



NACVA and the CTI's

Business Valuation, Healthcare Valuation,
Financial Forensics, Mergers and Acquisitions,
and Transaction Advisory Services Conference

December 6-9, Ft. Lauderdale, FL



Breakin' Up is Hard to Do: Dividing the Marital Estate and Figuring Alimony

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93rd Presentation

The Agenda

1. Practice Tips
2. Your Role in Divorce
3. Supporting Documentation
4. Marital Balance Sheet with Related Issues & Analysis
5. Need & Ability to Pay Analysis
6. Case Study
7. Just for Fun War Stories

Practice Tips

- New Client Memo routing/intake sheet
- Standard document request in Word format
- Fill-in-the-blank PDF data sheet
- Standard Engagement Letter template
- Maintain a great website as your “brochure” with downloadable and up-to-date PDF CV

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- Know your state’s case law and keep copies of all relevant cases

Practice Tips

- Maintain copies of all opposing expert reports
- Keep a complete list of your depositions & trial testimonies from day 1
- Answer your phone and emails
- Always assume you are headed to trial, but make the presentation usable at mediation without you just in case
- Issue all docs in PDF format and password protect them so no one can copy segments or signatures (Tools/Protection/Encrypt)

Your Role in Divorce

- **Identify**
 - True Income for Support (Tax Returns, General Ledger Analysis)
 - Assets (Account Statements, Calculations, Forensic Investigations)
- **Classify**
 - Marital v. Separate (Transmutation, Commingling, Appreciation)

Your Role in Divorce

- **Quantify¹**
 - Value a Business
 - Value a Pension Interest
 - Propose a Property Division
 - Lifestyle Analysis
 - Figure Alimony Need & Ability to Pay
 - Assist at mediation

1) Miles Mason: [The Forensic Accountant Deskbook](#)

TBA: “Breakin’ Up is Hard to Do”



Supporting Documentation

- General - 5 Years of business & personal tax returns, with W-2s
- Marital Residence - Real estate appraisal
- Mortgage - Payoff or monthly statement
- Checking/Savings Accounts – 24-48 months of bank statements checks
- Investment Accounts - 24-48 months of monthly/quarterly statements
- Defined Benefit Pension - Vested benefit statement & plan document

Supporting Documentation

- Defined Contrib. Plan/401(k) Savings Plan, etc. - 24-48 months of statements
- Stock Options - Vested & unvested grant statement & plan document
- IRA - 24-48 months of monthly/quarterly statements
- Vehicles - NADA valuation from Internet
- Other Personal Property - List & estimates from parties; appraisal Small Business - Business valuation from qualified expert

Supporting Documentation

- Credit Cards - 24-48 months of monthly statements
- Dissipation of Marital Assets - Receipts, canceled checks, CC statements, depo. excerpts, etc.
- Quicken and QuickBooks ***including passwords***
- Subpoena to all banks that a spouse may use
- Request the entire loan file, ***including personal financial statements (“PFS”) and loan applications***

Case Study – The Smiths

Personal

- Husband - (“money spouse”)
 - Investment Advisor
 - Age 50
- Wife - (“non-money spouse”)
 - Homemaker, now real estate agent
 - age 44
- Children, ages 11, 9 and 6
- 18 year marriage

Case Study – The Smiths

Major Assets and Issues

- Marital Residence
- Vacation Home
- Large Investment Accounts
- Stock Options
- Deferred Compensation
- Defined Benefit Plan
- 401(k) and IRAs
- Dissipation by H
- ***Wife's Need***

The Marital Balance Sheet

Factors to Consider

- This is of course, property division
- Client's desire for a particular asset
- Practicality, legality or necessity of one spouse owning an asset or owing a debt
- Future income earnings from an asset or cost of a liability

The Marital Balance Sheet

Factors to Consider

- Future earning capacity of each spouse
- Concept of offset
- Tax and basis consequences
- Attorney's request for an unequal division

The Marital Balance Sheet

Construction

1. Excel (of course)
2. Numbered lines
3. Numbered pages
4. Group asset and debt categories such as “Real Estate” and “Retirement”
5. Last 4 digits of account #

The Marital Balance Sheet

Construction

7. List debts with secured assets showing the net equity
8. Display property claimed as separate in whole or in part so as to establish the claim
9. Display the proposed division of each and every item along with the total net percentage to each spouse
10. Offset the present value of a pension, dissipation and the fair market value of a small business with other assets

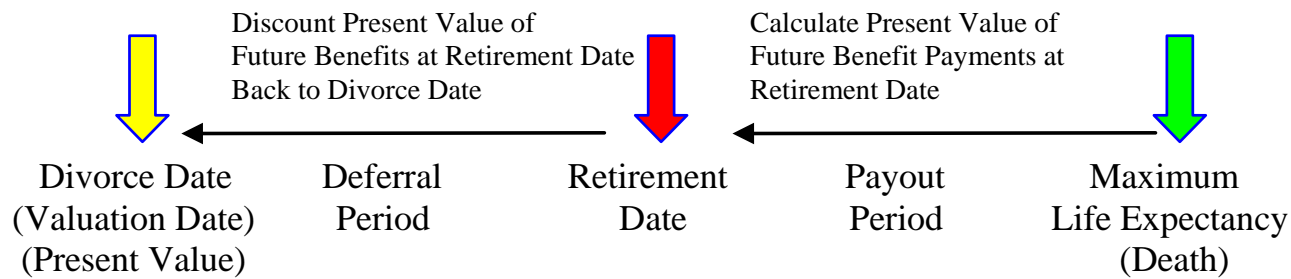
Related Issues & Analyses

- H's True Income
- Present Valuing a Defined Benefit Plan
- Dissipation Analysis
- Commingling & Transmutation of Separate Property
- Appreciation of Separate Property
- Deferred Compensation
- Stock Options

