

# WHAT JUDGES NEED TO KNOW TO DECIDE COMPLEX FINANCIAL ISSUE CASES

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## INTRODUCTION

There is really very little difference between what a Judge needs to know in a complex financial issue case vs. a simple financial issue case. In every case, a Judge needs to receive relevant admissible evidence relating to the applicable law which is presented in an understandable manner that aids the court in reaching an equitable result, to wit: the result you want. What distinguishes the complex case from the simple case is how much work you need to do to achieve that result.

## THE CHALLENGE WELL MET

As family law lawyers we work in one of the most difficult arenas of the law. Contested cases are charged with emotion, issues are usually personal and the outcome is as much bound by case law and statute as it is by the facts. Except

in one or two states, all of our cases are tried to the court and equity controls the outcome. If the old adage is true, that *there are no winners in a divorce*, then one way in which we can judge our skills is by the standard of how well we meet the challenge of the complex case.

Just as importantly, one way a Judge will rate our ability as specialists in family law is whether we, as trial lawyers, see a difficult case as a challenge to be faced and overcome or a reason to concede and run. Although it is a natural instinct to feel overwhelmed by a difficult or complex issue, it is the very act of conquering those challenges that has turned our specialty from an arena which traditionally had been scorned to one deserving of respect. Family law is an area increasingly on State Bar Exams because of its importance to the public. No other specialty requires a lawyer to be simultaneously versant in so many areas of the law while dealing with emotionally-charged situations.

## **PREPARATION**

To even begin to decide what a Judge will need to know to decide a complex case you will first have to identify the complex issue. There is no absolute definition of a complex issue. Certainly complex or difficult issues include areas that will rely on foreign law (laws from other jurisdictions), areas that will create new law, positions intended to change existing law, presenting voluminous information in a manner that a judge (and you) can keep straight, information that will cause a judge to question a witness' credibility, issues that Judges find uncomfortable deciding, or any issue that is not commonly before a court.

After you have identified that you have complicated issues, analyzed who you will be dealing with, completed your discovery, identified your witnesses and exhausted settlement opportunities, you still have much to do to prepare a complex trial issue for the court. Preparation for trial begins long before opening statements or even the pre-trial meeting with the court. A fellow AAML member once told me to always "pray for peace but prepare for war." Do not get caught unprepared because cases with complicated issues cannot be adequately presented without careful preparation.

As discussed below, prepare a theme for your case and incorporate that theme into your exhibits, the opening statement, trial memo and closing statement. Prepare your lay and expert witnesses and have a paralegal or attorney interview each potential witness. Also obtain written statements to not only map out possible testimony but also to lock in the witness' position, particularly in custody cases. Even when witnesses are identified, you must determine how their

testimony will fit into your theme and how many you can cut to avoid redundant or cumulative evidence. No matter how complex the case, Judges appreciate a crisp presentation that does not endlessly repeat the same thing.

### **EVERY CASE NEEDS A THEME**

Creativity can come in an instant or it can be birthed after a long gestation. However it comes, you need to know *when* creativity is needed and go looking for it when it is not present. Whether it is closing the door to your office or brainstorming with others, the method of taking something difficult and making it simple often requires creative inspiration. Even the best lawyers need facts and the ability to weave those facts. Lawyers need to *be creative* with the evidence they have, *“think outside the box”* to create the evidence they do not have and *rely on their own ability* more than on any experts that may be hired.

In the world of real estate they often say that the three most important things about a property are “location, location, location.” In legal cases everything needs to relate to a common “theme, theme, theme.” The theme of your case is an essential part of your strategic planning, and planning for the eventual trial requires knowledge of that theme. The theme of your case will control whether to hire an expert and which expert to use. The nature and order of your exhibits must strategically fit your theme.

Your trial memorandum also needs to clearly state your theme and the key facts that will support it. Without a theme you lose a critical opportunity to weave a common thread into every aspect of your case. Simply put, if you cannot show where you are going, then you will have a difficult time getting the Judge to join you at your destination.

### **SIMPLIFICATION**

The key to giving Judges what they need to know to decide complex and difficult financial issues is to simplify. Any lawyer can take a simple case and make it seem complicated. It is the skilled lawyer who can take the complicated matter and make it seem simple. The biggest mistake made by lawyers preparing and presenting complex financial or difficult issues is to overcomplicate the case by overloading the court with redundant testimony and stacks of documents. When the facts of a case or application of law to those facts appear complicated, then the attorney must work even harder to simplify the presentation.

In recent years there have been many high profile trials that have resulted in verdicts far different than contemplated by the moving party. A thread common

too many of those surprise verdicts was the use of overly complicated or redundant evidence. Whether it is DNA evidence, tax returns, business records or custody testimony, the necessity of keeping the trier of fact focused on the key theme of the case is critical to a successful outcome.

In a post-*Daubert* world where family law judges are increasingly challenged to be the gatekeeper of evidence that in the past has been admissible without exception, the trial lawyer's ability to simplify the complex will increasingly be the deciding factor in your ability to secure an equitable result.

There are many simplification tools that can make trials less complicated. The most significant tool in making complex issues simple for the judge is the use of Summary exhibits. KRE 1006, based on federal rule 1006, provides as follows:

“The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. A party intending to use such a summary must give timely notice of his intention to us the summary, proof of which shall be filed with the court. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.”

Almost every state has a similar statute but not all have the Kentucky requirement of advance notice to the other party. In fact this requirement is stricter than the federal rules of evidence. As noted in *Kentucky Evidence, 2002 Courtroom Manual*, p.539, KRE 1006 codifies an exception to the best evidence rule to allow summaries, abstracts and schedules of voluminous evidence to be submitted.

The first condition to be met is that the writings, recordings or photographs must be voluminous. There is no definition for the term “voluminous” so that issue is left exclusively to the discretion of the trial judge. Many judges would say that seven years of tax returns are voluminous or that any stack of bank records is voluminous. From a judge's perspective, they want you to make his or her job easier. That means that most judges will lean towards ruling that your summary or chart is summarizing voluminous evidence if it has the effect of reducing what the judge needs to review in forming an opinion. If your opponent objects to your summary or chart claiming the source documents are not voluminous, ask for a pre-trial ruling and point out that without the summaries, the court's review of the source documents would be inconvenient, confusing or time consuming. For example, if you have two years of bank records and all that is relevant to the

issue before the court is the charges made to pay for a paramour and those can be summarized on one page, which do you think a judge wants to see?

Under Kentucky law, the second test is that a proper foundation must be established for the admission of the summary. Testimony as to how the summary was created may be necessary unless a stipulation as to admissibility is reached. The summary or chart cannot contain information that is not contained in or could be computed from the original. For example, a chart that summarizes 10 years of tax returns could also include information that shows average rates of income since that average is calculated from the original. That also means that the source documents would each have to be admissible.

