000.00, and speculative stock market losses of \$10,000.00. The gift to his girlfriend should count against Husband, but the stock market losses should not. This would result in a division of the \$80,000.00 net worth of \$45,000.00 to wife and \$35,000.00 to Husband.

CAUTION: There is a significant difference between proving dissipation due to a one-time gift of \$10,000.00, and questionable dinners over a period of two years. Make certain to consider the financial cost of pursuing a dissipation claim versus the value of successfully proving dissipation.

(h) Effect of Individual Debts Paid During the Marriage.

Where marital assets or income earned during the marriage are used to satisfy the premarital debts of a party, including but not limited to student loans, the amount of the debt at the time of the marriage (to the extent satisfied during the marriage) should be considered and distributed to the debtor as a part of the debtor's ultimate share of the marital assets pursuant to the factors set forth in K.S.A. 23-2802 (2012).

(i) Examples of How to Divide Marital and Non-Marital Assets and Liabilities.

The following examples are offered to assist in the distinction between marital property and individual property and the treatment of each:

EXAMPLE 1: A married couple has a net worth of \$53,000.00, all in marital assets and liabilities. The net worth is as follows: a) a house with a net 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 nominal value (as household goods and furnishings are valued at the price a party could receive, not the purchase price. Unless a household good or furnishing is a valuable collectible, most items are worth a garage sale price.); 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 \$15,000.00; and f) stocks and bonds in the amount of \$13,000.00. If the parties receive an equal division, each party should receive \$26,500.00. In this case, the wife might receive a) and b), the husband could receive d) and e), and each spouse will receive one-half of c) and f).

EXAMPLE 2: A married couple has a net worth of \$63,000.00, made up of the assets described in Example 1, 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 \$7,000.00; it has now accrued \$3,000.00 of interest and is worth \$10,000.00. The calculation is as follows: each party will get one-half of the \$53,000.00, 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 marital property); Wife will receive the \$10,000.00 entry value of the certificate as individual property. Wife should receive \$38,000.00 (\$26,500 + \$10,000 + \$1,500) and Husband should receive \$28,000.00 (\$26,500 + \$1,500).

1.2: 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; or
- (2) The entry value of property received during the marriage by will or inheritance from the party's family member. Generally, 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 individual status of the property; 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. Generally, 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 individual status of the property.

(b) Restoring Individual Property.

As a general rule, individual property will not be divided, but restored at its entry value to the party for or by whom it was acquired before consideration of the division of marital property, so long as the property still exists and can be traced. 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. 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, as well as the other factors set forth in K.S.A. 23-2802, 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 used to purchase other assets, or when individual assets are traded for other assets, the new assets may be considered individual to the extent of the value of the original individual assets, so long as the value of the individual asset can be traced.

EXAMPLE 1: The parties are married for 2 years. Individual property is presently worth \$15,000.00, but had an entry value of \$12,000.00. The individual property is sold for \$15,000.00 and the proceeds, along with \$5,000.00 in additional marital 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 marital property.

EXAMPLE 2: Wife inherits a ranch and transfers ownership to herself in joint ownership with husband. The ranch is individual property as to its entry value and marital property as to any increase in value after inheritance.

CAUTION: Every case is different. If Husband quit his job and worked on the ranch for 15 years, Wife may only be set aside a small fraction of the non-marital value of the ranch.

(d) Effect of Sale of Individual Assets Where Proceeds are not used for the Purchase of New Assets.

When proceeds from individual liquidated assets are used for purposes other than the purchase of new assets, such as living expenses, the awarded spousal share will, in part, depend on whether marital assets exist that can be reasonably traced or identified as acquired from the individual assets. The overall equities of the situation are considered in determining how much, if any, of the value of liquidated individual assets will be restored to the party originally owning these assets. Some factors to be considered are:

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

1.3: 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 that liability.

(c) Debt Incurred After Filing.

It is presumed that after the parties have filed for divorce and have separated both physically and financially, the party incurring the debt should pay any debt incurred. 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.

(d) Student Loans.

Unpaid/outstanding student loans incurred by a party prior to the marriage are considered non-marital debt that is set aside to the party who incurred the debt. Unpaid/outstanding student loans that were incurred during the marriage are marital debt to the extent the loans were used for marital or living expenses and non-marital debt to the extent the loans were used for tuition, books, or other school expenses.

1.4: 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.

1.5: Presentation of Suggested Division.

