



CHAPTER 7

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**The Shape of the Table: Issues that Thwart
Settlement**

Carl Edwards

Law Offices of Carl T. Edwards, P.S.

Philip C. Tsai

Tsai Law Company, PLLC

CHAPTER SEVEN

ISSUES THAT CAN SEND YOUR CASE TO TRIAL OR HOW TO MAXIMIZE YOUR CHANCES OF SETTLING

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Carl Edwards

Law Offices of Carl T. Edwards, P.S.
419 Occidental Avenue S., Suite 407
Seattle, WA 98014
Ph: 206-467-6400
carl@cteps.com

Philip C. Tsai

Tsai Law Company, PLLC
2101 Fourth Avenue, Suite 1560
Seattle, WA 98121
206-728-8000
phil@tlclawco.com

CARL EDWARDS practice focuses on complex marital dissolutions, difficult parenting cases, and related matters. He graduated from Stanford University in 1980 with a B.A. in English and received his J.D. with honors in 1993 from the University of Washington where he was a member of the Washington Law Review, the Moot Court Honor Board, and the Order of the Barristers. Carl has served as secretary, vice-chair, and chair of the King County Bar Association's Family Law Section. He also served as the director of the Fremont Neighborhood Legal Clinic for two years and participates in the various volunteer programs which the bar offers for pro se family law litigants.

PHILIP C. TSAI received his B.A. in Sociology, *cum laude*, from the University of Washington in 1994; and his J.D., *cum laude*, from Seattle University School of Law in 1997. Philip is a member of the Washington State bar and has been in practice for 14 years. He is a partner at Tsai Law Company, PLLC, a boutique law firm in downtown Seattle where he almost exclusively practices family law. Philip is married with two children and in his spare time enjoys writing and playing music.

CHAPTER SEVEN

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I. How To Maximize Your Chances of Settlement in Three Words: Prepare for Mediation

When I was first asked to speak on the topic of “issues that drive a case to trial,” I contacted Larry Besk of Bartlett, Pollock & Besk, PLLC to see what full-time mediators would say if they were asked to identify “issues that often prevent cases from settling.” Larry talked to his partners and reported that, in their opinion, the number one issue that prevents cases from settling is lack of preparation by the attorneys.

This was not the answer I had hoped to elicit because I was looking for specific “issues” that frequently blocked settlement: e.g., conflicting business valuations, the validity of a tracing report, determining maintenance, etc. Their answer, however, proved to be both helpful and insightful. As I started thinking about specific issues and how to address those issues, I realized that my proposal for each issue was just a variation of the mediators’ general response that proper preparation for mediation is the single most important factor for maximizing your chances of settling.

A. Prepare Your Case For Mediation.

Preparing your case for mediation means getting the information you need to help your client make an educated settlement decision at mediation. In the best of cases, the attorneys exchange this information voluntarily and cooperate with a free flow of information. In harder cases, attorneys need to conduct an investigation and pursue formal discovery to get the information they need to settle the case. In either case, the first step is to identify the information you need. The second step is to determine how to obtain that information. This analysis should start early in the case.

One well-known benefit of mediation is that it avoids the cost of trial. In most cases, however, the attorney needs all the information that would be required to prepare for trial in order to effectively represent a client at mediation. Conducting basic discovery before going to mediation can greatly increase the odds of settling. This is particularly true in high-conflict cases.

“Early mediation” is an option only in cases where both parties have a good understanding of their assets and liabilities based coming out of the marriage. Where both parties are similarly situated in terms of their knowledge and understanding of their finances, there may be no need for extensive investigation of discovery. In order for "early mediation" to provide value without incurring unnecessary risk, this type of mediation needs to be conducted early enough in the case schedule to allow the parties to exchange additional information or conduct discovery if necessary.

B. Prepare Your Client For Mediation

In addition to preparing the case for mediation, the attorney must also prepare the client for mediation. Preparing the client for mediation means helping the client develop reasonable expectations about how his or her case will be resolved. This preparation begins in the first meeting, where the attorney should provide the client with objective feedback about his or her case. For example, a physician in private practice needs to know that his or her professional practice is an asset to be valued and awarded in the divorce and that the value of the practice will include a component for professional goodwill. "Professional goodwill" is an extremely difficult concept for most professionals to accept. Many professionals view our courts' approach to this issue as patently unfair. Whether or not the client agrees with the concept of "professional goodwill," the client needs to know that the court will place a value on professional goodwill regardless of the client's opinion. In this example, it would be very difficult to settle at mediation

if the client hears the term "professional goodwill" for the first time in opposing counsel's mediation letter.