Establishing the admissibility of the source documents is established the same way as would be done if there had been no summary exhibit. Most often the basis is stipulation. Only rude attorneys require foundation testimony to admit business records like bank statements, tax returns, etc. As noted above, understand the attitudes of your judge and your opponent long before trial. If your opponent is known to not be cooperative in the admissibility of basic exhibits, then submit a request for admission regarding any source document where the admissibility is not stipulated. This should be done long before you have prepared your summary exhibit. The failure to admit the accuracy and admissibility of the exhibit can later be the basis of an additional award of fees and costs incurred to produce that proof.

Finally, advance notice must be provided of the intent to offer such exhibits and the originals or copies must be available to all litigants for examination or copying at any reasonable time and place. In almost any divorce case, each side will already have the same source documents which would have been exchanged in discovery.

*CAVEAT: Opposing counsel should always check summary exhibits to make sure they are supported by the source documents and that captions and other creative additions to the exhibit are not misleading, conclusory or inflammatory.<sup>1</sup>*

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<sup>1</sup> For examples and federal case cites related to summary exhibits, see Kentucky Evidence, 2002 Courtroom Manual, Weissenberger's Federal Evidence, section 1106.1-4, 2 McCormick section 240, 6 Weinstein 2<sup>nd</sup> section 1006.01-08, 5 Mueller & Kil[Patrick section 583-85 or 4 Wigmore section 1230.

- Summary Exhibits
  - “The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation...” KRE 1006
  - These allow you to take voluminous material and present it in a useable and forceful format
  - Simplify testimony through summary exhibits
  - In Kentucky, where notice of summary exhibits must be timely provided, such exhibits will have to be disclosed before trial so there is no advantage to delaying exhibit exchanges.
  
- Joint Exhibits
  - Reduces confusion over conflicting positions
  - Even if the other side does not stipulate to a joint exhibit, convince the court to use yours because it is simpler to follow (i.e. joint exhibit in asset distributions)
  
- Charts
  - One of the most visually appealing and effective summary exhibits
  - Introduce through your client, an expert or even your assistant
  
- Trial memorandum
  - Creates a roadmap for your preparation and presentation
  - Argues your case before the case begins
  - Argues your case long after the evidence is closed
  - Evens the playing field
  
- Consistent themes
  - Helps you plan a strategy
  - Allows you to weave facts and law in harmony

## **EXAMPLES OF COMPLEX FINANCIAL OR OTHER FACT ISSUES**

In many ways, the number of complex problems you may face in a divorce case is only limited by the creativity or underhandedness of the parties involved. Although complex facts and financial issues are often a natural result of the world in which we live, it is often the case that the acts or omissions of the other party, either before or during the dissolution process, are the things that have created a complicated matter from something that should have been simple.

Some factors that can increase the apparent complexity of a family law case are:

- Unusual Assets
  - Collectibles & Fine Art
  - “One-of-a-Kind” assets
  - Assets that are not actively traded or sold
- Strange fact patterns
  - Criminal charges/convictions while case is pending
  - A party being the expert regarding his own asset
- Creative accounting
  - Use of business deductions to hide personal spending
  - Shell/sham transactions
  - Business/income declines pending trial
- Tax Specific Assets
  - Retirement accounts (marginal vs. ordinary tax rates, Standard IRA vs. Roth IRA, discounts vs. speculation, present valuation)
  - Investment Property vs. Primary Residence
- Asset Values that are beyond lay knowledge
  - Closely Held Corporations
  - Minority interests in businesses (i.e. LLC’s, Corporations, partnerships and real estate)
  - Business Valuations including professional or personal service businesses
  - Marketability discounts
- Medical and Psychological issues that may be beyond lay knowledge
  - Physical, emotional or sexual abuse of children
  - Physical, emotional or sexual abuse of a spouse
  - Religions, Cultures & Cults
  - Parental Alienation
  - Drug or Alcohol Abuse
- Lack of discovery
  - Non-cooperation
  - Non-production
  - Late Production
  - Cash Businesses
  - Lack of Tax returns
- Cases where credibility will control the outcome
  - Double Books
  - Undeclared Income
  - Hidden activity

- Manipulation of assets or evidence
  - Altered Documents
  - Assets subject to mandatory buy-out clauses (i.e. family businesses and professional partnerships/corporations)
  - Cash Businesses
  - Tax returns which show no income
  - Service Businesses
  - Hidden Income
  - Manipulative Spouses
- Dissipation of assets or income
  - Insufficient documentation of marital funds spent on post-separation family expenses or loan pay-backs
  - Liquidation of marital assets to pay pendente lite support
  - Profligate spending or incursion of personal and business debts
  - Post-separation acts which had a negative effect on the other party's credit rating
  - Recreational expenses that suggest a drastic change in spending habits
  - The use of marital funds for non-business travel is usually equated to dissipation when the travel is for other than a business purpose
  - Excessive expenditure on alcoholic beverages
  - Gambling losses or debts allegedly incurred for same
  - Expenditures on a paramour
  - Support paid to relatives when there has not been a long-standing pattern of such payments
  - Loans made to persons "close" to the lender
  - Payment of one party's income taxes after separation which benefited one spouse over the other
  - Unexplained expenditures
  - Questionable investments without input from the other party
  - Increased tax liability by failing to file a joint income tax return with spouse
  - Transfers of assets with no showing of a bona fide purpose, business or otherwise
  - Transfers to trusts or children without the other party's consent or against the other party's desire
  - Encumbering marital property where there is no showing that same was made to acquire marital property or to satisfy debts

- Where one party has the means to keep a mortgage current and does not

Although clearly not exhaustive, this list demonstrates many areas where the facts of the case may require extra attorney effort to simply present the issues to the court. The more counsel directly meets these issues, the more likely the court will accept counsel's theory as to the just and equitable result.

### **TRYING THE CASE**

Once you have picked your theme, identified the complex matters and prepared your evidence to simplify the complex issues and facts, it is time to try the case.

Premark all your exhibits, make a typed exhibit list and make sufficient copies for the court record, the witness, the trial court (to make notes on), your opponent and for you. This saves time in moving copies around the courtroom and makes the court staff very grateful. This author always provides four identical notebooks of exhibits at the beginning of the trial, and the court invariably asks the opposing counsel if they will stipulate to the admissibility of all the exhibits. The exhibit list should have a place to mark that the exhibit was offered, admitted or admitted with conditions. This ensures that you accurately know your record before closing and also know which exhibits you may need to offer a second time if not previously admitted. Often I will categorize the exhibit list so the judge can easily see to which issue the facts relate.

