

Chapter 6 DIVISION OF PROPERTY

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PART I: SCOPE AND OVERVIEW

DIVISION OF PROPERTY

§ 6.01 Scope

This chapter covers:

- The statutory concept of equitable distribution.
- The statutory criteria in determining property divisions.
- The general prohibition against making *pendente lite* property orders.
- Definitions of what constitutes property in Connecticut.
- Different types of property.
- Methods of valuing and allocating specific property.
- Tax considerations when dividing assets.

§ 6.02 Objective and Strategy

The chapter provides the practitioner with a summary of the law and statutory requirements pertaining to property division. This chapter continues with a discussion of *pendente lite* orders and the rare instances in which orders relating to property may be made. The considerations and requirements as to what constitutes property subject to division are discussed in detail in this chapter. Valuation issues and methodologies are discussed. Considerations regarding the manner of distributing assets is in this chapter. Finally, this chapter outlines the tax considerations for property divisions.

PART II: INTRODUCING THE BASIC CONCEPTS OF PROPERTY

DIVISION

DIVISION OF PROPERTY

§ 6.03 CHECKLIST: Introducing the Basic Concepts of Property Division

6.03.1 Introducing the Basic Concepts of Property Division

- Understanding jurisdiction and concepts of property division:
 - To make orders regarding property, the court must have personal jurisdiction or jurisdiction over the property.
 - Long-arm jurisdiction may not be obtained over a non-resident defendant. **Authority:** Conn. Gen. Stat. § 46b-46 and *Bove v. Bove*, 77 Conn. App. 355 (2003). **Discussion:** See § 6.04[1], below. See also Chapter 2, §§ 2.06–2.08, above. See also Chapter 2, §§ 2.16–2.21, above.
- Dividing property under equitable distribution:
 - Any property owned by either party on the date of the dissolution is subject to division.
 - How the property was acquired and who holds title is not determinative of the allocation of the property. **Authority:** Conn. Gen. Stat. § 46b-81; *Krafick v. Krafick*, 234 Conn. 783 (1995) and *Rivnak v. Rivnak*, 99 Conn. App. 326 (2007). **Discussion:** See § 6.04[2], below.
- Defining the estate for equitable distribution:
 - The property must be presently existing and not speculative or contingent.
 - A court is not limited by how and when property was acquired in dividing assets.
 - Property is defined to include liabilities.
 - Property fraudulently conveyed to a third party may also be included in the estate. **Authority:** *Bender v. Bender*, 258 Conn. 733 (2001), *Krafick v. Krafick*, 234 Conn. 783 (1995), *Rubin v. Rubin*, 204 Conn. 224 (1987), *Molitor v. Molitor*, 184 Conn. 530 (1981), *North v. North*, 183 Conn. 35 (1981), *Cottrell v. Cottrell*, 133 Conn. App. 52 (2012), *Bento v. Bento*, 125 Conn. App. 229 (2010), *Roos v. Roos*, 84 Conn. App. 415 (2004), and *Karen v. Parciak-Karen*, 40 Conn. App. 697 (1996). **Discussion:** See § 6.04[3], below.
- Considering the statutory factors:
 - The fourteen statutory criteria must be considered when making a property division.
 - Not all factors are given equal weight. **Authority:** Conn. Gen. Stat. § 46b-81; *Maturo v. Maturo*, 296 Conn. 80 (2010), *Gallo v. Gallo*, 184 Conn. 36 (1981), and *Rolla v. Rolla*, 48 Conn. App. 732 (1998). **Discussion:** See § 6.04[4], below. See also §§ 6.08–6.19, below.
- Analyzing what constitutes property:
 - There is a three-step analysis for evaluating property for equitable distribution:
 - Classification of the asset or liability as property subject to equitable distribution.
 - Valuing the property.
 - The manner in which the property is divided. **Authority:** Conn. Gen.

Stat. § 46b-81; *Bender v. Bender*, 258 Conn. 733 (2001), *Krafick v. Krafick*, 234 Conn. 783 (1995), and *Pasquariello v. Pasquariello*, 168 Conn. 579 (1975).

Discussion: See § 6.04[5], *below*.

□ Recognizing discovery issues early in the case:

- Upon learning the general nature of the assets in the case, a determination should be made as to the discovery needed to analyze and value the assets.

- A determination should be made as to whether experts are needed to value any assets of the estate. **Authority:** Conn. Gen. Stat. § 46b-62.

Discussion: See § 6.05, *below*.

□ Joining third parties in a dissolution action:

- Joinder is appropriate when an asset has been fraudulently conveyed.

- Joinder is likewise appropriate when an asset was to have been transferred to the parties but was not. **Authority:** *Gaudio v. Gaudio*, 23 Conn. App. 287 (1990) and *Wood v. Wood*, 2007 Conn. Super. LEXIS 3439 (2007). **Discussion:** See § 6.06, *below*. See also Chapter 2, § 2.29, *above*.

§ 6.04 Understanding Basic Legal Principles, Jurisdiction and Concepts of Property Division

[1] Obtaining Jurisdiction over Property

A court must have either personal jurisdiction over the parties or jurisdiction over the property to make orders related to that specific property. *Bove v. Bove*, 77 Conn. App. 355 (2003). For a more thorough discussion on *in rem* jurisdiction, see Chapter 2, §§ 2.06–2.08, *above*. For a more thorough discussion on personal jurisdiction, see Chapter 2, §§ 2.16–2.21, *above*.

With respect to non-resident defendants, the court may not obtain long-arm jurisdiction for purposes of a property division, as it is only applicable for alimony and support issues. Conn. Gen. Stat. § 46b-46(b).

#Comment Begins

Strategic Point: If Connecticut has jurisdiction over the marriage and custody issues and if long-arm jurisdiction is obtained over the defendant for alimony and support purposes, it is likely that the defendant will consent to jurisdiction over property, as it would make little sense to litigate the property division in another forum absent compelling circumstances. One instance of such compelling circumstances would be if the non-resident party lives in a state that distinguishes between separate and marital property and he or she is in possession of what would be deemed separate property in that jurisdiction.

#Comment Ends

[2] Dividing Property Under Equitable Distribution

The court is authorized to assign to either party some or all of the property or estate of the other. Conn. Gen. Stat. § 46b-81. This includes property of any nature, regardless of who holds title, and when or how the property was acquired, known as an “all property equitable distribution” scheme. *Krafick v. Krafick*, 234 Conn. 783 (1995). While Connecticut is an equitable distribution state, there is no requirement that the property subject to division be divided equally between the parties. *Rivnak v. Rivnak*, 99 Conn. App. 326 (2007).

#Comment Begins

Strategic Point: Many clients are under the misconception that how title to property is held will determine the property division. This potential misunderstanding should be clarified at the outset of the case.