Helping the client set realistic expectations is a critical part of the attorney's preparation for mediation. The attorney needs to make sure the client understands that they will not settle on the terms stated in their mediation letter and that settling will require compromise. Good preparation includes making sure the client has realistic expectations of what can be achieved at mediation – regardless of what the mediation letter says.

II. Specific Issues That Make Settlement Difficult

A. Disposition of Real Property.

The days are long gone when both parties want the family residence based on the expectation that the property will appreciate as the housing market continued to climb. It is more common now that neither party wants the house because it's under water or headed in that direction. Appraising houses in this market is difficult, and parties often have quite different opinions as to the value of the family residence. In many cases, selling the property and dividing the proceeds is not an attractive option, particularly where the parties invested heavily in the property before the market crashed. The family residence used to be the most valuable asset in many divorces. Now it is often the biggest albatross.

When the parties own real property that is underwater, they have three hard choices: (1) one party takes the house at a negative value, (2) they sell now and take their losses, or (3) they hold the property as tenants in common after the divorce and hope the market turns around.

Option 3 (hold the property as TIC) is available only through settlement because a trial court cannot leave the parties as tenants in common after a divorce trial. *Marriage of Shaffer*, 43 Wn.2d 629, 262 P.2d 763 (1953). The parties, however, can agree to hold the property as tenants in common until they want to sell the house. The key to settling in this manner is to draft

an agreement that leaves the parties in an arms-length business relationship. Most of the important terms should be identified and worked out in the CR 2A Agreement. The final details can be fleshed out in a property settlement agreement.

The factors that must be addressed in an agreement to hold real property as co-owners pending future sale include:

Legal Relationship of Parties: In most cases, and certainly most cases involving the former family residence, the most typical arrangement is for the parties to hold the property as tenants in common.

Use of the Property: The fact that the parties will be tenants in common does not mean both parties have the right to use the property. Unless the property is going to be rented out, one party typically has sole and exclusive use of the property. The tenant who is not in possession would have the same access to the property as a landlord in a landlord-tenant situation. (The co-tenants are collectively the landlord, and the co-tenant in possession is the tenant.)

Payment of Expenses: At a minimum, the agreement should identify who will pay the following expenses:

- Mortgages and lines of credit secured by the property;
- Property taxes and insurance;
- Routine maintenance;
- Major repairs (note the need to define the difference between “routine maintenance” and “major repairs”);
- Utilities

Sale of Residence: Factors to consider related to the sale of the house include:

- When the house will be listed for sale;
- Choice of listing agent;

- Whether any repairs, maintenance, or staging will be done to prepare the house for listing and, if so, how the costs associated with the work will be covered; and
- Setting the listing price and the mechanism for responding to offers on the property;

Division of Net Sales Proceeds: The agreement must specify the manner in which the net sales proceeds are divided. “Net proceeds” is typically defined as the gross sales price less any mortgages or secured lines of credit, closing costs, capital gains tax, and any reimbursements owed to either party. The agreement must define the formula by which the net sales proceeds will be divided. It can be a simple percentage (e.g., 45% to one spouse and 55% to the other). The formula can also be more complicated, including references to other factors: e.g., if the parties have agreed on the values and allocation of all other assets, the net proceeds could be divided to provide for an overall 55/45 division of community assets. If formula presumes that the sale will result in a profit in order to execute the formula, the agreement should also address what happens if the profits are not sufficient to execute the formula. For example, if the wife needs to receive at least \$35,000 from the net proceeds to provide for a 52/48 division of property in her favor, what happens if the sale only nets \$25,000?

Dispute Resolution: Agreements to hold property as tenants in common are fraught with opportunity for conflict. Disputes related to the sale of real property are often time-sensitive (e.g., whether to accept an offer, whether to counter-offer, etc.). An arbitration clause provides a speedy and relatively inexpensive resolution of these disputes.

Sample Agreements: Sample agreements regarding the sale of real property and formulas for maintenance are attached.

B. Child Support Issues That Complicate Settlement.

Combined monthly net income in excess of \$12,000/mo. Setting support when the parties' combined monthly net income exceeds the top of the economic table can be a problem if one party thinks support should be set in excess of the economic table. Extrapolating the economic table is no longer an option. *Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007). Basic support can be set in excess of the economic table based on consideration of (1) the parents' standard of living, and (2) the children's special medical, educational, or financial needs. *McCausland*, 159 Wn.2d at 620. The children's special financial needs do not have to be extraordinary. Common expenses such as "school supplies, school trips, school-required software, entertainment, health club dues, health insurance co-pays, nonprescription medicines, vacations, sports activities, music lessons, pets, birthday parties, and personal items such as clothing and haircuts" can also support setting basic support in excess of the economic table. *Marriage of Krieger and Walker*, 147 Wn.App. 952, 962-63, 199 P.3d 450 (2008). The problem is proving these types of expenses with sufficient specificity to justify a higher basic support level. See *Krieger and Walker*, 147 Wn.App. at 959-62.