Ensure the admissibility of exhibits. If you have not already done so, talk to opposing counsel about stipulations. Often agreements can be reached that admissibility issues will be waived but arguments as to weight will be preserved. Failing a stipulation, either file requests for admissions before trial or make sure you have the evidence and foundation to get the evidence in. This will require copies of the relevant rules of evidence, copies of case authority when necessary (or a short focused admissibility exhibit) and necessary witnesses to establish foundation or exceptions to rules of evidence such as hearsay exceptions.

Use props in your presentation. Charts, PowerPoint materials, photos, diagrams, and summaries are all useful trial aids and judges remember what they see.

Get your theme out early and often. The theme must be present in your trial memorandum and in your opening statement. It helps the judge to have you focus on your theme with statements such as "what this case is really about..." or "the real issues in dispute are..."

Remember who has the burden of proof and preserve your record. Think about what you need for an appeal throughout your trial and make sure that all evidence is in the record. If you are preserving a record, do not let a judge bully you into not presenting necessary evidence. Some judges say, "Let's move on to something else. I get it." If you have successfully made your point and your record, it is fine to shorten your presentation. On the other hand, if your client's case will be hindered, stand your ground respectfully. Sometimes a diplomatic response will be all that is necessary such as, "Your honor, I understand that you feel you have gotten the point of this testimony however, if my learned opponent should choose to appeal your decision, I would not want your decision to be disturbed if the appellate court felt the record was insufficient to convince them."

Be aware that most judges probably feel they could make the right decision after hearing opening statements and reading the trial memorandums, particularly if the lawyers clearly and honestly state their positions and the applicable law. Unnecessary or repetitive objections will not endear you to the judge and may in fact distract the judge from the very points you want to emphasize. More often than not, some attorneys will make a valid foundation objection without considering that the offering lawyer can establish the foundation by merely taking up more of the court's time. If the evidence is going to get in anyway, let it in.

Prepare a strong closing argument that revolves around your theme. If you want the judge to leave the bench remembering your theme and powerful argument, then you need to make sure that you have simplified the difficult issues in such a way that in reviewing the exhibits and your trial memorandum the judge will conclude, "She's right!"

Finally, either submit proposed written findings or a proposed judgment of dissolution that includes your findings. In the alternative, ask for leave to file proposed written findings after trial. Also submit a digital copy. Most judges are now comfortable using a computer and if you can put them in a position where their findings start with the approval or modification of findings you have provided, then you are already way ahead. It also allows you to remind the judge that the best way to prevent being overturned on appeal is to have written findings that support the fair and equitable decision you are asking the judge to make.

## **CONCLUSION**

The success of making complicated financial and fact issues seem simple for the judge begins with the lawyer's decision to seize upon the important theme of the

case that will enable him or her to develop a strategy. The strategy will encompass assembling the necessary evidence, preparing a convincing trial memorandum and creating demonstrative and summary exhibits that make a judge see the simplicity of your solution. No judge ever complained about a lawyer making his or her job easier.

○ FACT PATTERN 1 (no current wage history):

The parties had been in a long-term marriage of 26 years. The Wife had been a housewife throughout the last 23 years of marriage. The Husband had careers as a teacher, claims adjuster, mason, business manager & masonry business owner. He had not been formally employed for over 7 years prior to trial yet during that time provided a comfortable lifestyle for his family by investing in the stock market and developing two properties into successful commercial office buildings. In the 10 years prior to trial his income had ranged as high as \$500,000 per year. At the time of trial he was at his third day at work as a \$10/hr. flunkey at a brokerage firm.

The Husband's position was that the parties should equally divide the assets by equally dividing the income producing assets that would leave the parties with similar assets and income. The Wife's position was that the assets should be equally divided but giving her both income producing assets claiming that Husband's earning capacity was so much greater than Wife's that he had the potential to recoup assets and income in a way she could not.

The complicating factors in the case were the states case law suggesting that spousal support (alimony) could not be awarded if the present income could not support the obligation. Arguing earning capacity to justify a support award that exceeded his current income was likely to either fail or be reversed on appeal. The only logical solution for Wife was to seek both properties and waive spousal support.

In this was the *theme* was critical to the planning and presentation. The theme was that the facts would normally justify permanent and significant spousal support but that the Wife needed security more than support and security could only be provided through award of both commercial properties. This allowed the Wife to argue the spousal support elements and use those spousal support factors to also enhance the property award argument.

Strategy and Simplification:

- ✓ Trial memorandum that clearly states the theme
- ✓ Asset Liability Summary Exhibit which shows assets can be divided equally giving Wife the income properties
- ✓ Summary of 10 years tax returns to show income potential and "risk taker" attitude of Husband vs. Wife's conservatism

### **Fact Pattern # 1 – Trial Memo introduction Excerpt**

This case involves a 26-year marriage where Wife has been a full-time homemaker and parent for the past 23 years.

The significant issues for the court are spousal support and property division that are complicated by the factual history of this case. Husband was a teacher for Salem public schools when the parties married in 1976. He left that profession in 1978 to go to work for Wife's father's well-established business, XYZ's Masonry. Adding to his skills as a schoolteacher, Husband became a skilled bricklayer, and then added management skills while working in Wife's family's business. Wife's father then made arrangements so that Husband and Wife could purchase the family business. Husband then ran the family masonry business, earning a good income, until 1994 when the parties' business was sold.

Husband began his third (or fourth) career as an investor and developer following the sale of the family masonry business. Husband invested the proceeds from the sale. From 1994 to 2002, husband was self-employed in investing and trading of stocks. This generated additional income and also made it possible for Husband to expand his skills by developing real property.

Husband built two office buildings that are now rented and generating income. Those properties are central to the existing settlement dispute.

Husband's skills and earning capacity as a teacher, bricklayer, manager, investor and developer have been the basis of the support of the family for 26 years and allowed the parties a very comfortable lifestyle. In comparison to husband's significant training, work experience, and employment skills, wife has no marketable skills. She is a skilled mother and homemaker but that did not leave her with the many talents and skills to earn an income like Husband.

- In any other long-term marriage where there is such a disparity in earnings history, earning capacity and employment skills, the court would clearly award indefinite support.

- In any other long-term marriage where the Wife has spent 22 years as a "stay at home" homemaker raising three children, performing all the household duties and freeing up Husband to pursue his occupational pursuits, the court would award indefinite support.

- In any other long-term marriage where the statutory criteria are so lopsided in favor of support, the court would award indefinite spousal support.