#Comment Ends

[3] Defining the Estate for Equitable Distribution

Although a definition of the term “estate” is absent in the statute, the court may divide property of any nature, provided it is a presently ascertainable interest and is not speculative or contingent. *Rubin v. Rubin*, 204 Conn. 224 (1987). Notwithstanding this lack of definition, courts define property broadly. *Krafick v. Krafick*, 234 Conn. 783, 795 (1995). Equitable distribution does not limit the power of the court to allocate assets to one party based upon when, how, or the source of funds used to acquire assets. *Bender v. Bender*, 258 Conn. 733 (2001) and *Krafick*, 234 Conn. at 792 (1995). This includes property owned by one party before the marriage, or acquired by separate gift or inheritance. *North v. North*, 183 Conn. 35 (1981) and *Karen v. Parciak-Karen*, 40 Conn. App. 697 (1996). The definition of property includes liabilities. *Roos v. Roos*, 84 Conn. App. 415 (2004) and *Bento v. Bento*, 125 Conn. App. 229 (2010). The estate may also include property fraudulently conveyed to third parties. *Cottrell v. Cottrell*, 133 Conn. App. 52 (2012) and *Molitor v. Molitor*, 184 Conn. 530 (1981).

[4] Considering the Statutory Factors

When dividing property, the court must consider fourteen statutory criteria. Conn. Gen. Stat. § 46b-81. The court need not give equal weight to all criteria, and may choose to give no weight to one or more of these criteria. *Gallo v. Gallo*, 184 Conn. 36 (1981). The fourteen criteria listed in the statute do not represent a limitation, and the court may consider additional factors if deemed appropriate given the facts of the case. *Maturo v. Maturo*, 296 Conn. 80 (2010) and *Rolla v. Rolla*, 48 Conn. App. 732 (1998). Property may only be divided at the time the final decree enters. Conn. Gen. Stat. § 46b-81. For a more thorough discussion of the statutory factors, see §§ 6.08–6.19, *below*.

[5] Analyzing What Constitutes Property

The supreme court has set out a three-step analysis to be considered regarding property for equitable distribution purposes:

1. Whether the asset is property to be distributed within Conn. Gen. Stat. § 46b-81, otherwise known as classification of the property.
2. How to value the property.
3. How to divide the property between the parties.

Krafick v. Krafick, 234 Conn. 783, 792–793 (1995). A fundamental concept is that the court’s equitable power guides a property division. *Bender v. Bender*, 258 Conn. 733 (2001), *Krafick*, 234 Conn. at 804, and *Pasquariello v. Pasquariello*, 168 Conn. 579, 585 (1975).

#Comment Begins

Strategic Point: At the initial interview the client should be asked to list all property owned by either party including: bank and brokerage accounts, real estate, retirement assets, intellectual property, life insurance policies, business interests, trusts, and personal property. Obtaining this information begins the process of identifying the property that will be subject to distribution.

#Comment Ends

§ 6.05 Recognizing Discovery Issues Early in the Case

The practitioner should consider early in the case the discovery needed and whether to retain experts to analyze and value specific assets. Discovery is particularly important for the spouse who may not have actively managed the parties' assets and has not kept the financial records.

The discovery and valuation process may be labor intensive, requiring significant time to complete. This is particularly so in complex cases where assets may be held in many forms and more than one expert may be needed to analyze and value the property.

#Comment Begins

Strategic Point: Although not specifically mentioned, [Conn. Gen. Stat. § 46b-62](#) has been held to allow a court to award expert fees to a party. Thus, if representing the non-monied spouse and an expert is required, fees may be sought from the monied spouse to pay for an expert.

#Comment Ends#Comment Begins

Strategic Point: Once all the facts and supporting documentation have been collected, and appraisals have been secured for assets whose value must be established, organizing the facts and preparing summaries and spreadsheets will aid in the analysis of a likely property division and the formulation of a settlement position.

#Comment Ends

§ 6.06 Joining Third Parties in a Dissolution Action

Although a dissolution action typically involves only the spouses, there may be situations where it is appropriate to join third parties in the action. There are two primary situations in which joinder is appropriate in a dissolution action. First, when a third party has an interest in an asset that is claimed to have been fraudulently conveyed, he or she may be properly joined in the action. [Gaudio v. Gaudio, 23 Conn. App. 287 \(1990\)](#). Second, where a third party promised to transfer an asset to one or both of the parties, but has not done so, he or she may be joined in the action. [Wood v. Wood, 2007 Conn. Super. LEXIS 3439 \(2007\)](#). For a more thorough discussion on joinder, see [Chapter 2, § 2.29, above](#).

#Comment Begins

Strategic Point: If there is an issue of fraudulent conveyance, it is prudent to seek the joinder of the person to whom the conveyance was made. Unless that is done, a court may be limited as to the relief it may order.

#Comment Ends

PART III: ASSESSING THE STATUTORY CRITERIA

DIVISION OF PROPERTY

§ 6.07 CHECKLIST: Assessing the Statutory Criteria

6.07.1 Assessing the Statutory Criteria

- Assessing the statutory criteria—general considerations:
 - There are sixteen statutory criteria, some of which are the same as when considering alimony orders.
 - The alimony statute considers the desirability of the custodial parent working in light of the age and needs of the child, which is not considered in the property division.
 - The property division statute considers three factors not contained in the alimony statute:
 - Liabilities.
 - The opportunities for each party to acquire assets and income in the future.
 - The contributions each party has made to the acquisition, preservation, and appreciation of assets.
 - The court must consider, but need not make express findings as to, each statutory factor.
 - An equitable property division does not mean that the assets must be divided equally. However, it does require the court to provide an ability to comply with the orders. **Authority:** Conn. Gen. Stat. §§ 46b-81 and 46b-82; *Mickey v. Mickey*, 292 Conn. 597 (2009), *Caffe v. Caffe*, 240 Conn. 79 (1997), *Sunbury v. Sunbury*, 210 Conn. 170 (1989), *Gallo v. Gallo*, 184 Conn. 36 (1981), *Valante v. Valante*, 180 Conn. 528 (1980), *Oudheusden v. Oudheusden*, 190 Conn. App. 169 (2019), *Wendt v. Wendt*, 59 Conn. App. 656 (2000), *Bleuer v. Bleuer*, 59 Conn. App. 167 (2000), and *Werblood v. Birnbach*, 41 Conn. App. 728 (1996). **Discussion:** See § 6.08, below.
- Assessing the length of the marriage:
 - The length of the marriage is from the date the parties were married until the date the marriage is dissolved.
 - It does not include periods of cohabitation or a prior marriage between the same parties.
 - The courts may distinguish between property acquired prior to the parties separation and during the time they were living together. **Authority:** Conn. Gen. Stat. §§ 46b-28a and 46b-38rr(a); *Mueller v. Tepler*, 312 Conn. 631 (2014), *Loughlin v. Loughlin*, 280 Conn. 632 (2006), *Boland v. Catalano*, 202 Conn. 333 (1987), *Wendt v. Wendt*, 59 Conn. App. 656 (2000), and *Papageorge v. Papageorge*, 12 Conn. App. 596 (1987). **Discussion:** See § 6.09, below.
- Assessing the causes for the breakdown of the marriage:
 - Fault is not required when obtaining a dissolution but may be considered when rendering financial orders.
 - Conduct that occurred after the marriage broke down irretrievably is arguably not relevant to the cause for the breakdown of the marriage.
 - The asset division is not designed to reward the innocent party or to

punish the one who caused the marriage to break down. **Authority:** Conn. Gen. Stat. § 46b-81; *Robinson v. Robinson*, 187 Conn. 70 (1982), *Venuti v. Venuti*, 185 Conn. 156 (1981), *Desai v. Desai*, 119 Conn. App. 224 (2010), and *Ferrucci v. Ferrucci*, 11 Conn. App. 369 (1987). **Discussion:** See § 6.10, below.