The court is required by statute 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. In addition to the Domestic Relations Affidavit required pursuant to Kansas Supreme Court Rule No. 139, each party in a contested matter, or at least one party in a settled case, should prepare a balance sheet or 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 those properties that are to be retained by each party.

PART I: DIVISION OF PROPERTY

SECTION B: Valuation of Property

1.6: Determining the Fair Market Value of Particular Assets.

While it is best for all of the parties' assets to be appraised by expert valuers, obtaining an appraisal of each property item may not be cost-effective or practical, especially if the parties cannot agree upon a single appraiser for each asset or if each party hires one or more appraisers.

1.7: General Principles in Determining the Fair Market Value of Assets.

(A) Capital Gains.

When evaluating assets with unrecognized capital gains, the fair market value of that asset should be reduced by the amount of federal and state capital gain tax that would be due if the asset was sold or exchanged (unless assets with essentially equal off-setting capital losses are set aside to both parties).

(B) Minority Discounts.

Where the parties own a minority interest in a given asset (50% or less), the fair market value of the entire asset should be determined and then 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:

1. the majority interest in the asset is held by member of the parties' family, or
2. the party has a contractual relationship with entities representing more than 50% of the ownership of the asset in question that 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 husband does terminate his employment prior to further vesting after the division of property is done taking into account the retirement benefit as having a \$50,000 interest, the parties' separation agreement (or court order) could provide that wife would owe to Husband the sum of \$7,500 (one-half of the \$15,000 "miscalculation" of the value of Husband's retirement benefit).

(D) Selecting the Date of Valuation.

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

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

- (1) **Date of Separation**. The date of separation – particularly appropriate if the parties have been separated more than a year before the filing of the petition, If the parties handled their financial affairs independently after they separated physically,
- (2) **Date of Filing**. The date the petition was filed – particularly appropriate if orders were entered upon filing of the petition for the support of one of the parties by the other, or where support was voluntarily paid, or
- (3) **Date of Divorce**. The date of the divorce (most appropriate where there was no long-term separation before filing, no long delay in getting to trial, and no significant post-filing additions have been made to the assets by only one party. Also most appropriate where the value of assets and debts can be determined by reference to published market information and value of assets is not particularly volatile.)

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

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

(E) Division of Appreciated Assets.

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

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

(F) Ignoring as "Marital" Additions Made During Proceedings.

Where the parties have separately managed their respective finances (incomes, investments, etc.) during court proceedings, additions made by one party to an otherwise marital asset (e.g., a 401(k) plan) should be regarded as an "individual" asset that is not divided. Note that "separate management" of finances can be determined as a result of factors such as the payment of temporary support even though no change has occurred in the actual management of a particular asset.

(G) Alternative Methods of Division.

Where assets are difficult to value, or cannot be divided by the "value and split" approach, an alternative approach may be helpful, such as:

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

- (3) **Public Auction.** The parties can agree (or the Court can order) a public auction of the disputed items, leaving the parties free to bid on any items they particularly desire to retain, with the proceeds of the auction to be added to the other assets and divided.
- (4) **“You cut the pie; I’ll pick.”** Another balancing approach is to let one party set the value on a disputed item and allow the other party elect whether to “buy or sell” the item at that price to the party who set the value.
- (5) **Two Lists.** Yet another approach is for one party to make up two lists of the personal property and the other party is then given his or her choice of one of the two lists.

PART I: DIVISION OF PROPERTY

SECTION C: Valuing Specific Assets

1.8 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.

1.9 Thrift and Retirement Plans (Civil, Government, and Military).

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

(A) Defined-Benefit Retirement Plans.

A "defined benefit plan" is one in which the amount of the contributions to the plan are determined ("defined") by the benefit desired upon retirement. Defined benefit retirement plans must provide a normal benefit in the form of a life annuity or, in the case of married participants, a joint survivor annuity. These plans must also provide a pre-retirement survivor annuity for a surviving spouse of a vested participant who dies before normal retirement age. Defined benefit retirement plans can be valued by one of two methods authorized by the Kansas Court of Appeals: The "Present Cash Value Method" or the "Reserve Jurisdiction Method."

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.

Present Cash Value Method:

- (1) The presently vested monthly (or other unit of time) benefit should be reduced by the amount of the federal and state income taxes that the recipient will likely have to pay. The taxes should be estimated using the anticipated retirement income of the recipient, not the current working income of the recipient.