Counsel recognizes that the current problem is that Husband has positioned himself to claim that he is unable to pay the necessary spousal support and that they should each leave the marriage as if they had identical earning abilities. Husband has elected to not seek employment as a teacher, manager, construction manager or mason but rather has just recently sought an entry-level position. A position at a rate of pay at which he, but for the divorce, "wouldn't even walk across the street."

Husband has created a situation where Wife and the court face a *Hobson's choice* where support should be awarded based on past earning capacity although there does not appear to be the current earnings from which they can be paid. The alternative is for the court to award Wife the two income producing assets such that she is not dependent on Husband for her support and which leaves Husband to pursue his many talents unencumbered by a support obligation. What Wife needs most in this case is security and this proposal provides that. For 26 years Wife has relied on Husband to manage all the assets and for the families support, and if she is to be thrown into the world, free of the safety of the marital cocoon, then she needs the security and dependability of a steady stream of income.

Although Wife wishes to stay in the family home until the completion of the school year, she does not want to be awarded the home and if compelled to take it she would sell it. Wife needs the income from the properties more than have equity tied up in a residence. Further, Husband is the one who has the documented ability to make money with equity. For example, Husband could borrow against the home and build another commercial building whereas Wife will probably have to hire a property manager just to help manage the buildings she seeks.

The spousal and property analysis follow but the above summary is the crux of this case. Wife simply cannot survive without the award of both income-producing properties or in the alternative substantial indefinite support.

- FACT PATTERN 2 (unique collectible asset and lack of records):

In this case the largest asset in the marriage was a collection of “turn of the century” postcards. Husband was the internationally recognized valuation expert on a large part of his collection. There were few records and no tax filings. Husband himself valued his collection at \$70,000-\$80,000 and then hired an “expert” value who valued them at \$110,000. However, Husband had insured and inventoried the collection.

It was Wife’s stated desire to retain ownership of her home and keep her retirement account from her employment. The objective of the case was to convince the court to assign a high enough value to the collection such that it would offset the value of Wife’s desired assets without dividing the collection.

From the outset, the theme of the case was that Husband was “the expert” and any admissions against interest made by husband were more reliable than any third party experts’ subjective opinion. The difficulty facing counsel was how to take those admissions and make them central to the valuation process despite the “9-11” effect on the economy. Counsel needed to bind to any admissions.

Strategy and Simplification:

- ✓ Determine the theme at the outset
  - Husband’s \$500,000 and other admissions through his insurance inventory is a critical link.
- ✓ Depose Husband at intervals to develop the these without revealing
  - Commit Husband to documentation provided the insurance co.
  - Ignoring Husband’s explanations and let him talk
  - Discover names of buyers and sellers of his collectible cards
  - Commit Husband to the lack of records & present inventory
  - Infer by tone and questions that the purpose of deposition was to show hidden cards or income
- ✓ Obtain other Valuation records
  - Issuing “Records Subpoenas” to Husband’s customers
  - Subpoena Insurance Company records
- ✓ Establish Valuations
  - Cross reference documented sale prices to inventory prices
  - Depose Husband to acknowledge subpoenaed sales records
- ✓ Simplify Presentation
  - Prepare Trial Memo summarizing relationship between admissions and valuation position
  - Create summary exhibit of data compiled
  - Create Valuation exhibit based on summaries
  - Plan key expert cross examination bullets

## FACT PATTERN #2 - Trial Memorandum Excerpts

1. The Largest Marital Asset is Husband's Collectible Inventory/Retirement. The largest asset of this marriage is Husband's collection/retirement of turn of the century postcards, framed art, original art and china, all of which are quite unique and are traded worldwide. Husband's "business" for almost the past decade has been buying and selling collectible postcards, earning a purported income while at the same time increasing the net value of his collection. Husband made representations to Wife and others that his "collections" value exceeded all their other assets combined. As is typical in divorce cases, he only decided that this asset was worth significantly less when he was faced with the breakdown of the marriage.
  
2. In this Case the Husband is the "Expert" and He has admitted its Value. This case is also unusual in that Husband is "the expert" in valuing his collection. He has represented himself as "the expert" in this area to his customers, his insurance company and even the US Postal Service. *Even the reference guide chapters for some artists he collects rely almost exclusively on his determination of fair Market Value in published valuation guides.* When husband held himself and his collection value out to the federal government he asserted that:
  - a) The valuations he had made to his insurance company were "actual value;"
  - b) That the reliance of State Farm Insurance Co. and it's agent was further evidence that the inventory was FMV;
  - c) That all values were verified from value guides and books;
  - d) That he was "...well known in the 'postcard or Deltiologist field' and regarded as an expert in many areas by Dealers and other collectors;"
  - e) That his prices, at the time of claim, reflected "actual sales;" and
  - f) That the "actual book values are slightly higher than actual sales prices but are within 5-10% normal variance range..."
  
3. There are No Unbiased Independent Experts. There is no one individual who is qualified to give a qualified, independent and unbiased value of his inventory collection/retirement. The purported "experts" are either customers of Husband or Husband is their customer. It is a close community. Husband also declared that half his collection was irreplaceable at nearly any price and that **"ten different dealers would give you ten different appraisals also."**
  
4. The Collection is Not an Asset that can be divided. Due to the unique nature of this asset and Husband's unique qualifications and experience, this asset cannot be divided between the parties. Only Husband is capable of obtaining the maximum dollar for each card. It is Husband that has the knowledge of buyers, personal relationships with buyers and sellers, a reputation in the field, intimate knowledge of the business and the collection/retirement and it is Husband, and only Husband, who has conducted a business of buying and selling these cards. Husband even admits in deposition that Wife is not capable of making the kinds of sales he can. The best example of Husband's unique knowledge and skill is his sales of post separation purchases.

Husband himself best stated why the court should not divide the collection by writing Wife on July 13, 2001 that "my lawyer wants to give you half of all the art and PC's because he knows you wouldn't know what to do with them."

5. Husband Destroyed Records and attempted to Destroy other records. Not only did Husband attempt to hide his collection in locations away from the family home (i.e. neighbors and relatives) but Husband tried to destroy all written records of his inventory such that no one, other than him, would know what he claimed to possess or what values he attributed to his collection. Husband also destroyed the only means of verifying his claimed sales and the proceeds received for those sales. Husband also attempted to dispose of all inventory records. It was only after the insurance company refused that Husband was willing to provide an inventory.

Husband has been unable to document or testify about sales. When asked how much he had made from selling cards in any year from 1994 to 2000 he was unable to give any figure, he just knew he made "enough."