□ Establishing the ages of the parties:

- Age is mentioned in every decision and has its importance when considered with other factors.

- Age is important in assessing the ability of a party to work and to acquire assets and income in the future. **Authority:** *Simmons v. Simmons*, 244 Conn. 158 (1998). **Discussion:** See § 6.11, below.

□ Determining the health of the parties:

- Health is a factor typically viewed in light of other factors such as employment and ability to earn an income.

- It likely has more of an impact on alimony than on property division orders. **Discussion:** See § 6.12, below. See also Chapter 5, § 5.07, above.

□ Assessing the station of the parties:

- Station is the social standing or standard of living of the parties.

- The court is not compelled to replicate the standard of living in making the property division orders. **Authority:** *Greco v. Greco*, 275 Conn. 348 (2005), *Blake v. Blake*, 207 Conn. 217 (1988), and *Golden v. Mandel*, 110 Conn. App. 376 (2008). **Discussion:** See § 6.13, below.

□ Determining the occupation, vocational skills, education, employability, earning capacity, and income of the parties:

- Typically, the occupation to be considered is that which a party has pursued during the course of the marriage.

- These criteria are typically more relevant in an alimony determination.

Authority: *Arrigoni v. Arrigoni*, 184 Conn. 513 (1981) and *Fucci v. Fucci*, 179 Conn. 174 (1979). **Discussion:** See § 6.14, below. See also Chapter 5, § 5.10, above.

□ Determining the estate of each of the parties:

- The estate must include assets that are presently existing interests in property, not expectancies.

- All assets owned on the date of dissolution, irrespective of how the asset was acquired, are subject to the property division. **Authority:** *Krafick v. Krafick*, 234 Conn. 783 (1995), *Bartlett v. Bartlett*, 220 Conn. 372 (1991), *Eslami v. Eslami*, 218 Conn. 801 (1991), *Rubin v. Rubin*, 204 Conn. 224 (1987), *Thompson v. Thompson*, 183 Conn. 96 (1981), *Krause v. Krause*, 174 Conn. 361 (1978) and *Fronsaglia v. Fronsaglia*, 202 Conn. App. 769 (2021). **Discussion:** See § 6.15, below. See also §§ 6.31–6.43, below.

□ Allocating the liabilities of the parties:

- The court may order either party to pay a debt for which one or both spouses are responsible.

- A consideration in allocating debts is how and why a debt was incurred. **Authority:** Conn. Gen. Stat. § 46b-81; *Kirwan v. Kirwan*, 187 Conn. App. 375 (2019), *McKenna v. Delente*, 123 Conn. App. 146 (2010) and *Casey v. Casey*, 82 Conn. App. 378 (2004). **Discussion:** See § 6.16, below.

□ Determining the needs of the parties:

- The needs of the parties are primarily a consideration for alimony purposes. **Discussion:** See § 6.17, below. See also Chapter 5, § 5.11[1], above.

□ Considering the parties' opportunity for the future acquisition of capital

assets and income:

- A party who has been employed consistently throughout the marriage likely has better opportunities to acquire assets and income in the future than does a stay at home parent.

- A court may also look at the future retirement benefits to be received by a party. **Authority:** *Greco v. Greco*, 275 Conn. 348 (2005), *Bender v. Bender*, 258 Conn. 733 (2001), *Blake v. Blake*, 207 Conn. 217 (1988), *Thompson v. Thompson*, 183 Conn. 96 (1981), and *Cabrera v. Cabrera*, 23 Conn. App. 330 (1990). **Discussion:** See § 6.18, *below*.

- Contributing to the assets is not dispositive of the property division:

- The court will consider each party's contributions to the acquisition, preservation, and appreciation of assets.

- However, the fact that an asset was owned on the date of the marriage or was received by gift or inheritance does not prevent it from being distributed at the time of the dissolution. **Authority:** Conn. Gen. Stat. § 46b-81; *Dubicki v. Dubicki*, 186 Conn. 709 (1982), *Pencheva-Hasse v. Hasse*, 221 Conn. App. 113 (2023), *Wood v. Wood*, 160 Conn. App. 708 (2015), *Golden v. Mandel*, 110 Conn. App. 376 (2008), *Martin v. Martin*, 101 Conn. App. 106 (2007), *Tracey v. Tracey*, 97 Conn. App. 122 (2006), and *Casey v. Casey*, 82 Conn. App. 378 (2004). **Discussion:** See § 6.19[1], *below*.

- Factors to be considered when analyzing contributions:

- One consideration is the contributions made by a party to a particular asset.

- Post separation efforts by one spouse in acquiring assets will also be considered.

- The contributions made by one spouse's family members will be taken into account. **Authority:** *Smith v. Smith*, 249 Conn. 265 (1999), *Kroop v. Kroop*, 186 Conn. 211 (1982), *Wendt v. Wendt*, 59 Conn. App. 656 (2000), *Wolf v. Wolf*, 39 Conn. App. 162 (1995), *Ashton v. Ashton*, 31 Conn. App. 736 (1993), and *Papageorge v. Papageorge*, 12 Conn. App. 596 (1987). **Discussion:** See § 6.19[2], *below*.

- Considering non-monetary contributions:

- Just as a court will consider monetary contributions to assets, so too will it consider the non-monetary contributions.

- A working spouse who contributes to the household chores will not necessarily receive a disparate amount of assets. **Authority:** *Werblood v. Birnbach*, 41 Conn. App. 728 (1996) and *O'Neill v. O'Neill*, 13 Conn. App. 300 (1988). **Discussion:** See § 6.19[3], *below*.

- Considering the dissipation of assets:

- The corollary to considering contributions to assets is the dissipation of assets.

- For a court to consider dissipation, it must have occurred when the marriage was undergoing a breakdown or when a dissolution had been contemplated.

- Dissipation may also include improper expenditures made during the dissolution action.

- The court will not typically consider bad investments as dissipation.

- Authority:** *Gershman v. Gershman*, 286 Conn. 341 (2008), *Finan v. Finan*, 287 Conn. 491 (2008), *Parlato v. Parlato*, 134 Conn. App. 848 (2012), and *Shaulson v. Shaulson*, 125 Conn. App. 734 (2010). **Discussion:** See § 6.19[4], *below*.

§ 6.08 Assessing the Statutory Criteria—General Considerations

There are fourteen statutory factors the court must consider when determining the property division. [Conn. Gen. Stat. § 46b-81](#). These statutory criteria are similar to those for awarding alimony. [Conn. Gen. Stat. § 46b-82](#). Thus, the decisions regarding the criteria listed in one statute are often applicable to the other. *Mickey v. Mickey*, 292 Conn. 597, 615 (2009) and *Sunbury v. Sunbury*, 210 Conn. 170 (1989).