Trying to agree on how much basic support should be increased based on the type of expenses identified in *Marriage of Krieger and Walker* can be a vexatious task. These expenses are hard to predict and harder to prove, yet they cry out for some type of additional child support. In most cases, the expenses that would support increased basic support can also be characterized as "special child rearing expenses" under RCW 26.19.080(3). The statute does not define "special child rearing expenses" other than to say, "such as tuition and long-distance transportation costs." RCW 26.19.080(3). As a practical matter, the definition of expenses the court would characterize as "special child rearing expenses" depends on the incomes and life styles of the parents. In higher income cases, these expenses often include private school tuition, expensive extracurricular activities, cars and auto insurance for teenagers, college application

fees, nanny care instead of traditional daycare, summer camps, computers, cell phones, etc.

Under RCW 26.19.080(3), special child rearing expenses are split in proportion to the parties' incomes.

Rather than focusing on increasing basic support in excess of the economic table, which requires the parties to agree on a specific monthly amount that is necessary to cover the children's special expenses, it is often easier to settle support when the parties' incomes exceed the economic table by identifying the types of direct children's expenses that can be fairly characterized as special child rearing expenses, and then splitting those expenses in proportion to the parties' incomes. This approach requires the parties to contribute to the children's special expenses on a pro rata basis as the expenses arise, based on the actual cost of the children's activities, tuition, etc. These expenses are covered in Paragraph 3.15 of the current mandatory form for the Order of Child Support. Identifying a broad range of special child rearing expenses and dropping them into Paragraph 3.15 of the Order of Child Support often provides a reasonable basis for settling high-income support cases.

C. Relocation – Perhaps the Most Unsettling Issue.

Relocation of a child's primary residence is controlled by RCW 26.09.405-560. Relocation cases are difficult to settle because there is little room for compromise. If the primary residential parent wants to move to Rhode Island and the other parent objects, there is a 3,000 mile gap to be bridged. I'm not aware of any such cases that have settled by having everyone move to Nebraska. Either one party capitulates, or the case goes to trial.

Obtaining a parenting/relocation evaluation can help settle a relocation case, but only if both parties respect the evaluator's recommendations. This is not always an option due to the shortened case schedule for relocation cases and the exigencies of the case (e.g., if the moving parent has a great new job that that requires him or her to start working as soon as possible, it

may not be practical to delay the relocation action to allow for a parenting evaluation). Nonetheless, agreeing to a parenting evaluation if there is sufficient time is often helpful for settling relocation cases. If the evaluator does his or job correctly, a report that makes a recommendation on the issue of relocation gives the favored parent a trump card that cannot be readily disregarded in settlement talks. This approach, admittedly, is a bit of a crap shoot. Clients should be warned that an unfavorable recommendation from the evaluator may be extremely detrimental to his or her case.

Using a volunteer superior court judge for a settlement conference can be particularly helpful in relocation cases. Judicial settlement conferences are typically shorter in duration than private mediation (two or three hours vs. all day). Relocation cases, however, typically present simpler fact patterns than dissolutions or traditional parenting plan modifications where one parent is requesting a flip of custody. It is often possible to present the facts in a manner that the judge can understand with a limited amount of time. The impact of having a judge weigh in on the ultimate relocation issue cannot be overstated. If the judge tells the objecting parent, “if this were in my court, the primary residential parent would be allowed to move,” the odds of settlement are greatly increased. Few family law matters revolve so tightly around a single question. Judicial input on that question (i.e., relocation) can be essential to breaking through an impasse.

III. Spousal Maintenance, How Much And For How Long?

One of the most challenging aspects of advising a family law client is the determination of alimony/spousal maintenance. One reason this challenge exists is that there is no schedule or specific financial guideline in Washington that the judicial officer determining maintenance is required to follow. While RCW 26.09.090 provides the Court with factors to consider when awarding or not awarding spousal maintenance, the Court has substantial discretion regarding

fashioning the duration and amount of an award. An award of spousal maintenance is usually not disturbed on appeal unless a party can prove an abuse of discretion. No guideline makes it difficult for the family law practitioner to advise a client for settlement and can often result in a trial. No specific guideline can also lead to unpredictable outcomes and similar fact patterns with very different results.

a. Analysis in Washington

The most renowned treatise regarding judicial discretion and financial equity between of spouses in a marital dissolution proceeding was written by Judge Winsor, “Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions,” *Washington State Bar News*, vol. 14, page 16 (Jan. 1982).