6. Husband has the Burden of Proof.

All of these unique issues require the court to approach a solution to this matter that is just and equitable and *shifts the burden to Husband* to provide documentation of any "post-June 2000 inventory" sales (less than one year prior to the TRO). Failing that, Husband must be bound by the June 2000 inventory created by Husband to be relied upon by others. Only Husband had the ability to record the sales. Only Husband knows whom he sold to. Only Husband has a relationship with the buyers. Only Husband knows what "on approval" submissions turned into sales. And only Husband can provide the reliable documentary proof of such sales yet he has destroyed the ability to do so.

## **I. THE COURT SHOULD VALUE THE PARTIES' CARD AND ART COLLECTION BASED UPON HISTORICAL SALES AND HUSBAND'S REPRESENTATIONS OF VALUE AND NOT A PURPORTED APPRAISAL**

### **A. Husband made representations of value.**

It is well settled law that admissions made against interest are significant evidence and can outweigh any other proffered evidence. In the case of valuation of unique marital assets, admissions made prior to the breakdown of the marriage are particularly reliable as to an individual's true belief as to value. Financial statements, insurance records, appraisals, statements to governmental agencies, statements to friends, and statements made in the presence of his attorney all are inherently reliable indicators in assessing value. This is particularly true when a party's opinion changes dramatically, as in this case, after the breakdown of the marriage.

Husband went to great lengths to establish a value for collection. These values were attested to with extensive representations that these were true fair market values and were not inflated. Husband made the following representations to third parties:

#### **1. Husband's Admission in the Presence of Prior Counsel.**

On or about July 10, 2001, Barbara Kautto, a legal assistant to Wife's counsel, was on the phone with Husband's attorney asking questions about the postcard and art collection. At the time, Husband was in the attorney's office. Unable to answer the questions, Husband's counsel put Husband on the telephone to answer questions. In the ensuing conversation Husband asserted that his collection, not counting his uninventoried revolving stock, was no longer worth \$552,000 but instead now had an inventory value of \$432,000 due to sales of \$118,000 in cards. He then added that the retail value of the postcards was \$400,000. This admission of value was made at a time when Husband was court ordered not to sell any cards.

## 2. Husband's Representations to his Insurance Company

Due to the unique nature of this asset and its high value, Husband elected to have the collection insured with State Farm Insurance Co. beginning in 1996. There were many significant and key representations made by Husband to obtain this coverage. They include the following:

- A) It was a complete inventory of the collection of postcards, art prints and original works (excluding revolving stock).
- B) To estimate the prices he relied on catalogues, libraries, 20 years of experience, buying and selling through "shows, private treaty and auctions," other dealer opinions and "actual sales of similar material or actual sales of similar material; or the actual material listed.
- C) "Values stated herein are actual current values and have not been inflated, but represent the actual market value based on all available information."
- D) "I, Gordon L. Gesner am qualified to make this appraisal as my experience is documented and known throughout the postcard (deltiology) field. ...My prices for "Philip Boileau" material is published in #3 different volumes of postcard price guides..."
- E) In June of 1998 Husband provided written updates to State Farm providing for 10% increases in value in 1997 and specific increases in value in 1998. In 1998, some values were increased and others were not. There was no pattern to the increases. The overall increase in value placed the total collection value at **\$428,412** that was the value he wanted through June of 1999.
- F) In June of 2000, Husband updated his inventory again stating that he intended to sell his "Mucha" art nouveau which had been inventoried at \$42,881 and that it should be removed from inventory. He also updated values of the remaining collection and listed additions to his collection. At that time he represented the value of his collection at **\$552,517**. The itemization of these additions is found in exhibit 6 pages 7-23. Of particular note is his addition of prints and china found on page 19.

Husband cannot declare that his values are not inflated and represent actual Fair Market value and then retract the statement for purposes of his divorce. The insurance company relied upon his representations in insuring this collection. The company relied upon him in accepting his value in case of loss. It chose a rate structure based upon these representations at that value. **These extensive records were independent information available as to value and then, as noted above, Husband attempted to retrieve from the company ALL their copies of the inventories, even those held by State Farm in other locations.**

When questioned in his deposition about the value he gave to the insurance company he confirmed that his representations of value were based upon actual sales, catalogs, auctions and his own experience in buying and selling cards. He went further to state that he intended that the insurance company rely upon his representations.

By Husband's own admission he represented a value of his collection to the insurance company that which he based upon actual sales, the market and his own experience. It was not until the divorce began that he has dramatically changed his position.

## 3. Representations to Governmental Agencies Show the Reliability of Inventoried Valuations

Husband also made a claim with the federal government on September 9, 1998 asserting a value for a portion of his collection that he asserted had been lost in the mail. Under threat of criminal penalty he used his insurance inventory valuation to support his claim of value. He used the insurance valuation and the increased insurance valuation to buttress his claim.

Although those representations were not of his entire collection, they show another admission; this time to the U.S. Government, that he believed the FMV of his collection was accurately reflected in his insurance inventory. More importantly it provides another independent way of testing the validity of his “insurance inventory” valuations. When making a claim he did not discount the values from his inventory values in any way.

...  
This situation is similar in that Husband made a representation of a value to the Postal Service (consistent with his inventory but higher than his current position) and then wants a more favorable value now at the time of divorce. The court should follow the reasoning in Budge and disregard husband’s argument finding that the better evidence of value is found in the pre-divorce statements made by husband.

**B. Husband’s bias, bad faith and motivation**

In this analysis the court cannot ignore that Husband attempted to deny Wife the ability to even obtain the prior inventories and valuations he had prepared for his insurance company. On May 17, 2001 husband telephoned the insurance agent asking for the insurance companies’ copy of the inventory of his collection. Then on May 21, 2001 he wrote the company stating, in part “I’m also requesting the return of all copies of my postcards inventory whether in your possession or your company’s possession.” Husband’s explanation for his demand of the return of those records is not credible. There is only one plausible reason and that is he demanded return of all copies due to a pending divorce.

Based on these facts the court cannot find Husband credible in his claim that all cards were presented for valuation. Nor can the court rely on Husband’s valuation witness, who at best has an opinion as to value of only what he saw, and not even the fine art.

In arriving at a just property division, the court requires full disclosure of all assets by the parties. ORS 107.105(1)(f). Husband must fully disclose to the court and wife all of the items in the postcard and “fine art” collection. The inconsistency between the June 2000 inventory and his current claimed inventory, combined with his acts and omissions, establishes by preponderance that he has not fully disclosed those items to wife or to the court. Though this is an inference, it is a reliable one based upon all the evidence and the fact that the lack of direct evidence is solely the result of Husband’s own acts and omissions.