It is important to keep the statutory criteria in mind throughout the case, particularly when gathering the facts, establishing a strategy, organizing the potential evidence, and if necessary, trying the case. The statutory criteria for dividing property are as follows:

1. The length of the marriage.
2. The causes for the annulment, dissolution of the marriage, or legal separation.
3. The ages of the parties.
4. The health of the parties.
5. The station in life or style of living.
6. The occupations of the parties.
7. The amount and sources of income.
8. The earning capacity of each party.
9. The vocational skills possessed by each party.
10. The education of each party.
11. The employability of each party.
12. The estate or assets of each party.
13. The liabilities of each party.
14. The needs of each of the parties.
15. The opportunity of each for the future acquisition of capital assets and income.
16. The contribution of each of the parties in the acquisition, preservation, or appreciation in value of their respective estates.

The alimony statute contains two factors that are not listed as criteria to determine a property division, namely the desirability of the custodial parent seeking employment and the

division of assets made pursuant to [Conn. Gen. Stat. § 46b-81](#). [Conn. Gen. Stat. § 46b-82](#). The property division statute contains three criteria not present in the alimony statute: liabilities; the opportunities for each party to acquire assets and income in the future; and contributions to the acquisition, preservation or appreciation of assets. [Conn. Gen. Stat. § 46b-81](#).

The court has wide discretion in dividing property. [Werblood v. Birnbach](#), 41 Conn. App. 728, 731 (1996). When dividing property between the parties, the court must consider all the statutory factors, but does not have to make express findings as to each. [Caffe v. Caffe](#), 240 Conn. 79 (1997). Equal weight need not be given to all the statutory criteria, and the courts have declined to identify any of the criteria as being entitled to greater weight than any of the others. [Gallo v. Gallo](#), 184 Conn. 36, 49–50 (1981) and [Valante v. Valante](#), 180 Conn. 528, 530–531 (1980). Essentially, to survive an appeal, the trial court need only indicate that it has considered the statutory criteria.

There are no formulas or guidelines as to how much property either party should receive or how the property should be divided. An equitable award does not require that the parties' property be divided equally. [Wendt v. Wendt](#), 59 Conn. App. 656, 663 (2000) and [Bleuer v. Bleuer](#), 59 Conn. App. 167, 172 (2000). However, courts will typically start at an equal division of assets and then determine, what, if any, factors weigh in favor of skewing the assets to one party or the other. However, a court cannot create a property division requiring one party to pay significant sums both to the other spouse and to retire debt, which results in a clear inability to comply with the court's orders. [Oudheusden v. Oudheusden](#), 190 Conn. App. 169 (2019).

#Comment Begins

Strategic Point: When evaluating a case, the statutory factors should be assessed against the facts of the case to determine those which buttress and those which harm the case. These factors should be kept in mind throughout the case.

#Comment Ends

§ 6.09 Assessing the Length of the Marriage

The length of a marriage is the time the parties have been legally married up to the date of dissolution. The time the parties may have lived together or any prior marriage between them is not included. [Loughlin v. Loughlin](#), 280 Conn. 632 (2006). The significance of a long-term marriage is often in the effect it has on the other statutory criteria, such as health, employment opportunities, and the ability to acquire assets and income in the future. [Loughlin](#), 280 Conn. at 644. The courts have distinguished between property acquired while the parties were living together as a married couple and property acquired after their separation. [Wendt v. Wendt](#), 59 Conn. App. 656 (2000) and [Papageorge v. Papageorge](#), 12 Conn. App. 596 (1987). The rationale for this distinction is primarily due to the contributions made in acquiring, preserving, and appreciating assets post separation.

While [Loughlin](#), 280 Conn. 632 (2006) established that a court may not consider the period of cohabitation as part of the length of the marriage this general rule of law may not apply across the board to same-sex couples. In a move that suggests it would not, the Connecticut Supreme Court expanded a common law loss of consortium claim to a couple who would have been married at the time of the tortious conduct if such marriage had not been barred by state law. [Mueller v. Tepler](#), 312 Conn. 631, 649 (2014).

When considering the attachment of premarital cohabitation, for a same sex couple, to the

length of the marriage, significant dates would include the date of a commitment ceremony, the date on which the couple may have drafted documents identifying the other as a health care proxy or custodian of his or her remains, a date on which mirror wills may have been executed or any other date the couple recognizes within the relationship as a significant anniversary. Given the Connecticut Supreme Court's decision in *Mueller*, it is quite possible a court would determine that the *Loughlin* limitation of the length of the marriage would not apply to a same-sex couple should it be proven that, on a specific date, such as the date of a commitment ceremony, the couple would have entered into a legal marriage had they been able to do so and that, as soon as legal marriage became available to the couple, the couple in fact did enter into a legal marriage.

#Comment Begins

Warning: When engaging in a “length of the marriage” analysis, the practitioner should be aware of other reasons why a couple may not have entered into a legal marriage or legally recognized relationship as those relationships became available. Marrying someone of the same sex, for example, could have jeopardized a couple's ability to adopt a child from a foreign country or could have resulted in an individual's discharge from the military under the now-repealed “Don't Ask, Don't Tell” law. *Mueller* does not discuss how these factors could impact a spouse's ability to bring a loss of consortium claim and therefore does elucidate further this particular discussion.

#Comment Ends

It also may be possible that there are several “dates of marriage” for one couple. For example, a couple may have entered into a civil union in Vermont and a marriage in Massachusetts. Both of these relationships will be recognized as marriages under Connecticut law. [Conn. Gen. Stat. § 46b-28a](#). Even though the earlier date of relationship recognition will control the “length of the marriage” criterion for both alimony and property division, all dates should be included in the complaint, and relief should be sought for the dissolution of all relationship types. This is because even though Connecticut will recognize all such relationships as marriages, the states from which those relationships originated may not, and the couple does not want to find themselves remaining domestically partnered in California, for example, because Connecticut only dissolved their marriage and not their domestic partnership.

#Comment Begins

Warning: Even though marriage did not become available to same-sex couples in Connecticut until 2008, civil unions, unless a dissolution action commenced prior to October 1, 2010, merged into marriages by operation of law. [Conn. Gen. Stat. § 46b-38rr\(a\)](#). Additionally, Connecticut will recognize as a marriage a legal relationship entered into elsewhere that carries the same rights, benefits, and obligations as marriage in Connecticut. [Conn. Gen. Stat. § 46b-28a](#). As early as 1989, registered partnerships, which were substantially similar to marriage, were available in Denmark and, in the past twenty years, many other jurisdictions have legalized marriage or marriage-like relationships for same-sex couples. It is quite possible, therefore, for a couple to have a “date of the marriage” that predates same-sex marriage in Connecticut.

#Comment Ends

In any case in which the couple has been together for a significant period of time prior to entering into a legally recognized relationship status, serious thought should be given to pleading an additional count sounding in contract pursuant to the principles enunciated by the supreme court in *Boland v. Catalano*, 202 Conn. 333 (1987). This additional count would be similar to

claims made for opposite-sex couples who cohabitated for a period of time prior to marriage and would be based on contract-in-fact, constructive trust, quantum meruit, or unjust enrichment. Should the court agree that the length of the marriage predates the marriage, as envisioned under *Mueller*, such a count may not be necessary, but until such time as that legal issue has been clarified, it would be wise for the practitioner to include the second count.