In his treatise, Judge Winsor provides reasoned analysis of how judicial discretion should be exercised:

“In the case of a short marriage, the marriage has in fact not been the significant event that is normally presumed. Particularly, there has not been a long reliance on the marital partnership. Therefore, the emphasis should be to look *backward* to determine what the economic positions of the parties were at the inception of the marriage and then seek to place them back in that position, including provision for interest or inflation, if feasible. After doing that, if there are properties left over, they would presumably be divided about equally. Presumably in a short marriage maintenance would not be paid, except in extraordinary circumstances or perhaps for a very brief adjustment period.” ...

“In the case of a long marriage, the goal should be to look *forward* and to seek to place the spouses in an economic position where, if they both work to the reasonable limits of their capacities, and manage properties awarded to them reasonably, they can be expected to be in roughly equal financial positions for the rest of their lives. Long term maintenance, sometimes permanent, is presumably likely to be used unless the properties accumulated are quite substantial, so that a lopsided award of property would permit a balancing of the positions without (much) maintenance.”

Winsor, Robert W., “Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions,” *Washington State Bar News*, vol. 14, page 16 (Jan. 1982).

While Judge Winsor’s article provides practical guidance regarding how to treat spouses of a marriage based on the duration, the type of property being awarded, and respective financial

circumstances of the parties, it still does not answer the question of amount and duration of spousal maintenance.

Some family law practitioners in Washington use a 4 to 1 ratio regarding alimony, i.e., for every 4 years of marriage, 1 year of spousal maintenance is appropriate assuming all of the other factors are present for an award.¹ Therefore, for a 20 year marriage, 5 years of spousal maintenance may be appropriate. However, there are many issues that can complicate even this seemingly straight forward formula. For example, should the pre decree or temporary period of maintenance be included in the ratio? What if the parties have been separated for a substantial period of time prior to the filing of the action? When there are children involved, RCW 26.19.071 clearly indicates that maintenance actually received is income to the recipient. However, should the spousal maintenance duration take into consideration the ages of the children including whether support will terminate for an emancipated child when child support is being ordered in addition to the spousal maintenance?

While there is no single answer to how to handle these issues when they arise in your cases, it is important to recognize and attempt to fashion a solution early on if a successful settlement is to be achieved.

b. Other States Approach

Many states use specific guidelines and formulas to fashion a spousal maintenance award. For example, while the ultimate award is left to the discretion of the Court, Santa Clara, California routinely uses a formula to determine spousal maintenance *pendente-lite*. The Santa Clara formula is as follows:

Payor Net Income (payor's gross monthly income minus income tax and Social Security payments and minus child support) –(child support x 40%= _____)- (Payee net income x 50% = _____). When the starting alimony determination is made,

¹ However, some practitioner's will use a 3 to 1 ration while others use a 5 to 1 ratio. There does not seem to be uniformity with this approach.

the court can consider deviations such as credit for private school tuition, amount of community debt assumed by payor, etc.²

In Florida, a long-term marriage is defined as 16 years or more. There is a presumptive award of permanent alimony. Marriages of less than six years are short term marriages and there is no presumptive award of permanent alimony. Marriage between six and sixteen years is a gray area in which no presumption of permanent alimony exists. In such cases, statutory factors are used with a rule of thumb timeline to fashion an appropriate award of spousal maintenance.³

In Texas, a 10 year marriage is required for any amount of post dissolution maintenance unless one of the spouses is disabled. Support is limited to \$2,500 per month for a period not to exceed three years.⁴

In New Mexico, support during the pendency of the proceeding is set so that each party has one-half of any remaining income after fixed expenses are paid to include housing costs, utility expenses, minimum loan and credit card payments and insurance premiums. NMRA 1-122.A (2001).

c. American Academy of Matrimonial Lawyers Approach

One approach to establishing an alimony award is to follow the AAML's Commission Recommendations. Those recommendations provide a formula to determine the amount and duration of alimony focusing on the income of the spouses and length of marriage.

Specifically, to determine the *amount* of alimony, a spousal support award should be calculated by taking 30% of the payor's gross income minus 20% of the payee's gross income. However, when added to the gross income of the payee, the alimony award shall not result in the recipient receiving in excess of 40% of the combined gross income of the parties. Gross income

² *Alimony Guidelines: Do They Work?* Virginia R. Duga, Jon A. Feder Family Advocate, (2003).