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

If the participant was not vested at the time of the marriage or cohabitation, or if other factors make it impossible to determine the "beginning value" monthly benefit, then the "current present value" of the retirement plan should be reduced only by the actual contributions made to the plan prior to the parties' marriage or premarital cohabitation.

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.

Reserve Jurisdiction Method:

This method amounts to ordering the employee-spouse to begin paying a certain portion of monthly retirement benefits to their former spouse as soon as they begin receiving them in the future. The payments must be made irrespective of whether the spouse has remarried, since the plan benefits are being divided as a part of the parties' marital net worth as opposed to maintenance. The payments are calculated using a one-half of a fraction formula: the numerator is the number of years the parties were married while the payee spouse was employed by the employer paying the retirement benefits, and the denominator is the total number of years the employee was a participant in the retirement plan. *See In re Marriage of Harrison*, 13 Kan. App. 2d. 313, 769 P.2d. 678 (1989).

(B) Defined-Contribution Retirement Plans.

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

- (1) **If the plan offers only an annuity payout option**, 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** 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 tax treatment on lump sum distributions).

While ordinarily there would be a 10% penalty for distribution of the benefits prior to age 59 ½ (unless the benefits are "rolled over" into an IRA), the penalty does not apply where the distribution is to an alternate payee through a Qualified Domestic Relations Order. In valuing the fair market value of the benefits where no division or distribution to the nonparticipant spouse is contemplated, no early withdrawal penalty should be applied because it is highly unlikely that the owner of the benefits would elect a course of action that would create the penalty.

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

(C) Thrift Plans.

Thrift plans are, and should be evaluated as, "defined contribution" plans.

(D) IRA Accounts.

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

(E) KPERS Accounts.

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

(F) Private Annuity Contracts.

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

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

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

1.10 Oil Interests.

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

1.11 Residential Rental Property.

Experts should be consulted in determining the value of residential rental property, particularly during times of volatility in the real estate market. One starting point is the fair market value determined by the Johnson County Assessor's office, although an appraiser can also be used if mutually selected and paid for by the parties.

1.12 Commercial Properties.

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

1.13 Non-Professional Business Entities.

Non-professional business entities (such as a closely-held corporation, small partnership interest or sole proprietorship) saleable as a "going concern" should be valued using a capitalization rate of the average of the past three to five year's 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.

***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.

1.14 Professional Business Entities.

Professional entities, whether corporations, partnerships, or sole proprietorships, should be valued with reference to goodwill, but only to the extent that the goodwill is marketable for that particular professional. K.S.A. § 23-2801(a) (2012). 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 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 when obtaining the degree or license should also not be counted as liabilities.

1.15 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.

1.16 Household Goods, Furniture, Furnishings, Appliances, Supplies, Jewelry, furs, Silver, China, Crystal, Antiques, Oriental Rugs, and Fine Art.

Courts are generally disinclined to devote substantial amounts of time to the determination of the present value (or division) of "normal" household furnishings. Consequently, the valuation and division of household furnishings must often be accomplished by the parties and their counsel. Several alternative approaches may be used (see 1.7(G), above), and the following options:

Option 1: Even Division. If an even division of the personal property in-kind is desired and the parties are unable to agree upon the in-kind division, then any of the methods in Section 1.7(G) (*supra*) can be used, or if an even division is not practical, then

Option 2: Value in Hands of Non-Dealer. The household goods, furniture, etc. should be evaluated at 50 percent (50%) more than the fair market value of the property in the hands of a non-dealer (unless the owner of the personal property happens, by chance, to be a dealer in that kind of 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: Pursuant to a divorce, Former Wife receives household goods, the value of which from original purchase invoices and insurance schedules is \$10,000. The actual amount of cash that wife could sell the assets for, however, is \$3,000. Therefore, the value for purposes of the divorce is \$4,500 (150% of \$3,000).

NOTE: 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.

1.17 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 receives Social Security benefits unless the unemployed spouse remarries before age 60.

1.18 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 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.