§ 6.10 Determining the Causes for the Breakdown of the Marriage

Although Connecticut does not require fault grounds for an annulment, dissolution of marriage, or legal separation, “fault” is a statutory factor which the court must consider when dividing property if it represents the cause for the breakdown of the marriage. *Conn. Gen. Stat. § 46b-81* and *Venuti v. Venuti*, 185 Conn. 156, 159 (1981). Accordingly, conduct which occurred after the marriage had irretrievably broken down could not cause the breakdown and is therefore, arguably, not relevant. *Venuti*, 185 Conn. at 159. The mere filing of a complaint does not necessarily fix the time of the breakdown of the marriage to the date of the complaint, despite the fact that it is alleged that the marriage has broken down irretrievably. *Ferrucci v. Ferrucci*, 11 Conn. App. 369 (1987). The court may find that the marriage broke down prior to the date of the complaint or cross-complaint or over a period of time. *Ferrucci*, 11 Conn. App. at 370–371. Evidence of post-breakdown fault may be admissible if it is probative of a pre-breakdown pattern of continuous conduct.

The assignment of assets is not to be considered either as a reward for virtue or as punishment for wrongdoing. However, a party whose misconduct causes the breakdown of the marriage should likewise not be applauded. *Robinson v. Robinson*, 187 Conn. 70 (1982). The cause for the dissolution of the marriage may be found to be especially egregious and may justify the court awarding a disparate amount of the assets to one spouse. *Desai v. Desai*, 119 Conn. App. 224 (2010).

#Comment Begins

Strategic Point: Clients should be educated early in the process that while he or she may want a “pound of flesh” because of the behavior of his or her spouse, a court is unlikely to share that viewpoint. Fault may be the biggest issue for the client, but they must be made to realize that it is not the biggest issue for the court.

#Comment Ends#Comment Begins

Strategic Point: If your client has engaged in conduct that would be considered fault, obtaining his or her spouse’s version of the causes for the breakdown of the marriage may be beneficial before he or she learns of your client’s behavior and then attempts to rewrite history.

#Comment Ends

§ 6.11 Establishing the Ages of the Parties

The age of each party is a factor mentioned in every decision, but usually attains significance when considered with other factors. Age may affect the ability to work and to accumulate assets in the future. A young person may have many years of earnings ahead of him or her and a long time to recover from the financial setback of a dissolution of the marriage. Conversely a person at the end of his or her earning career will be left with the assets awarded at the time of the decree with little or no ability to recover. A difference in age may have an impact on the financial orders where one party is at the end of his or her career while the other is at the start of his or her career. *Simmons v. Simmons*, 244 Conn. 158 (1998).

§ 6.12 Determining the Health of the Parties

As with age, the health of the parties becomes a factor if one of the parties is in ill health and often depends on whether it impacts other statutory factors, such as employability, vocational skills, and income. Health is more likely to have an impact on an alimony award than a property division. For a more thorough discussion on the health of the parties, see Chapter 5, § 5.07, *above*.

§ 6.13 Assessing the Station of the Parties

Station has been defined as social standing and standard of living. *Blake v. Blake*, 207 Conn. 217, 232–233 (1988). As a practical matter, station in life is significant when considering the impact the division of property will have on the socio-economic circumstances of the parties. However, the court is not compelled to issue orders replicating the station of the family. *Golden v. Mandel*, 110 Conn. App. 376 (2008). If the parties have consistently lived in a manner that required substantial expenditures for housing, furnishings, travel, social events, and other expenses typical and reasonable for their socio-economic standing, the court is likely to consider such needs and try to construct a property division which permits the parties to continue in a similar lifestyle as they had during the marriage. *Greco v. Greco*, 275 Conn. 348 (2005).

#Comment Begins

Strategic Point: Most families will be unable to replicate the style of living enjoyed while they were married after a dissolution where the same income is now supporting two households. Managing a client's expectations in this regard is essential from the outset of the case.

#Comment Ends

§ 6.14 Determining the Occupation, Vocational Skills, Education, Employability, Earning Capacity and Income of the Parties

Occupation, vocational skills, education, employability, earning capacity, and income are often considered together by the court due to their interdependence. Generally, the court views a party's occupation as that which he or she pursued sometime during the marriage. *Fucci v. Fucci*, 179 Conn. 174 (1979). However, a party's occupation is not necessarily the one in which he or she is engaged full time at the time of the dissolution; it can be a past occupation which the party may resume. *Arrigoni v. Arrigoni*, 184 Conn. 513 (1981). The occupation, employability, and income of the parties is primarily considered in alimony determinations. In 2013, Conn. Gen. Stat. § 46b-81 was amended to specifically include education and earning capacity as factors to be considered in determining the property division. For a more thorough discussion on occupation, vocational skills, education, employability, earning capacity, and income, see Chapter 5, § 5.10, *above*.

§ 6.15 Determining the Estate of Each of the Parties

Probably the most important factor to be considered in formulating a property division is the estate or assets of each of the parties. Assets, to be divisible by a court, must be presently existing assets and not mere expectancies, such as a future inheritance. *Rubin v. Rubin*, 204 Conn. 224 (1987). The value of a future unvested inheritance is unquantifiable because the will may be revised or revoked. *Rubin*, 204 Conn. at 232, *Thompson v. Thompson*, 183 Conn. 96 (1981), and *Krause v. Krause*, 174 Conn. 361 (1978). An interest in an estate which is vested but in litigation may be too speculative to value, and its valuation may be deferred to a later alimony modification and not included in the property division. *Eslami v. Eslami*, 218 Conn. 801 (1991). Similarly, if the value of a vested but undistributed trust interest cannot be reasonably determined, the trial court may delay considering the trust until its value is reasonably ascertainable in a subsequent modification of alimony. *Bartlett v. Bartlett*, 220 Conn. 372 (1991).

Every asset owned by the parties, irrespective of when and how it was acquired, is subject to division in a dissolution action. *Krafick v. Krafick*, 234 Conn. 783 (1995). For a more thorough discussion on defining, valuing, and allocating specific assets, see §§ 6.31–6.43, *below*.

#Comment Begins

Strategic Point: Clients often erroneously believe that there is a distinction between marital assets and separate assets. However, there is no such distinction, a fact of which all clients should be made aware.

#Comment Ends

However, a party who sold his interest in his company, in violation of the automatic orders, using the funds to invest elsewhere, in violation of the automatic orders, could not prevail in a claim that the wife was awarded a disproportionate amount of the assets, when his calculation did not consider his dissipation of the business asset he sold. *Fronsaglia v. Fronsaglia*, 202 Conn. App. 769 (2021).

§ 6.16 Allocating the Liabilities of the Parties

The court has the authority to assign the payment of the debts of the parties to either party. Conn. Gen. Stat. § 46b-81 and *McKenna v. Delente*, 123 Conn. App. 146 (2010). In allocating debt, the court will primarily consider how and why debt was acquired. To the extent that debt was jointly incurred for the family, it will likely be allocated between the parties. However, if debt was improperly incurred for one spouse to the exclusion of the family, it will likely be allocated to that spouse. *Casey v. Casey*, 82 Conn. App. 378 (2004). The allocation of debt must consider the parties' financial ability to service the debt in addition to the manner in which the debt was incurred. *Casey*, 82 Conn. App. at 385.