³ *Id.*

⁴ *Id.*

is defined by the state's definition of gross income under the child support guidelines, including actual and imputed income. There may be factors in any given case to deviate from this formula.

To determine the *duration* of the alimony award, multiply the length of the marriage by the following factors: 0-3 years (.3); 3-10 years (.5); 10-20 years (.75), over 20 years, permanent alimony. There may be factors in any given case to deviate from this formula.

IV. Separate Property Claims

Another difficult issue that may thwart settlement is how to analyze and prove a separate property claim. First, some basic tenants of the law are examined.

The law favors characterization of property as community property. Marriage of Davison, 112 Wn.App. 251 (2002). Marriage of Brewer, 137 Wn.2d 756 (1999).

When dividing property in a divorce, the Court has to have characterization as either separate or community "in mind" or it is reversible error. Blood v. Blood, 69 Wn.2d 680 (1966). Marriage of Skarbek, 100 Wn.App. 444 (2000).

Separate property should not normally be subject to division between the parties. Marriage of Olivares, 69 Wn.App. 324 (1993). However, separate property may be divided under the just and equitable criteria of RCW 26.09.080. Exceptional circumstances is no longer necessary for the court to invade separate property to achieve a just and equitable result as all property is before the Court for a fair and equitable division. RCW 26.09.080. Marriage of Griswold, 112 Wn.App. 333 (2002).

One of the most common and notable scenarios in family law is when a spouse owns a separate property residence prior to marriage but later refinances the residence titling the property in both parties' names. Or, one spouse uses separate property to purchase property in the name of the other spouse or both spouses. Prior case law established that under this scenario, there was a presumption of a gift by the spouse owning the separate property to the other spouse,

otherwise known as the “joint title gift presumption”. See Marriage of Olivares, 69 Wn. App. 324 (1993), Marriage of Hurd, 69 Wn. App. 38 (1993).

However, the joint title gift presumption was recently overruled in Estate of Borghi, 167 Wn.2d 480 (2009). The Court in Borghi, *supra*, recognized the conflicting presumptions established in the cases up to that point in time. The court in Borghi, *supra*, stated:

Further, to apply a presumption based on a change in the name or names in which title is held would create a situation in which a court is asked to resolve an evidentiary question based on nothing more than conflicting presumptions. This case illustrates the conundrum. A court starts with the presumption that the property is Jeanette Borghi's separate property because it was acquired with her own funds before her marriage to Robert Borghi. The parties in this case agree it was initially her separate property. Then, the court must rely on the inclusion of both Robert and Jeanette Borghi's names on the 1975 deed to support a presumption that the property is community property. Applying these presumptions simultaneously, the court reaches an impasse. If we somehow reason that the community property presumption must prevail because it is later in time, then what became of the rule that clear and convincing evidence of actual intent is needed to overcome the original separate property presumption? In sum, applying a gift presumption to counter the separate property presumption in these circumstances would reduce community property principles to a game of King's X. See 19 WEBER, *supra*, § 10.7 n.4, at 142. We refuse to do so and instead adhere to the well-settled rule that no presumption arises from the names on a deed or title. To the extent *Hurd* and *Olivares* suggest a gift presumption arising when one spouse places the name of the other spouse on title to separate property, we disapprove these cases.

While the joint title gift presumption has been overruled, this does not automatically mean that a spouse who decides to use separate property to acquire property in both parties' names cannot make a gift to the community by doing so. However, clear and convincing evidence of the intent of the spouse creating community property needs to be established with concrete evidence of intent to create community property to overcome the separate property presumption.

Another scenario that may thwart settlement is a lack of sufficient *tracing* of separate property by the spouse making the separate property claim. The law is clear that property acquired during a marriage is presumed to be community property. Marriage of Sedlock, 69 Wn.

App. 484 (1993). However, it is also clear that property owned by a spouse prior to marriage is presumed to be separate property. Marriage of White, 105 Wn.App 545 (2001). To rebut the community property presumption, the burden of proof is on the party claiming separate property to clearly and convincingly trace the property to a separate property source. Marriage of Pearson-Maines, 70 Wn. App. 860 (1993). Specifically, the Court in Pearson-Maines, *supra* stated:

The well-established rule is that the character of property, whether separate or community, is determined at its acquisition. Property acquired after marriage is presumptively community property. The presumption may be rebutted by clear and satisfactory evidence. *E.I. DuPont de Nemours & Co. v. Garrison*, 13 Wash. 2d 170, 174, 124 P.2d 939 (1942). If the property was separate property at the time of acquisition, it will retain that character as long as it can be traced and identified. *Baker v. Baker*, 80 Wash. 2d 736, 745, 498 P.2d 315 (1972).