1.19 Options.

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

Non-cash forms of compensation such as Employee Stock Purchase Plans and Restricted Stock Units should be given careful consideration when valuing. These forms of compensation have varying vesting schedules and tax rates, making it inappropriate to use a blanket tax adjustment. Consulting with an expert is advised

1.20 Cryptocurrency and Non-Fungible Tokens.

Cryptocurrency is any digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value including but not limited to virtual currency. Examples of cryptocurrency include but are not limited to those that include encryption methods to validate or maintain records such as bitcoin, bitcoin cash, bitcoin SV, Litecoin, ether, dogecoin, and over 1,000 others. Other industry terms used are digital asset, coin (such as those issued in an Initial Coin Offering (ICO)), token, and digital cash. It is recommended that if cryptocurrency or a non-fungible token is owned by either party, discovery should be tailored to appropriately identify and value the cryptocurrency or non-fungible token.

1.21 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.

1.22 Expectancies.

Expectancies, such as potential inheritances, do not have any asset value since they are nothing more than “great expectations” in which the party does not have a vested interest. Accordingly, except in extraordinary circumstances, the fact that a party has an expectancy should

not be considered in establishing a division of net worth. In appropriate circumstances, the parties may also choose to reserve jurisdiction to the Court to make further orders regarding the property at a more appropriate time in the future.

1.23 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.

1.24 **Insurance.**

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

1.25 **Property and Casualty Insurance Agencies.**

Property and casualty insurance agencies should be valued from 1 to 2.5 times one year's annual gross income from commissions (as opposed to investment or other income).

1.26 **Bank and Savings and Loan Stock.**

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

1.27 **Trusts.**

There are generally two types of trusts that 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 from it and has the right to revoke or amend the trust (i.e., a self-declaration trust: revocable trust wherein a spouse is the Grantor, Grantee and beneficiary of the trust). Assets in these types of trusts should be divided between the spouses in the same manner as assets not in trust.

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

EXAMPLE B: Husband and Wife jointly create a Grantor type trust or they both create individual trusts for Federal Estate tax planning purposes subsequent to the marriage. Any individual trust asset (assets brought into

the marriage by one party and placed in the trust) should be set aside to the party who brought those 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 marital assets should be divided equally between the parties.

(B) Non-Grantor type trust.

Non-grantor type trusts are trusts that were set up by someone other than a spouse but provide that one of the spouses is a beneficiary of the trust. If the trust is revocable and the person who set up the trust is still living, then no assets of the non-grantor trust should be subject to division between the divorcing spouses; the interest is speculative because the grantor may amend or revoke the trust at any time.

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

EXAMPLE B: If the trust is irrevocable (i.e., the grantor has died and the trust is set up for benefit of the beneficiary), then the interest of the beneficiary, and the value of that 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 or principal, and 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 that property shall be set aside to the Husband and Wife has no interest therein.

1.28 Personal Injury Settlement and Judgments.

Personal injury settlements should be considered marital property for purposes of division of net worth, but that does not necessarily compel an equal division of the proceeds. *In re Marriage of Powell*, 13 Kan. App. 174, 766 P.2d 827 (1988). A logical approach would be to set aside entirely to the injured party the future (post-divorce) economic and non-economic losses,

while dividing equally between the parties the balance of the settlement or judgment (such as non-economic loss to date, economic loss to date, etc.).

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

1.29 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 that membership would be \$30,000.

(B) Nontransferable Memberships.

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

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

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

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

PART II: **SPOUSAL MAINTENANCE (SPOUSAL SUPPORT)**

Introduction

This section of the *Family Law Guidelines* addresses spousal support maintenance.² Kansas Statutes limit the Court's ability to modify maintenance once the Court has ordered it. The Court may not increase or accelerate maintenance without the consent of the payor. Unusual financial circumstances involving one or both of the parties may justify variations from the usual analysis of need and ability to pay.

The *Family Law Guidelines* are the work of the Family Law Section of the Johnson County Bar Association. These guidelines are not Kansas law, they are not court mandated, and they do not apply to every situation. They are suggestions created to help litigants and their attorneys to better evaluate and resolve their cases. The Section does not intend for these Guidelines to suggest how a court may rule on any given day.

These Guidelines:

- are a tool for litigants and their attorneys
- are not “the law”
- do not limit litigants, attorneys, or judges from creating a maintenance agreement that differs from these guidelines
- do not mandate any minimum or maximum maintenance
- were developed based on current knowledge and practice
- are not helpful in all circumstances

²The *Family Law Guidelines* is the work of the Family Law Section of the Johnson County (Kansas) Bar Association. The Section is made up of lawyers, judges, and mental health professionals who have a strong interest in family law. Although the *Guidelines* are helpful in reaching resolution by settlement or decree, they are not binding and they have not been adopted by the Johnson County District Court. The *Guidelines* represent Section consensus designed to provide a framework for negotiation and a suggested way to resolve difficult issues arising in family law cases. These *Family Law Guidelines* are not a substitute for critical analysis of any individual case. The *Guidelines* have proven to be a valuable resource to help resolve disputes over the past several decades.