#Comment Begins

Strategic Point: If there is a claim that debt has been improperly incurred, supporting proof must be provided to the court. Such proof may include credit card statements to show what was purchased. If a party increased his or her spending habits that resulted in debt, proof of these purchases should be juxtaposed to prior spending habits.

#Comment Ends

The allocation of debt may also include the trial court entering orders, after the

completion of an arbitration, for the payment of private school tuition debt. Since an arbitration cannot resolve issues of child support and private school educational expenses are in the nature of child support, then the trial court has jurisdiction, despite the arbitration award, to allocate the private school debt as part of its orders. *Kirwan v. Kirwan*, 187 Conn. App. 375 (2019).

#Comment Begins

Warning: The *Kirwan* court very cleverly navigated the treacherous waters of the power of an arbitrator and child support orders. The arbitrator had the ability to determine the allocation of the debts of the parties and the trial court in requiring the husband to be pay the private school debt was allocating a liability. However, the trial court reasoned it was doing so by virtue of its authority to determine child support, which is outside the purview of an arbitration.

#Comment Ends

§ 6.17 Determining the Needs of the Parties

The needs of each of the parties at the time of and after the dissolution are a basic consideration primarily when the court awards alimony. For a more thorough discussion on needs, see [Chapter 5](#), [§ 5.11\[1\]](#), [above](#).

§ 6.18 Considering the Parties' Opportunities for Future Acquisition of Capital Assets and Income

A primary consideration in property divisions is how each of the parties will fare financially after the dissolution. One such factor recognizing this is each party's opportunity to acquire assets and income in the future. *Bender v. Bender*, 258 Conn. 733 (2001). If a party's future employment is uncertain, a court may not be justified in failing to award him or her property. *Greco v. Greco*, 275 Conn. 348 (2005). A party with a successful career will be viewed as having positive prospects to acquire asset and income in the future. *Blake v. Blake*, 207 Conn. 217 (1988). Contrasted against the employed spouse's career will be the education and future employment opportunities of the non-working spouse. If the non-working spouse does not have great prospects in the future, this criteria takes on added importance and may justify a disparate property division in favor of the non-working spouse. *Cabrera v. Cabrera*, 23 Conn. App. 330 (1990). Looking at a party's ability to earn income in the future could include not only a party's career path, but also the receipt of future retirement benefits. *Thompson v. Thompson*, 183 Conn. 96 (1981).

#Comment Begins

Strategic Point: Many times this factor comes into play when a party has put his or her career on hold to raise children while the other party continues his or her career. The stay at home parent will typically be unable to establish and advance a career in the same fashion as the working spouse.

#Comment Ends

§ 6.19 Considering the Contribution of the Parties in the Acquisition, Preservation, or Appreciation of Assets

[1] Contributing to Assets Is Not Dispositive of the Property Division

The contribution of each party to the acquisition, preservation, and appreciation of the

assets is one of the factors which the courts consider when determining the asset division. *Conn. Gen. Stat. § 46b-81*. While all assets owned on the date of the dissolution may be allocated to either party, the contributions factor allows the court to determine the monetary and non-monetary efforts made by each party to the total marital estate. Additionally, assets which were acquired prior to the marriage, though inheritance or gift, may also be assessed under ~~this statutory criteria~~this statutory criterion; yet the mere fact that there is an inheritance does not automatically require that those assets be awarded to the party receiving the inheritance. *Wood v. Wood*, 160 Conn. App. 708 (2015). However, the fact that an asset was owned in whole or in part at the time of the dissolution does not exempt it from being awarded to the other spouse. *Martin v. Martin*, 101 Conn. App. 106 (2007).

Assessing contributions is very fact sensitive. While the court may consider how the property was acquired, that is not to be dispositive of how the property is distributed at the time of the dissolution. *Tracey v. Tracey*, 97 Conn. App. 122 (2006). A party will not be rewarded for using assets, owned by the other spouse prior to the marriage, solely for his or her own benefit and splurging on non-essential items. *Casey v. Casey*, 82 Conn. App. 378 (2004). However, if a party contributes to preserving an inheritance, especially to the detriment of other assets, that claim must be clearly presented. *Golden v. Mandel*, 110 Conn. App. 376 (2008). A party who does not assist in preserving assets and was at fault for the breakdown of the marriage may support a disparate award of assets, which will not be considered punitive. *Dubicki v. Dubicki*, 186 Conn. 709 (1982). A party who had assets at the time of the marriage who also dissipated assets could not prevail on a claim that the trial court improperly awarded the other party with certain of those assets, especially when the court did not provide her with a long-term alimony order. *Pencheva-Hasse v. Hasse*, 221 Conn. App. 113 (2023).

#Comment Begins

Strategic Point: If one party has made contributions to assets acquired solely by the other party, evidence must be submitted to support the efforts made by the party who does not own the asset. An articulation of the decision should be sought in the event the court, after trial, does not state these contributions and the property division does not reflect these contributions.

#Comment Ends#Comment Begins

Strategic Point: The origin of an asset is not necessarily dispositive of how it will be divided. There is no concept of separate property in Connecticut as is present in other states. Accordingly, assets which a party owned at the time of the marriage or received by way of gift or inheritance will not necessarily be titled with that party at the conclusion of the dissolution.

#Comment Ends

Many practitioners attempt to treat property acquired prior to the marriage, inheritances or gifts, as “separate property” to be carved out of the assets considered for property division in a dissolution. However, such a resolution is unlikely to occur. There are many factors to take into account regarding the distribution of these assets. One factor is the timing of the receipt of such asset; if it has occurred recently, it is more likely that the party receiving the asset will be able to retain most of the asset rather than if it was received early in the marriage. The length of the marriage can be impactful such that a shorter marriage is more likely to result in a party retaining more of such assets than in a longer marriage. The totality of the other assets will likewise play a role in the determination of the allocation of the so-called “separate assets,” such that the larger the estate in relation to such assets the more likely the recipient will retain more of such asset.

[2] Analyzing Contributions, Factors to be Considered

One consideration when looking at contributions is which party made the majority of contributions to the particular asset. *Smith v. Smith*, 249 Conn. 265 (1999) and *Wolf v. Wolf*, 39 Conn. App. 162 (1995). This will include both the manner in which the asset was acquired and efforts made by each party to preserve and appreciate the asset. An asset that has been in one party's family for a long time is likely to be treated differently than assets acquired during the marriage. *Ashton v. Ashton*, 31 Conn. App. 736 (1993). The contributions of a party's extended family members, in terms of helping in the purchase of assets or payment of a debt, will be considered. *Kroop v. Kroop*, 186 Conn. 211 (1982).

Property which has been accumulated through the efforts of only one spouse during the time of the separation may be viewed differently than that accumulated prior to the separation. *Papageorge v. Papageorge*, 12 Conn. App. 596 (1987). Part of the rationale is that the spouse acquiring the asset did so without any contribution by the other spouse. *Wendt v. Wendt*, 59 Conn. App. 656 (2000).