There are many different factual scenarios that can arise when tracing separate property. Some common situations include: (1) a spouse owned a separate property residence that was sold during the marriage and the proceeds of the sale were used as a deposit or down payment for another residence purchased during the marriage; (2) funds that exist in a bank or stock account prior to marriage that have been used during the marriage and commingled with community bank or stock accounts; (3) retirement accounts that were contributed to prior and during the marriage resulting in mixed separate and community property character; and (4) stock options that were awarded prior to the marriage but vest during the marriage.

It is advisable if you have separate property tracing issues in your case to begin the tracing analysis immediately upon commencement of the representation. In many instances, it can take several months to obtain documents (if they can be obtained) that will be necessary to meet the clear and convincing evidence test enumerated in Pearson-Maines, *supra*.

There are some cases where your client may have the documents necessary to perform the tracing, but many times, that is not the case. Depending on the length of the marriage, the documents necessary for a tracing analysis can be decades old. Issuing subpoenas to obtain the documents is helpful. However, having your client contact the appropriate source, whether it is real estate professionals and escrow documents or financial institutions holding bank and retirement account statements to obtain the documents is frequently more fruitful.

Beginning the tracing analysis early on in your case is key to a successful settlement. Do not use the mediation or settlement conference process to perform discovery or expect the other spouse to admit that the property in question is separate. If necessary, hire an expert to perform the tracing analysis and provide a report that you can use during mediation or at trial.

V. Expectancy Or Loss

Another issue that can sometimes interfere with your ability to settle a case in the context of division of assets and liabilities is a proper analysis of expectancy or loss. There are many types of expectancies that arise in family law cases including: (1) whether a spouse will receive an inheritance, (2) the likelihood that a spouse will receive a parental gift subsequent to the divorce, (3) possibility of remarriage, and (4) receipt of or loss of social security benefits. Some expectancy benefits are able to be considered by the Court while others are not.

a. Inheritance

The general rule regarding inheritance is that a bequest in a will while the testator is *still living* is merely an expectancy and should not be considered by the Court when making a division of assets and liabilities. *See Rubin v. Rubin*, 204 Conn. 224, 229-30, 527 A.2d 1184, 1187, 62 A.L.R.4th 91 (1987); *Gassaway v. Gassaway*, 489 A.2d 1073, 1076 n.9 (D.C. 1985). However, when the testator has passed away and the will can no longer be changed, the bequest becomes a vested interest to the extent of its actual value. Marriage of Hurd, 69 Wn. App. 38

(1993). Under that circumstance, although the inheritance is characterized as separate property, the Court should consider its existence pursuant to RCW 26.09.080(2) . Hurd, 69 Wn. App. at 50.

In an unreported case, Marriage of Trammell, 98 Wn. App. 1003 (1999), the Court applied the expectancy rule enumerated in Marriage of Hurd, *supra*, and found that a non disclosed inheritance where the testator had passed away created a vested interest which should have been disclosed to the other spouse pursuant to a Property Settlement Agreement that divided any undisclosed assets between the spouses equally. Trammell is a good example of the importance of properly analyzing an expectancy and full disclosure.

b. Parental Gifts

Similarly to the expectancy rule enumerated in Marriage of Hurd, *supra*, the Court should also not consider whether the parents of a spouse will make a gift to the spouse when determining a fair and equitable division of assets and liabilities. Lake v. Lake, 63 Wyo. 373 (1947). In Bungay v. Bungay, 179 Wash. 219 (1934) (a pre no fault divorce case), the Court stated:

Since, as we have seen, the husband has only two hundred dollars per month income, above that already assigned in good faith to secure the payment of community indebtedness, these provisions are impossible of performance unless someone comes to the appellant's aid. It is suggested that appellant's father is well-to-do, and perhaps it was expected that he would assume the burden thus created, but we know of no rule of law which, under circumstances such as here exist, makes a father liable for the indebtedness of an adult son, and the law can look only to appellant's earning power as the measure of his duty to provide.