PART II:
SPOUSAL MAINTENANCE (SPOUSAL SUPPORT)

SECTION A: Overview of Spousal Maintenance (Spousal Support)

Maintenance (spousal support or “alimony”) is neither a right nor an entitlement in Kansas. Kansas courts exercise broad discretion in determining both the amount and duration of any spousal support award. Generally, the purposes of maintenance are: (1) to help mitigate an economic imbalance in present or future earning capacity and financial well-being in light of the particular facts of each case, and (2) to assist in rehabilitation of a divorcing spouse’s ability to appropriately support themselves in the future. The initial factors to consider when determining whether spousal support is appropriate are: (1) the economic needs of one spouse, and (2) the ability of the other spouse to pay support. Although maintenance is inherently transitional and not intended to create a long-term lifestyle, the facts of any given case may suggest deviation from this basic principle. For example, although it may be appropriate to allow no spousal support or nominal spousal support in a short-duration marriage (generally less than 3 years in length), a long-duration marriage may justify substantial maintenance for an extended time. Unusual circumstances, such as the mental or physical health issues of a party, might mitigate in favor of more or less maintenance for longer or shorter periods.

PART II: **SPOUSAL MAINTENANCE (SPOUSAL SUPPORT)**

SECTION B: Factors to Consider

While divorcing parties are free to negotiate and contractually establish or address maintenance under different terms, Kansas courts must follow Kansas statutes and case law when determining this issue. Wide latitude is given to the courts in awarding maintenance; the Court may award maintenance in an amount the Court finds to be “fair, just and equitable under all of the circumstances.” K.S.A. 23-2902(a) (2012). *See also In re Marriage of Colgan*, 331 P.3d 833 (Kan. Ct. App. 2014).

Kansas courts may not order more than 121 months of initial maintenance, regardless of the length of the marriage. K.S.A. 23-2904. *See also In re Marriage of Dicus*, 328 P.3d 1127 (Kan. Ct. App. 2014). However, the Court may order an extension if the Court reserved jurisdiction to extend maintenance if a proper request is filed before the expiration of the maintenance period. K.S.A. 23-2904. *See also Einsel v. Einsel*, 340 P.3d 1236 (Kan. Ct. App. 2015). No single extension can exceed 121 months as well. Historically, courts rarely grant extensions.

No one should presume that spousal support should be paid or not paid. There should also not be any presumption of an absolute entitlement or an unrealistic expectation of a particular style or standard of living similar to what the parties experienced during the marriage. However, in the context of a specific fact situation, "need" may be a relative term. When assessing "need," it may be appropriate to consider the parties' historic lifestyle as one factor. *See In re Marriage of Kunzle*, 169 P.3d 344 (Kan. Ct. App. 2007). While maintenance serves the purposes of transitioning the parties into their respective futures and of cushioning the financial impact of one household becoming two, the analysis should consider all relevant factors as set forth in this section.

In assessing whether there should be maintenance and the amount and duration of any maintenance, the initial analysis should focus on the present and future needs of one spouse and the ability of the other to pay. The first question to consider is whether one spouse “needs” financial assistance from the other, and this preliminary question requires a much broader analysis than merely a review of the parties' Domestic Relations Affidavits or short-term prospective budgets. Where one spouse has sacrificed career or financial opportunities during the marriage to aid the other’s career or aid the family unit, or is otherwise historically financially dependent on the other spouse, the need may be readily apparent.

If the division of the assets, the parties’ respective incomes, or other factors suggest that both parties will have the financial ability to appropriately support themselves without payment of maintenance, then a fair question is whether any maintenance at all is justified. The specific facts of each case must be carefully analyzed in making this threshold determination. Generally, justification for maintenance at a substantial level for an extended period is greater when the duration of the marriage is longer, the ages of the parties are more advanced, and the prospective disparity in the parties' financial prospects and income-generating capability is greater. This general principle assumes, of course, that the payor spouse actually has the ability to pay.