Before the breakdown of the marriage Husband prepared detailed documented records of his collections that he dutifully submitted to his insurance company. As late as June of 2000 Husband had represented the current state of his collection and it’s value of \$552,517. Less than a year later the marriage broke down and Husband has intentionally destroyed his receipt books and records of sale. Husband claims to have virtually no evidence that can document the postcards or art that he claims left his collection since his June 2000 inventory. He has moved his cards from the home to multiple locations, destroyed records; his violated the existing court orders and even actively tried to remove all records of his collection inventory, *supra*. As a result the court should place the burden of Husband to prove the sale of any card missing from the June 2000 inventory list.

Husband’s position is akin to a business owner in a divorce who has consistently had income at a very high level yet at the time of divorce contends that the business is down and the expenses are up but there is no documentation to verify or explain the claim.

The court should impose upon husband the burden of proving what items he has sold, to whom and for how much. It should not be and cannot be incumbent upon wife, who has not had control over the assets, to be required to ferret out husband’s transactions and prove his post-separation activities.

**B. Historical sales data has been used by Wife in her valuation.**

In an attempt to be objective and equitable, Wife has looked at samples of actual sales records to develop a methodology for discounting the inventory value established by Husband. Husband's acts and omissions have made it exceedingly difficult to accomplish this task. Notwithstanding this difficulty Wife has made a review of documental sales of high and low priced items to establish such a methodology.

With that sampling Wife was able to establish that of the inventoried items sold for a price under \$300, the actual sales was discounted from the inventory value. She was also able to establish that for sales of inventoried items which sold for \$300 or greater, the actual sales price was also discounted from the inventory valuation but not near as much (i.e sales were over 80% of inventoried value). Wife was also able to trace some actual sales that were not traced to inventories.

With this objective method of analyzing the inventory list Wife was able to go through the inventory listing and apply these percentages to the actual inventory which Husband held out to third parties in June of 2000, make adjustments for actual documented sales and make adjustments for historical inventory valuation discounts. From that Wife was able to establish an objective valuation of the collection, relying on actual sales by Husband and representations made by Husband as to inventory valuations.

Evidence of recent sales has always been widely accepted by Oregon courts as good evidence of value and the use of sales data from before the TRO is helpful. See Madden and Madden, 114 Or App 319, 323, 836 P2d 1349 (1992) (a bona fide offer to purchase property is evidence of value in a dissolution proceeding); See also generally Campbell v. Karb, 303 Or 592, 740 P2d 750 (1987) (evidence of price fixed by two parties dealing at arm's length is generally readily accepted as establishing fair market value).

### **Conclusion**

The admissions and affirmative representations of value that Husband made to State Farm Insurance, the US Postal Service, Barbara Kautto and others all are significant evidence as to the reliability of the valuations used by Husband in his valuation inventory of June 2000.

The actual sales sampling that Wife has been able to document provides a rational, equitable and unbiased approach to adjusting Husband's inventory value for purposes of this divorce.

The value of \$370,496 is reasonable based on the evidence. A simple alternative is for the court to take Mr. Gesner's claim of \$432,000 value made last July, discount it by the average sales discount of 74%, subtract the post July 2001 sales and the net FMV would be \$308,734.

### **FACT PATTERN #3 -(Imputed Income)**

The business owner is able to spend, during the marriage, as a high income spouse yet at the time of divorce is able to shoe tax returns with income ranging from \$27,000-\$52,000 per year. The issue is to properly value the business and support capability by challenging the credibility of the tax returns. The goal is to get an equitable distribution of the assets and a fair level of support.

The theme of the case is that Husband uses the business as a piggy bank and clever accounting cannot hide true income.

Caveat: The risk of any such analysis is that when the parties have filed joint tax returns, the court may feel ethically bound to notify the IRS of the tax fraud thereby causing grief to both parties. In one case this counsel successfully proved imputed income and the dishonest spouse rushed to the IRS to declare that he just discovered that his spouse had been fraudulent (it harmed both).

#### **Strategy and Simplification:**

- ✓ Hire a forensic CPA to analyze deductions
  - Self dealing (i.e. consulting fees)
  - Fake W-2 wages
  - Payments to paramour
  - Personal credit charges to business
  - Disallowance of excess corporate vehicles
  - Personal utilities charged to business
  - “under the table” earnings
  - Purchases charged to inventory
- ✓ Depositions and cross checking to undermine business purpose
- ✓ Impute all improper deductions to income stream
- ✓ Trial memo raising fault in the guise of fact

## SAMPLE EXHIBIT OF IMPUTED INCOME

### ABC Hardware Income

	2001	2000	1999	1998
Gross sales	\$1,227,519	\$1,242,098	\$1,260,301	\$1,110,958
Cost of goods sold	698,819	766,484	754,558	660,978
<b>Gross profit</b>	<b>528,700</b>	<b>475,614</b>	<b>505,743</b>	<b>449,980</b>
Other income	2,530	7,590	6,210	0
<b>Total income</b>	<b>531,230</b>	<b>483,204</b>	<b>511,953</b>	<b>449,980</b>
Salaries and wages	189,759	194,563	167,213	155,927
Taxes and licenses	24,153	23,467	13,656	24,403
Depreciation	35,853	31,373	21,635	15,500
Insurance	83,552	61,047	59,717	50,076
Consulting fees	32,500	27,161	70,715	72,000
Freight	23,662	24,498	22,515	22,283
Other expenses	89,235	65,638	114,923	81,834
<b>Total expenses</b>	<b>478,714</b>	<b>427,747</b>	<b>470,374</b>	<b>422,023</b>
<b>Net claimed income before taxes</b>	<b>52,516</b>	<b>55,457</b>	<b>41,579</b>	<b>27,957</b>
Add back:				
Consulting fees	32,500	27,161	70,715	72,000
Salaries on Form W-2	14,300	14,300	14,575	14,300
Cash payments to Anne Wilder	5,200	5,200	5,200	5,200
Personal credit card charges	34,038	31,962	19,378	20,000
expensed				
Disallowance of six of eight vehicles	20,700	19,500	18,300	18,300
Personal utilities paid by corp.	4,800	4,800	4,800	4,800
Estimated unreported cash sales	30,000	30,000	30,000	30,000
Vehicle charged to inventory purchases	0	0	18,896	0
<b>Total recomputed income</b>	<b>\$194,054</b>	<b>\$188,380</b>	<b>\$223,443</b>	<b>\$192,557</b>
Cash balance per tax return	\$722,765	\$678,768	\$630,776	\$614,780

- FACT PATTERN #4 (Dissipation of Assets and Income:

In this case Husband and Wife had Husbands' parents business. 6 months later Husband decides to divorce Wife and he conspires with his parents and their corporate counsel to dispose of marital assets and income by giving back the business and then putting husband in a managerial position that paid him less than ¼ his prior ownership income. They also took an unrecorded home the parent had gifted and tried to call it a rental.