The Court in Bungay, *supra*, makes it clear that when dividing property between spouses, the fact that one or both of the spouses' parents may have means to assist the spouse after the divorce is final, the Court cannot take that factor into consideration.

c. Remarriage

The Court may also consider whether one of the spouses in a divorce proceeding is likely to remarry when determining a fair and equitable division of assets and liabilities. The Court in Eide v. Eide, 1 Wn. App. 440 (1969) upheld the trial court's division of property and liabilities and specifically quoted the trial court as follows:

She has had no training for any particular occupation. It is true that she has been a waitress. She has been a cashier. But people who can do that kind of work are numerous, and except in times of high employment, which is now, of course, I would think that she would have more difficulty in getting that kind of a job than someone twenty or twenty-five years younger. Also, as we get older that kind of work becomes much more difficult to be on your feet all of the time. But I do think that some thought has to be given here to her security for the future and the fact that at her present age she is much less likely to remarry than she was at the age when she did marry Mr. Eide.

d. Social Security Benefits

The Court may also consider as part of a fair and equitable division of property whether a spouse will receive Social Security Benefits. Specifically, in Marriage of Zahm, 138 Wn.2d 213 (1999), the Court held that Social Security Benefits are indivisible separate property of the spouse earning the benefits. Specifically, the Zahm, *supra*, court held:

Although extrajudicial case law on this issue is scant, we conclude that federal statutes secure social security benefits as the separate indivisible property of the spouse who earned them. This approach ensures that the benefits intended for the beneficiary reach that party and that the benefits are insulated from the occasionally unpredictable fortunes of legal dispute.

The Court is also able to consider whether a spouse will lose anticipated social security benefits when fashioning a fair and equitable division of property and liabilities. The court in Patrick v. Patrick, 43 Wn.2d 139 (1953) specifically held:

After considering the rules just mentioned, we are of the opinion that an award of alimony to the appellant in the sum of fifty dollars a month would not be unreasonable, as the property award made by the trial court will hardly leave the husband in a necessitous condition. While we are not inclined to disturb the court's division of the property, we believe the court erred in failing to make some provision for reasonable alimony to the wife, since, in our opinion, appellant should be compensated in some manner for her

potential interest in the social security benefits of the husband, as to which, under Federal law, she will lose all rights by virtue of the divorce.

Therefore, the family law practitioner should be aware of the different arguments that can be made regarding expectancy and loss when considering the overall economic circumstances of the parties.

VI. Conclusion

Preparing both the case and the client for mediation is the most important thing an attorney can do to maximize the chances of settling. While some issues are particularly problematic in this economy, those issues can be resolved by creative drafting that gives the parties options not available at court. Sample agreements regarding the sale of real property and formulas for maintenance are attached.

Agreement to Hold and Sell Real Estate – Example # 1

Disposition of Residence. The residence located at _____, Seattle, Washington, shall be listed for sale five years after the date of execution of this agreement or six months after [the dog's] passing, whichever occurs first, but in no event prior to November 1, 2016, absent wife's agreement. Pending sale the parties shall own the property as tenants in common and not as joint tenants with right of survivorship.

Pending sale, the following shall apply:

1. The wife shall have the exclusive right to occupy the property beginning November 1, 2011. The husband shall remove his personal items from the house by that date, except for the husband's book collections and items of personal property, which the husband may leave in the house until it is sold.
2. The husband shall be responsible for making the mortgage payments, real estate taxes and homeowners insurance payments and shall receive the federal income tax deductions for those expenses that are paid.
3. The wife shall pay utilities
4. Landscaping costs shall be shared equally.
5. Neither party shall further encumber the property, nor use the property as collateral for any purpose.
6. The wife will do home maintenance and some of the landscaping.

The property shall be listed for sale with a multi-listing broker and shall remain listed for sale with a minimum price as the parties agree upon or such other minimum price as determined by binding arbitration pursuant to RCW 7.04A with Lawrence Besk. The parties shall be obligated to cooperate fully in the sale. Upon closing of the sale of the residence, the parties agree that the net sale proceeds will be divided as follows: 55% to the wife and 45% to the husband.

The net sale proceeds shall be defined as the gross sale proceeds minus (a) payment of the existing mortgage and any existing liens or encumbrances, (b) costs of sale, (c) repayment to either party that has spent funds to prepare the residence for sale that have been agreed to by the parties or ordered by the arbitrator (including any needed improvements or repairs), (d) closing costs, (e) any and all taxes associated with the sale and (f) any realtor fees.

In the event of any dispute arising under this section including but not limited to the occupation and use of the residence, payment of expenses, or sale of the residence, the dispute shall be decided by binding arbitration pursuant to RCW 7.04A by _____.

Agreement to Hold and Sell Real Estate – Example # 2

Real Estate To Be Held As Tenants In Common Until Sold. The parties have a community interest in the following five real properties (hereafter referred to as "the Rental Properties"): [various properties identified].