In those cases where one party demonstrates the need for financial assistance, the inquiry shifts to whether the other party is reasonably able to provide such assistance. If both parties are equally or nearly-equally needy, generally neither party should have maintenance from the other. One party may have significant need; but, if the facts show that the other party cannot reasonably provide financial assistance, then there may not be any viable way to pay maintenance. In other cases there may be abundant ability of one spouse to pay maintenance, but due to the particular circumstances there may not be much demonstrable need for it by the other spouse.

Kansas courts have listed various factors and circumstances to be considered in determining the need for and in calculating the amount and duration of maintenance. The Section has not made any attempt to list all factors, the courts and attorneys should be mindful of recent changes in or additions to the relevant body of law. The following factors (among others) are most relevant to the analysis:

- The parties' needs and overall financial situation.
- The present and prospective earning capacities of the parties.
- The length of the marriage.
- Property owned by the parties, regardless of source.
- The ages of the parties.
- The contributions or sacrifices by one party to aid the other's education or career.
- Rehabilitation issues:
 - The retraining or education needs of one or both of the parties.
 - The number of years a party has been absent from the job market and the reason for the absence.
 - The parties' skills and ability to reenter the job market.
 - Unusual or unique health or medical needs.

See, e.g., Williams v. Williams, 219 Kan. 303, 548 P.2d 794 (1976), and *Stayton v. Stayton*, 211 Kan. 560, 506 P.2d 1172 (1973).

Marital fault is not a factor to consider when determining if maintenance is appropriate. It is never appropriate to use maintenance for punitive purposes. *See In re Marriage of Sommers*, 246 Kan. 652, 659 (1990). Courts have, on rare occasion, allowed consideration of marital fault when a party's conduct is "so gross and extreme that failure to penalize therefor would, itself, be inequitable." *See In re Marriage of Sommers*, 246 Kan. 652, 659 (1990). Marital fault is also not an appropriate consideration when determining the amount or duration of support.

PART II:
SPOUSAL MAINTENANCE (SPOUSAL SUPPORT)

SECTION C: Determination of Earning Capacities

2.1 : Imputation of Income.

Usually each party's present gross income would be the same as their earning capacity. It may also be appropriate to consider historical information, the seasonal nature of employment, and the likelihood of continued income in the future. If appropriate, income may be imputed to either party. If either party is deliberately unemployed or underemployed but reasonably capable of full-time employment, income may be imputed by considering the potential and probable earnings based on historical earnings of the parties, their educations, and any unique skills or qualifications.

2.2 : The Formula – Calculating the Amount and Duration of Maintenance.

For typical fact situations, or on a temporary order basis where all of the evidence or facts may not yet be fully known or developed, a reasonable basis and 2-step process for establishing (1) the amount and (2) the duration of maintenance is as follows:

- (1) First, determine if the marriage duration is more or less than 25 years in length.
 - (a) If the duration is *equal to or greater than* 25 years, then the amount is calculated as follows for the below (under (2)) Duration period:

Amount. 28% of the first \$300,000 difference in the parties' gross incomes or earnings (or imputed earning capacity), plus 10% of the excess difference (more than \$300,000 difference) of their gross incomes or earnings.

- (b) If the duration is *less than* 25 years, then the amount is calculated as follows for the below (under (2)) Duration period:

1. If Child Support is being or is to be Paid (where there are minor children and child support is being paid by the same party paying Maintenance), or there is a court-approved shared expense plan:

Amount. 20% of the first \$300,000 difference in the parties' gross incomes earnings (or imputed earning capacity), plus 10% of the excess difference (more than \$300,000 difference) of their gross incomes or earnings.

2. If Child Support is NOT being Paid (where there are no minor children of the parties):

Amount. 25% of the first \$300,000 difference in the parties' gross incomes or earnings (or imputed earning capacity), plus 10% of the

excess difference (more than \$300,000 difference) of their gross incomes or earnings.

- (2) Duration. One-third of the total duration of the marriage (to a statutory maximum of 121 months) reserving to the Court jurisdiction to extend maintenance on motion filed pursuant to the statute.

In determining the length of the marriage, the period typically should be calculated from the date of the marriage (or the date the parties' commenced cohabitating as a financially-unified household prior to marriage) until the date of the parties' physical or financial separation or the filing date of the Petition for Divorce or other agreed-upon date. Credit should also be considered for the payor spouse for the period of time he or she pays any temporary maintenance, whether court ordered or paid by informal agreement, after the separation of the parties until the time of the divorce.

Example: if the calculation of time for maintenance results in a term of five years (60 months), and the parties have been separated for six months, during which time appropriate support has been paid by the maintenance payor, the remaining term of maintenance should be 4.5 years (54 months).