[3] Considering Non-Monetary Contributions

When assessing contributions, the court is to consider both monetary and non-monetary contributions. *O'Neill v. O'Neill*, 13 Conn. App. 300 (1988). In this instance, the spouse who stayed home to raise children will not be penalized for a lack of financial contributions to the assets. The fact that a working spouse also shares in some of the household responsibilities will not necessarily mean that he or she is entitled to more of the assets. *Werblood v. Birnbach*, 41 Conn. App. 728 (1996).

#Comment Begins

Strategic Point: Non-monetary contributions can also include efforts by one party in improving the home or other assets, either through his or her direct labor, role as a general contractor, or investment acumen.

#Comment Ends

[4] Considering the Dissipation of Assets

A corollary to the court considering the contributions each party has made to appreciating assets, is to consider the dissipation of assets. Dissipation must have occurred either when a dissolution was being contemplated or during a period of time in which the marriage is undergoing a breakdown. *Finan v. Finan*, 287 Conn. 491, 499 (2008). Expenditures that are made during the dissolution, if excessive and not in accordance with past spending practices, will also constitute dissipation. *Shaulson v. Shaulson*, 125 Conn. App. 734 (2010). Poor investment decisions will not constitute dissipation. *Gershman v. Gershman*, 286 Conn. 341 (2008).

One manner of addressing dissipation *pendente lite* is to request a return of the funds dissipated, even if they are being held by another person. If the transfer of the asset occurred prior to the dissolution action commencing, it will be deemed a violation of the automatic orders as a continuing concealment of the asset, justifying a court ordering its reconveyance. *Parlato v. Parlato*, 134 Conn. App. 848 (2012).

#Comment Begins

Strategic Point: The court will not “Monday morning quarterback” investment decisions in making a finding of dissipation. However, the court will look at whether assets have been spent in

anticipation of the dissolution and during the dissolution beyond the normal pattern of the family. To prove dissipation, the typical family expenditures must be demonstrated as a contrast to the claimed expenditures.

#Comment Ends

PART IV: ASSESSING *PENDENTE LITE* PROPERTY CONSIDERATIONS

DIVISION OF PROPERTY

§ 6.20 CHECKLIST: Assessing *Pendente Lite* Property Considerations

6.20.1 Assessing *Pendente Lite* Property Considerations

- Applicability of the automatic orders and securing assets:
 - The parties are prohibited from dissipating, concealing, encumbering, or transferring assets *pendente lite*, with limited exceptions.
 - A *lis pendens* may be filed to secure an interest in real estate in Connecticut.
 - Jointly owned assets can be protected by requiring two signatures for removing funds from a bank account. **Authority:** *Powell-Ferri v. Ferri*, 2013 Conn. Super. LEXIS 1543 (July 10, 2013); Conn. Gen. Stat. §§ 46b-80 and 52-325; P.B. § 25-5(b). **Discussion:** See § 6.21, *below*. See also Chapter 3, §§ 3.25–3.26, *above*.
- Awarding a party exclusive possession of the home:
 - A motion for exclusive possession may be filed and must include:
 - The nature of the property.
 - Whether the property is rented or owned.
 - The length of time the parties have either rented or owned the home.
 - The family members currently residing in the home.
 - The grounds upon which exclusive possession is sought. **Authority:** Conn. Gen. Stat. § 46b-83(a) and P.B. § 25-25. **Discussion:** See § 6.22, *below*. **Forms:** Motion for Exclusive Possession, see Chapter 20, § 20.46, *below*.
- A *pendente lite* distribution of assets is prohibited:
 - Property may only be assigned at the final hearing.
 - Assets may be used for the reasonable and usual expenses of the family *pendente lite*.
 - The court may allocate use of an asset such as real property or an automobile *pendente lite*.
 - The court may permit the sale of a property or the conversion of an asset to preserve the value.
 - The assets may be used to pay for the costs of the litigation, including attorney fees, expert fees, and fees for a guardian *ad litem* or attorney for the minor child.
 - A court will not force a party to incur a debt *pendente lite* but may

make orders for the repayment of debt. **Authority:** Conn. Gen. Stat. § 46b-81; *Parrotta v. Parrotta*, 119 Conn. App. 472 (2010), *Rousseau v. Perricone*, 2011 Conn. Super. LEXIS 995 (2011), *Goduti v. Goduti*, 2011 Conn. Super. LEXIS 351 (2011), *Dembroski v. Despina*, 2010 Conn. Super. LEXIS 3442 (2010), *Schmitz v. Manolis*, 2009 Conn. Super. LEXIS 1539 (2009), *Mazzella v. Mazzella*, 2007 Conn. Super. LEXIS 1848 (2007), *Hershey v. Hershey*, 2004 Conn. Super. LEXIS 3019 (2004), *Strich v. Strich*, 47 Conn. Supp. 530 (2002), and *Kiernan v. Kiernan*, 2000 Conn. Super. LEXIS 1366 (2000); P.B. § 25-5(b) (1). **Discussion:** See § 6.23, *below*.

§ 6.21 Applicability of the Automatic Orders and Securing Assets

At the time the parties file an action for dissolution, legal separation, or annulment, the automatic orders, which prohibit either party from dissipating, transferring, concealing, or encumbering their assets, become effective. Practice Book (hereinafter “P.B.”) § 25-5(b). The Practice Book was amended to clarify situations in which securities may be sold without being consideration a violation of the automatic orders. A sale will be permitted if: it is intended to preserve the parties’ estate; it is done on the open market or at an arms-length transaction; and the funds from the sale remain in the account from which they originated. To the extent that the parties have jointly made investment decisions, they shall continue to do so during the pendency of the action, unless a party must take emergency action to preserve the estate provided the other spouse is immediately notified. P.B. § 25-5(b). Despite these automatic orders, it may be prudent to further secure specific assets. The filing of a *lis pendens* on real property will secure that asset from future claims. Conn. Gen. Stat. §§ 46b-80 and 52-325 and is not considered a violation of the automatic orders. Additionally, these assets may be further protected by ensuring that joint bank or brokerage accounts and home equity lines of credit cannot be accessed without two signatures. The automatic orders may not be used to require a party to take an affirmative action but rather seek to preclude certain actions. *Powell-Ferri v. Ferri*, 2013 Conn. Super. LEXIS 1543 (July 10, 2013). If there is a real concern about the dissipation of an asset, even with the automatic orders in place, a motion to restrain use of the assets may be filed. For a more thorough discussion of the automatic orders, see Chapter 3, §§ 3.25–3.26, *above*.

§ 6.22 Awarding a Party Exclusive Possession of the Home

The court has the power to award to either party exclusive use of any real property available for use as a residence which either or both of them own. Conn. Gen. Stat. § 46b-83(a). This exempts property that is legitimately rented to third parties. A motion for exclusive possession shall include the following:

1. The nature of the property, which would include a single-family home, apartment, etc.
2. Whether the property is rented or owned by one or both of the parties.
3. The length of time each party has owned or rented the property.
4. The family members currently residing in the property.
5. The grounds upon which exclusive possession is sought.