The theme of the case was that the Husband, in concert with his parents, intentionally dissipated marital assets and marital income for purposes of cheating the Wife and the court should remedy those acts in the divorce. In essence, fault in a no-fault state.

Strategy and Simplification:

- ✓ Recognize from the outset that the case involved conspiracy and dissipation and aggressively attack all parties
  - Research dissipation law
  - Depose everyone
- ✓ Bring Civil Action against co-conspirators
  - Consolidate for trial
  - Fraudulent transfer
- ✓ Join all necessary parties
  - Parents and corporation
- ✓ Utilize forensic accountant to analyze “cooked books”
- ✓ Write proposed findings as investigation progresses and plan trial around findings
- ✓ Plan case like fault divorce
- ✓ Create demonstrative summary exhibits to show:
  - Payroll changes
  - Loan changes
  - Salary and dividend changes
  - Stockholder equity changes
- ✓ Draft Trial memorandum that summarizes issues and asks questions in a manner that suggests the answer
- ✓ Write findings that are appeal proof

## FACT PATTERN #4 - TRIAL MEMORANDUM INTRODUCTION

This case involves the dissolution of a 16-year marriage complicated by serious acts of misconduct, "dissipation of marital assets" and fraud perpetrated by the Husband with the aid of his family, the Third-Party Respondents.

Wife is 33 years old and works as a waitress. Husband is 41 and until the filing of the divorce was owner of the family roofing business, known as In-Law Roofing Co. There are three children of the marriage aged 15, 12, and 10. Custody in the Wife is not contested.

Third-party Respondents are Husband's parents and currently are the absentee owners of In-Law Roofing Co. Prior to the parties' separation, Husband was made an officer of In-Law Roofing. He also ran the business. In the summer of 1993, the parents retired to eastern Oregon. Thereafter they sold In-Law Roofing, some land and a trailer to Husband and approximately six months before the divorce was filed the final sale paperwork was completed. Thereafter, Husband was the owner of In-Law Roofing subject to the terms of the contract sale agreement.

The parties also owned a home that was titled in the parents' names due to a tax lien against the parties. The parents loaned the parties the down payment, and the parties made the payments, made substantial improvements and even made extra principal payments. The parents' loan was similar to the help they had provided to another child.

Shortly before Husband filed for divorce he consulted his parents. They jointly agreed to mark the sale agreement "void" or "cancelled" effectively transferring ownership of the business back to his parents. *In essence, they attempted to "unsell" the business.* In addition, Husband had his mother send Wife a "rental" agreement for the parties' home that was never signed.

On or about October 28, 1995, Wife filed her first amended response that alleged claims of fraud, constructive trust, fraudulent transfer and dissolution claims of dissipation of income and assets.

On March 17, 1995, subsequent to depositions being completed and new counsel being obtained by the Third Party Respondents, a settlement between Wife and Third-Party Respondents was reached wherein the parents would drop any claim of interest in the family residence (*i.e. it would now be considered a marital asset without claim of interest by them*). Wife would not pursue her fraud claim against Mrs. In-Law nor would she attempt to set aside the transfer of title to the business.

However, as a specific condition to the settlement, Wife retained the right to pursue all claims against Husband (including pursuing a property and support award which recognized the sale of the business to Husband and the acts taken subsequent thereto). In addition, the court would retain jurisdiction over all parties and the home to determine the title and the validity, amount and terms of any debt owing to the Third Party Respondents (*i.e. such as the terms for paying the home down payment, loans from the corporation to the parties and alleged loans made by the corporation to Husband*).

This agreement is contained in a letter dated March 17, 1995, and executed by counsel for Wife and Third Party Respondents, a copy of which is attached hereto as Exhibit "162".

Husband opposed this settlement that placed the family home clearly in the marital asset category.

To equitably resolve these issues, the Court will need to make specific findings on a number of key matters. The key issues are as follows:

- 1) *In view of the fraudulent transfer of the business, and its income potential, what is Petitioner's earning capacity for purposes of calculating support?*
- 2) *How do the fraudulent acts of dissipating and/or transferring of assets by Petitioner and Third-party Respondents affect how the remaining assets and liabilities should be divided?*
- 3) *Should the Court consider the Husband's participation in the fraud in making a "long half" distribution to the Wife?*
- 4) *What is the proper duration and amount of spousal and child support to be awarded Wife in view of all the facts of this case?*
- 5) *Should Wife be awarded all her attorney fees, expert fees, and costs in this matter, particularly in view of the actions taken by Husband in concert with his family?*

Wife sets forth in the attached Exhibit "2" the proposed findings and judgment orders sought.

### **SAMPLE DETAILED JUDGMENT FINDINGS**

3.2. At the time of the purchase of the family home located at \_\_\_\_\_, Albany, Oregon 97321 there was an agreement that the home was being purchased for Petitioner and Respondent (hereafter referred to as "the parties"), that the down payment was being loaned at no interest, and that the down payment could be paid back when the parties were able.

3.3. Third Party Respondent In-Laws and Respondent have entered into a settlement whereby the In-Laws waive any claim of title in the property and will transfer their interest to the parties pursuant to the direction of this court.

3.4. As part of their settlement, the In-Laws and Respondent have not agreed on the terms of repayment of the down payment, and the Court retains jurisdiction to resolve that issue and the method of assigning the loan.

3.5. The Petitioner conspired with Third Party Respondent In-Laws to wrongfully dissipate marital assets by removing the marital home from consideration in the marital estate. (See findings 6 and 9 infra. As part of that conspiracy, Petitioner denied the parties' claim of interest and called the property a rental when he: (a) had always considered it the parties'; (b) had made substantial improvements under a claim of ownership; (c) contracted for water under a claim of ownership; (d) made extra principal payments under a claim of ownership; and (e) always held the property out to others as belonging to the parties. The Petitioner further told Respondent that the only way she would share in the equity in the home was if she agreed to his terms in which case his parents would tender title. Otherwise, they would jointly put her "out on the street." The court makes this finding as it bears on the award of attorney fees only.

3.6. That on or about September 30, 1993, Third Parties Jim In-Law and SUSAN In-Law entered into a legitimate sale to Petitioner of the business known as In-Law Roofing.

3.7. The Petitioner and Third Party Respondents entered into an oral agreement while the parties still cohabitated, which was later codified in writing that sold Third Party Respondent In-Law Roofing, land and a mobile home (office) to Petitioner. It was the intent of the Third Parties that said sale was equitably made to the parties and was for the benefit of both parties.