In some instances, where one party continues to pay all of the family household expenses but no actual temporary maintenance is paid by that party, the parties should consider whether a credit should be provided for each month the household expense payments were made by a party in lieu of temporary maintenance.

The suggested formula does not contemplate marriages where extreme facts or circumstances exist.

Tax Implications. The above formula considers the tax treatment and impacts under most circumstances and fact scenarios that would normally apply to both parties under the 2017 Tax Cuts and Jobs Act (TCJA) and the changes to the deductibility and taxation of maintenance ("alimony") payments under the prior version of the Internal Revenue Code. The TCJA applies to all maintenance judgements entered after December 31, 2018. Individual tax treatment, results, and impacts under this, tax regime may vary from party to party and case to case. Where there is a determined significant or extraordinary impact to either party due to the application of this tax code provision special care should be exercised in analyzing the circumstances of such cases, and expert analysis coupled with creative thinking will often be required in order to craft reasonable and realistic support plans that accurately account for the specific or actual tax implications of each of the parties. No single approach or rule would apply to every case and the Section endorses creative resolutions of such complex taxation cases through allocating each party a portion of both the upside and downside risks, tax benefits, or tax liabilities. The parties should also be cognizant that the Congress and tax authorities and agencies routinely and periodically amend or revise the tax codes, definitions, and regulations and the TCJA treatment of maintenance ("alimony") may be revised or amended in the future from time to time, which could alter the applicability of this formula to a specific case.

A. Generally, Spousal Maintenance could terminate on the first of the following occurrences:

- (1) The death of either party.
- (2) The remarriage of the maintenance recipient.
- (3) The expiration of the term of maintenance specified.
- (4) The maintenance recipient's cohabitation in a marriage-like relationship.

B. Under most circumstances, the length of the marriage should be calculated from the date of the marriage or from date the parties started living together (or the date the parties' commenced cohabitating as a financially-unified household prior to marriage) until the date of the parties' physical or financial separation or the date of filing for Divorce or Separate Maintenance.

C. Generally, the maintenance obligor should receive credit for appropriate temporary maintenance payments made during the pendency of the divorce. There are many possible approaches to establishing maintenance, and the specific facts and circumstances of each case must be thoroughly analyzed in determining both the amount and duration of maintenance.

These Guidelines recognize and acknowledge the wide diversity of factual situations that present themselves for analysis in marital dissolution matters, and the Guidelines intend to foster careful analysis of the facts, rather than routine adherence to a rote formula or rule. The facts of any given case may suggest a smaller amount or shorter duration of spousal support, while other cases may call for more maintenance for a longer period. The suggested formula does not apply to marriages where extreme facts or extraordinary circumstances exist. Thoughtful analysis of the facts and circumstances must be applied in each case.

2.3: Calculation Examples.

Hypothetical 1. The parties have been married 6 years (72 months). Spouse A earns \$120,000 annual gross income, and Spouse B earns \$50,000 annual gross income. Both parties' incomes are relatively stable and predictable, and they have minor children (child support is being paid by the parent also paying maintenance). In this fact situation, the Guidelines formula suggests that, in the absence of other extraordinary or compelling circumstances, Spouse A pay maintenance (spousal support) to Spouse B as follows:

Amount: $\$120,000 - \$50,000 = \$70,000$ (income differential)

 $\$70,000 \times .20 = \$14,000$ (annually)
 $\$14,000 \div 12 = \$1,167$ (suggested monthly maintenance)

Duration: $72 \text{ months} \div 3 = 24 \text{ months.}$

Hypothetical 2. The parties have been married 18 years (216 months). Spouse A earns \$450,000 annual gross income, and Spouse B earns \$50,000 annual gross income. Both parties' incomes are relatively stable and predictable and they have no minor children (child support is not being paid). In this fact situation, the Guidelines formula suggests that, in the absence of other extraordinary or compelling circumstances, Spouse A pay maintenance (spousal support) to Spouse B as follows:

$$\begin{aligned} \text{Amount:} & \quad \$450,000 - \$50,000 = \$400,000 \text{ (income differential)} \\ & \quad \$300,000 \times .25 = \$75,000 \\ \text{plus} & \quad \$100,000 \times .10 = \underline{\$10,000} \\ & \quad \quad \quad \$85,000 \text{ (annually)} \\ & \quad \$85,000 \div 12 = \$7,083 \text{ (suggested monthly maintenance)} \\ & \quad \text{Duration: } 216 \text{ months} \div 3 = 72 \text{ months.} \end{aligned}$$