PV of Defined Benefit Pension

The COLA Wars

Pension Plan Valuation Timeline



Dissipation

Dissipation: *“The use of an asset for an illegal or inequitable purpose, such as a spouse’s use of community property for personal benefit when a divorce is imminent.”*

Black’s Law Dictionary

Dissipation

Tennessee: “Ward Factors”

The Trial Court must consider:

1. Whether the evidence presented at trial supports the alleged purpose of the various expenditures; and if so,
2. Whether the alleged purpose equates to dissipation under the circumstances
 - a. The typicality of the expenditure to the marriage

Dissipation

Tennessee: “Ward Factors”

- b. The benefactor of the expenditure, i.e., it is primarily benefited the marriage or the sole dissipating spouse
- c. The proximity of the expenditure to the breakdown of the marriage; and the amount of the expenditure
- d. The amount of the expenditure

Need and Ability to Pay Alimony

- Know your property division and alimony code and case law
 - *TN...In making any order under this subsection (b), the court shall consider the financial needs of each spouse and the financial ability of each spouse to meet those needs and to prosecute or defend the suit.*
- Property division first
- Alimony second
 - Single-month v. multi-year

Smith v. Smith
Wife's Need for Support
3/31/11

Monthly Basis - 1st Year Only

Gross Monthly Income	<u>3,333</u>	
Net Monthly Income After Taxes & Deductions		970
Child Support		<u>3,200</u>
Total Monthly Income		4,170
Mortgage		(1,950)
Monthly Living Expenses		<u>(7,083)</u>
Shortfall		<u>(4,863)</u>
Alimony "Need"		<u>5,000</u>
Surplus		<u>137</u>

Need and Ability to Pay Alimony

Single-month analysis is flawed for these reasons:

1. Represents a snapshot in time
2. Gross understatement of income by self-employed and commission or bonus-dependant spouses
3. Use of expense figures that appear to be historical, however the future expenses will inevitably be different due to new housing arrangements, additional child care expenses, duplications, and ***INFLATION***

Need and Ability to Pay Alimony

Single-month analysis is flawed for these reasons:

4. Failure to incorporate the use of investment earnings available from the divided property
5. Failure to incorporate the use of retirement assets or pensions at retirement date or for use immediately if necessary
6. Overstatement of monthly expenses after listing those ordered to pay as temporary support which may end

Need and Ability to Pay Alimony

The Analysis

- A simplified, lifetime financial plan covering all of the remaining years of each spouse's life expectancy
- A forward-looking projection
- Standard of Living
- Earning Capacity
 - SIDS – Sudden Income Deficit Syndrome
 - If I had a dime for every time I heard the statement “business is way-off this year”

Need and Ability to Pay Alimony

Steps

1. Project over the remaining life expectancy of each spouse
2. Allow for contributions to retirement plans and/or IRAs based on past practices
3. Incorporate an investment rate of return on the non-retirement and retirement financial assets
4. Factor in the receipt of child support

Need and Ability to Pay Alimony

Steps

5. Figure the new mortgage note or rent (if any)
6. Analyze the personal living expenses then project using the anticipated living situation based on an approximation of the pre-divorce standard of living
7. Calculate federal and state taxes on the projected earnings, other taxable incomes, itemized deductions and the tax consequences for paying/receiving alimony

Just for Fun



H Claimed Substantial Contrib. to W's Sep. Prop. Appreciation

- Claiming his federal tax w/h from paychecks earlier in the marriage helped to pay tax on W's separate income (expert analysis revealed that W actually contributed \$50k to cover H's tax shortages on the income he earned)
- Gave investment advice to W's trustees (even though most investments were in gifted public company stock or the family's own proprietary mutual funds)

H Claimed Substantial Contrib. to W's Sep. Prop. Appreciation

- Claiming he was allowed to make withdrawals from the trust funds (W claims he had to get her permission and H refuted this claim)
- Posting large tax losses on his sole prop. business thereby offsetting tax liability of W (i.e. his losses contributed to her appreciation)
- Hiring a CPA to prepare taxes that saved \$41k in taxes (but with fraudulent info from H)
- Tried to get into a fight with me at his estate sale

Now I Own It / Now I Don't

Gift Tax Fraud in Divorce

- W's father methodically gifted shares in family business over 16 years, but no gift tax returns filed (to be a true gift for IRS purposes it must be irrevocable)
- Meticulous hand written spreadsheet on gifts
- Form 1120, Schedule E tax returns show W's ownership interest increasing each year
- Father actually issued Deeds of Gift

Now I Own It / Now I Don't

Gifted Fraud in Divorce

- Handwritten “death bed” letter from father detailing the gifting and his intentions
- Letter from corp. CPA to a bank explaining W’s ownership in the corp.
- Stock redemption agreement in W’s name
- At divorce time and under oath in his deposition, father claimed it was all a sham to save taxes and only IF he died (i.e.-FRAUD)
- Case settled - our client came out great!