3.8. Prior to said sale, Petitioner ran In-Law Roofing, and at the time of the actual sale the Third Party In-Laws had already moved to Eastern Oregon from the Albany area.

3.9. In anticipation of Petitioner filing for dissolution and Respondent filing a claim against these assets, the Petitioner and the Third Parties conspired to retroactively cancel the written agreement regarding the In-Law Roofing sale. At that time, the Petitioner had fully complied with each and every term of the sale agreement. At that time, the Third Party Respondents In-Law had not sent any letter specifying any item of default. At that time, there was no legal reason by which the sale agreement could have been terminated. At that time there was no rational or logical business reason for Petitioner to return the business and terminate the sale.

3.10. The cancellation of the sale and transfer back to the Third Parties of the corporate and other sale assets was an attempt by the Third Parties and Petitioner to dissipate and manipulate marital assets which would have the effect of removing them from the jurisdiction of this Court.

3.11. The acts of the Petitioner and the Third Party Respondents resulted in the wrongful dissipation of marital assets in that the re-transfer by Petitioner of the business was without consideration, the transfer was made to hinder the potential claim of the Respondent in the dissolution suit, the transfer was to an insider and the threat of divorce was pending at the time of the reconveyance of the business to the Third Party Respondents.

3.11.1 The Court notes in particular the testimony of the corporation's attorney in making finding 3.11 in that he testified that:

- a. termination of the sale of the business was, in part, a way of limiting husband's exposure on spousal and child support in the divorce; and
- b. the possibility that wife would share in obtaining part of the business was a factor in advising the In-Laws about unselling the business; and
- c. the value of the business and what wife would get in the divorce was another consideration that he and the In-Laws discussed in making the sale; and
- d. he was concerned about how much husband would have to pay as spousal and child support in light of the dividends.

3.12. Petitioner served in the role as President and manager of In-Law Roofing in the past and continues to do so.

3.13. The net value of In-Law Roofing (and the other contract sale items) at the time of the fraudulent conveyance to the Third Party In-Laws was \$87,938. It is just and equitable to charge Petitioner with the value of those transferred assets.

3.14. In-Law Roofing had the ability to produce substantial income to its officers and manager. In 1992 it paid its officers \$106,843. In 1993 it paid its officers and Petitioner over \$140,000. The contract sale terms written in 1994 allowed for combined annual payments to Petitioner of \$35,000 in salary, \$800 per month in lease payments, and \$85,000 in dividends for a combined income in excess of \$120,000 per year. During Petitioner's period of ownership, he paid himself wages of \$2,483 per month and \$5,000 per month in dividends for a combined gross monthly income of \$7,483 per month or approximately \$90,000 per year.

3.15. The Court specifically rejects the Petitioner's claim that the combined gross income he earned while owner of In-Law Roofing cannot be considered in determining his income capacity for purposes of setting support.

3.16. Petitioner will not be permitted to legally benefit by his actions and his acquiescence in concert with the Third Parties to manipulate the Petitioner's income by retroactively terminating his contractual right to receive in excess of \$120,000 per year in income.

4. The Court finds that for purposes of calculating child and spousal support the Petitioner possesses the capacity to earn \$6,000 per month and the Respondent possesses the capacity to earn \$1,100 per month. Counsel should calculate child support based upon these findings, including the spousal support award, pursuant to the Oregon Child Support Guidelines.

5. Respondent's current earning capacity is impaired due to her extended absence from full time work outside the home and the parties' desire for her to fulfill the role of homemaker. The court finds that based upon her good health, age and possession of a real estate license, Respondent's earning capacity will increase over time and that within seven years wife's earning capacity should be high enough to insure that she can afford a standard of living not disproportionate to what she enjoyed while married. Accordingly spousal support should be \$1000 per month for two years; reducing to \$800 per month of two years; reducing to \$650 per month for two years; and reducing to \$500 per month the final year.

6. The actions of Petitioner, in concert with the Third Parties, have caused Respondent to go to extraordinary lengths to establish the true marital assets, debts and income. As a result of those actions, Respondent has incurred substantial attorney's fees and costs that should not have been necessary. Those actions resulted in the need for thorough and complicated analysis, research, discovery, preparation, and evidence presentation which in and of themselves resulted in the Third Parties' decision, only after the case was approximately 1 year old, to relinquish a claim of interest in the family home. Based on the actions of the Petitioner, in concert with the Third Parties, the Court awards a judgment against Petitioner for all of Respondents' attorney's fees, costs, expert fees and discovery fees. Respondent's counsel shall submit an affidavit pursuant to ORCP 68 regarding his Rule 68 attorney fees and costs and a supplemental accounting of all other non ORCP 68 charges attributable to this case. The non-ORCP 68 charges will be assessed as part of the property division.

7. This marriage should be dissolved.

8. The family home is awarded to Respondent subject to the mortgage and the debt owed to Third Party Respondents for the down payment. The Petitioner's interest in the business is awarded to the Petitioner.

### **FACT PATTERN #5 (Custody with drug and abuse issues):**

In this case the Father and mother had both abused methamphetamines. Mother got clean first and had allegedly stayed clean. Mother then upped the ante by making allegations of physical abuse of her and sexual abuse of a child. This had the effect of her enlisting as the county's "women's crisis center" and the state children's protective services (CSD) as allies which also limited fathers contact to once weekly supervised visits at a state offices. There was a pending criminal investigation and a pending independent custody evaluation. The complexity of the case was how to overcome the presumptions and biases that arose from the above facts so that Husband could have a fair shot at proving he was the better parent.

The Theme for the case was that despite the above, Dad is had been the primary caretaker of the children and that Mom lacked credibility.

#### Strategy and Simplification:

- ✓ Turn Accusations into an advantage
  - Stress exaggeration
  - Find inconsistencies in Wife's claims
  - Encourage Wife's embellishment to undermine her credibility with DA and custody investigator
  - Encourage Husband to expose all his own faults to the custody evaluator
- ✓ Locate other recovering drug users from Wife's path and use their recovery as a means to obtain their cooperation to do what's right. (i.e. convincing a "12 step" recovering drug abuser that telling the truth was part of their own recovery)
- ✓ Plan cross-examination of Domestic Violence experts by exposing their own bias
  - Exaggerations of domestic control (i.e. false claims of withholding clothing)
  - Impeachment of Domestic violence experts
  - Show Husband as one controlled
- ✓ Establishing that Husband had been the primary caretaker
  - Witnesses from family and care providers
  - Witnesses to Wife's activities outside the home
- ✓ Focus on positives of Husband rather than negatives of Wife
- ✓ Let Wife impeach herself