Hypothetical 3. The parties have been married 27 years (324 months). Spouse A earns \$375,000 annual gross income, and Spouse B earns \$50,000 annual gross income. Both parties' incomes are relatively stable and predictable and they have no minor children. Child support may or may not be being paid by a party. In this fact situation, the Guidelines formula suggests that, in the absence of other extraordinary or compelling circumstances, Spouse A pay maintenance (spousal support) to Spouse B as follows:

$$\begin{aligned} \text{Amount:} & \quad \$375,000 - \$50,000 = \$325,000 \text{ (income differential)} \\ & \quad \$300,000 \times .28 = \$84,000 \\ \text{plus} & \quad \$25,000 \times .10 = \underline{\$2,500} \\ & \quad \quad \quad \$86,500 \text{ (annually)} \\ & \quad \$86,500 \div 12 = \$7,208 \text{ (suggested monthly maintenance)} \\ & \quad \text{Duration: } 324 \text{ months} \div 3 = 108 \text{ months.} \end{aligned}$$

PART II: **SPOUSAL MAINTENANCE (SPOUSAL SUPPORT)**

SECTION D: Special Considerations

2.4: Parties Nearing Retirement.

Unique challenges are confronted in cases involving divorcing parties who are nearing retirement, especially where such cases involve long-term marriages. Special care should be given in analyzing the circumstances of such cases, and creative thinking will often be required in order to craft reasonable and realistic support plans.

For example, where a couple have reached social security age and are ready and preparing for retirement after a long-term marriage, it may be neither reasonable nor realistic to expect one party to pay the other long-term support as suggested by these Guidelines. The same applies to one party who has been a high-earning executive for many years, but now is approaching retirement with an income expected to be a fraction of what they have been earning.

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

2.5: Parties with Variable Incomes.

In some cases the parties' present gross income will be highly variable or difficult to ascertain. The general maintenance principles may not be appropriate for fact situations involving one or more parties with substantially fluctuating incomes. Such situations allow for creative maintenance agreements, such as providing for lower monthly maintenance with lump-sum maintenance payments based on excess income periodically received. Those whose incomes are primarily from big-ticket commission sales or transactions (e.g. commercial real estate agents or individuals whose incomes are largely derived from variable bonuses) are good examples.

Consideration should be given to establishing maintenance payments based on reasonably predictable gross income ("base income") augmented by additional lump-sum maintenance payments if the payor receives gross income in excess of the base gross income via bonuses, commissions, etc. One option to consider is to take an average of the historic variable gross annual income of a party for the preceding reasonable time frame (e.g. 3 years or 5 years) to determine an average "base" gross income for a party.

No single approach or rule would apply to every case and the Section endorses creative resolutions of such cases through allocating each party a portion of both the upside and downside risks.

2.6: Duty to Disclose.

In all cases where maintenance is modifiable or terminable, the parties have a duty to timely disclose material changes of circumstances that might constitute grounds for modification or termination of maintenance.

2.7: Method of Payment.

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

2.8: Modification or Extension of Maintenance.

If the parties agree in writing to the amount or duration of maintenance, the Court cannot modify these terms at a later time unless the ability to modify these terms in the future was included in the agreement. The parties should include detailed terms and any specific conditions for future modification of maintenance in any written agreement if they desire the ability to modify maintenance in the future under those agreed terms and conditions. If the Court determines spousal maintenance at a trial or other hearing, the Court may modify the amounts or other conditions for the payment of maintenance at any time in the future with reasonable notice to the party affected. However, the Court can only modify the amounts originally awarded that have not already become due.

The Court may not modify the original or subsequently modified award without consent of the party liable for maintenance, if the modification has the effect of increasing or accelerating the liability for the unpaid maintenance beyond what was stated in the original decree. Thus, Court-ordered maintenance may be reduced but not increased beyond the original amount or term ordered. Past due installments may never be modified, except by agreement.

Generally, in fact situations where the length of the marriage or other unique circumstances justify maintenance of 121 months or more, the parties should reserve to the Court continuing jurisdiction to reinstate or extend the duration of maintenance in accordance with Kansas statutory and case law.

Johnson County Bar Association
Family Law Section
Financial Considerations Guidelines – 2022

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