Effective upon execution of this agreement, the parties shall hold the Rental Properties as tenants in common without right of survivorship with the wife holding a 52.5% interest in each property and the husband holding a 47.5% interest in each property. Due to the depressed housing market at the time this agreement is being executed, the parties agree to hold the Rental Properties for an undetermined period of time until it is commercially reasonable to sell the properties. From the time of this agreement until December 31, 2016, the Rental Properties may only be sold by agreement of the parties (with the exception of _____, which the parties have agreed will be sold immediately), but agreement shall not be withheld unreasonably. Any dispute as to whether the any of the Rental Properties should be sold prior to January 1, 2017, shall be subject to binding arbitration. After January 1, 2017, the Rental Properties shall be listed immediately for sale upon the request of either party. The parties are not required to sell all of the Rental Properties at the same time. Prior to December 31, 2016, the parties may agree to sell some of the properties while holding the others for a longer period of time. After January 1, 2017, either party may demand that specified properties be sold without requiring that all of the properties be sold.

Pending sale, the following shall apply:

- i. The parties shall continue to lease the Rental Properties to third parties for the purpose of generating the maximum amount of rental income while still maintaining the properties in a commercially reasonable manner.
- ii. The parties shall continue to use _____, Inc. or other mutually agreed-upon property management company to manage the Rental Properties. The Husband shall continue to be the primary contact with the property management company and shall keep the wife timely informed of his communication with the property management company related to the management of the Rental Properties. Any dispute regarding the parties' relationship with the management company, including the decision to change management companies, shall be subject to binding arbitration.
- iii. Any net rental income received from the combination of all of the Rental Properties shall be divided as follows upon receipt: 52.5% to the Wife and 47.5% to the Husband. Each party shall report their share of the rental income for federal income tax purposes, and any federal income tax deductions or other financial benefits related to the ownership and management of the Rental Properties shall be divided in the same proportion as the rental income.
- iv. No repairs or improvements shall be made to the Rental Properties without the approval of both parties, such approval not to be unreasonably withheld.
- v. If the parties are required to make out-of-pocket payments of any kind related to the Rental Properties, the parties' ultimate responsibility for those payments shall be as follows: 52.5% to the Wife and 47.5% to the Husband. The Husband shall be responsible for making any out-of-pocket payments that may be required of the parties when the payments are due and shall be reimbursed "off the top" when the properties are sold. Reimbursements to the husband shall be determined on a property-by-property basis (i.e., the husband shall be reimbursed for payments related to a particular property only when that property is sold). Absent prior agreement of the Wife, the Husband shall not be compensated for any time spent in managing the Rental Properties.
- vi. Neither party shall assign, encumber, mortgage, alienate, hypothecate or otherwise affect his or her interest in the property prior to closing except as might otherwise be allowed herein or as might be mutually agreed by the parties in writing.

Once it is determined that a property is to be sold, whether by agreement of the parties or arbitration ruling prior to December 31, 2016, or by demand of either party after January 1, 2017, the following shall apply:

- i. The property to be sold shall be immediately placed on the market for sale at an agreed listing price subject to the provisions of the parties' management agreement with _____. If the sale of the property is no longer subject to the terms of the parties' management agreement with _____ or a replacement management company, the parties shall use a mutually agreed-upon listing agent. Once the property is listed for sale, the parties shall actively market the property until sold, taking all steps necessary to effectuate a prompt sale, including but not limited to reasonable adjustments of the listing price.
- ii. No offer to purchase the property shall be accepted unless approved by both Petitioner and Respondent, such approval not to be unreasonably withheld.
- iii. The Petitioner and Respondent both qualify as bona fide purchasers.
- iv. The wife shall assume responsibility for and report 52.5% of the total capital gains on the sale of each property and shall pay the taxes thereon and the husband shall assume responsibility for and report 47.5% of the total capital gains on the sale of each property and shall pay the taxes thereon. Each party shall hold the other party harmless on their portion of capital gains tax obligations, including reasonable attorney fees.
- v. Net proceeds remaining from such sale after the payment of all obligations, broker's fees, closing costs, work orders, taxes, reimbursements and assessments upon said property, etc. shall be distributed as follows: 52.5% to the Wife and 47.5% to the Husband.
- vi. The parties shall cooperate in executing escrow instructions or other documentation as needed to accomplish the provisions of this paragraph. The parties shall fully and promptly cooperate in providing each other with documentation of the tax basis in the property. In the event either party fails to timely cooperate in executing their responsibilities under this agreement, such party may be held liable for damages caused by lack of cooperation.

Any disputes between the parties herein related to joint ownership, management, or sale of the Rental Properties shall be subject to binding arbitration, and the arbitrator's power shall include, without limitation, specific performance or payment of reasonable costs or reasonable penalties for failure to comply with this agreement or with arbitration decisions.