P.B. § 25-25.

#Comment Begins

Strategic Point: Significant reasons are required to justify the granting of a motion for exclusive possession. Courts are reluctant to order the parties to assume the expenses for two homes pending the dissolution. It is quite possible that a family can barely afford to reside ~~together,~~ and together and will be totally unable to afford a second residence. That is not to say that when circumstances are particularly bad, a court will not grant a motion for exclusive possession, irrespective of the financial impact.

#Comment Ends#Comment Begins

Forms: Motion for Exclusive Possession, *see* [Chapter 20, § 20.46, below](#).

#Comment Ends

§ 6.23 Alienating or Using Assets *Pendente Lite*

[1] Prohibiting *Pendente Lite* Distributions of Assets

The court may assign property “at the time of entering a decree,” which clearly prohibits the distribution of property *pendente lite*. [Conn. Gen. Stat. § 46b-81](#). There is no statutory or appellate case authority that the court may divide property during the pendency of the action. However, the court is not prohibited from approving agreements between the parties to dispose of assets during the pendency of the action.

#Comment Begins

Strategic Point: While the court is prohibited from assigning property *pendente lite*, many courts interpret this to mean that they are prohibited from ordering the sale of a property *pendente lite*. It may be argued that a sale is not an assignment of property, especially where the proceeds are held in escrow. Additionally, if there is a possibility of losing an asset unless it is sold, such as a property to foreclosure, it may be argued that the sale is intended to preserve as much of the asset as possible.

#Comment Ends#Comment Begins

Strategic Point: There are times during a dissolution action where it may be desirable to allocate assets to one party, such as to obtain a new residence or pay counsel fees. In such instances, the parties may agree to the allocation of funds as an advance against equitable distribution.

#Comment Ends

[2] Using Assets *Pendente Lite*

The automatic orders permit the use of assets for the reasonable and usual household expenses *pendente lite*. P.B. § 25-5(b)(1). Where the parties’ lifestyle prior to the dissolution action included the invasion of assets to pay expenses, the court may order alimony *pendente lite* from assets. [Hershey v. Hershey](#), 2004 Conn. Super. LEXIS 3019 (2004) and [Kiernan v. Kiernan](#), 2000 Conn. Super. LEXIS 1366 (2000).

#Comment Begins

Strategic Point: When seeking temporary alimony, all or part of which may be paid from assets,

frame the motion in the alternative to allow the court to make orders pertaining to the payment of household expenses and an order of alimony. This may provide the court with more comfort in allowing the assets to be used to pay expenses.

#Comment Ends

The temporary allocation of personal property, such as exclusive use of a family car, is permissible and is not a violation of the automatic orders, as the asset remains available for final distribution. *Mazzella v. Mazzella*, 2007 Conn. Super. LEXIS 1848 (2007).

[3] Selling Assets or Paying Liabilities to Preserve the Estate

Despite the statutory directive that property is divided at the time of the final decree, situations occasionally present themselves where court may make orders requiring the liquidation or sale of assets. However, such circumstances are very rare.

A court may permit the conversion of assets from one form to another to preserve their value, such as the sale of the marital home in order to preserve the equity of a property at risk of foreclosure. *Strich v. Strich*, 47 Conn. Supp. 530 (2002). Courts have also permitted the conversion of assets from one form to another, such as to allow the purchase of a residence *pendente lite*. *Dembroski v. Despina*, 2010 Conn. Super. LEXIS 3442 (2010). However, a court will not force the sale of property absent compelling circumstances. Thus, despite the fact that the parties may have agreed to list the property *pendente lite*, one party will be unable to have a court force the other party to accept an offer on the home. *Schmitz v. Manolis*, 2009 Conn. Super. LEXIS 1539 (2009). Liquidating an asset and holding the funds pending the final dissolution for distribution by the court would not be contrary to Conn. Gen. Stat. § 46b-81, as it is not being distributed prior to the dissolution.

#Comment Begins

Strategic Point: While it may be a long shot to have a court order the sale of the home, if the parties are in dire circumstances, the motion should be filed. Even if the court denies the motion, it can be argued that attempts were made by one of the parties to preserve the asset, when the final orders enter.

#Comment Ends

[4] Expending Assets on the Costs of Litigation

It is permissible, under the automatic orders, for a party to spend assets on the reasonable fees for an attorney, expert, guardian *ad litem* or attorney for the minor children, but these fees must be for representation in the dissolution or custody action. P.B. § 25-5(b)(1). The courts are split on the use of assets to pay for a criminal lawyer during the pendency of the dissolution action. *Parrotta v. Parrotta*, 119 Conn. App. 472 (2010) and *Strich v. Strich*, 47 Conn. Supp. 530 (2002).

#Comment Begins

Strategic Point: The mere fact that a party has title to the majority of assets does not mean that they have unfettered discretion to pay litigation expenses. A motion may be filed to restrain such expenditures and allow the court to provide for an even playing field.

#Comment Ends

[5] Incurring Debt *Pendente Lite*

Since the major objective of any *pendente lite* order is to maintain the status quo, any order sought to incur debt would seemingly violate that premise. Accordingly, a spouse who is unwilling to engage in a refinance of a mortgage will not be obligated to do so as it will require a debt to be incurred. *Goduti v. Goduti*, 2011 Conn. Super. LEXIS 351 (2011). However, where a debt is to be repaid to reduce interest payments and the assets are significant, the court may allow such repayment. *Rousseau v. Perricone*, 2011 Conn. Super. LEXIS 995 (2011).

#Comment Begins

Strategic Point: Presumably, if a property has a debt upon which both parties are obligated, a refinancing of that debt, without taking out additional funds, would not constitute incurring a new debt.

#Comment Ends

PART V: DEFINING, VALUING, AND ALLOCATING PROPERTY FOR PURPOSES OF THE ASSET DIVISION—OVERVIEW

DIVISION OF PROPERTY

§ 6.24 CHECKLIST: Defining, Valuing, and Allocating Property for Purposes of the Asset Division—Overview

6.24.1 Defining, Valuing, and Allocating Property for Purposes of the Asset Division—Overview

- Defining what constitutes property:
 - The nature and attributes of property must be considered.
 - Property which is speculative or contingent cannot be divided.
 - Property is defined expansively. **Authority:** Conn. Gen. Stat. § 46b-81; *Bender v. Bender*, 258 Conn. 733 (2001), *Lopiano v. Lopiano*, 247 Conn. 356 (1998), *Bornemann v. Bornemann*, 245 Conn. 508 (1998), *Krafick v. Krafick*, 234 Conn. 783 (1995), and *Rousseau v. Perricone*, 148 Conn. App. 837 (2014).
Discussion: See § 6.25, below.
- Considering valuation:
 - The assets are to be valued on the date of the dissolution and the filing of a motion for clarification will not change the valuation date.
 - Where assets are incapable of being valued on the date of dissolution, the value should be as close to the dissolution date as possible.
 - As long as the assets are valued as of the date of the dissolution it is permissible to take into account post separation contributions to assets.
 - Assets which were dissipated or sold in violation of the automatic orders may be valued at the time of the dissolution of the parties' marriage.
Authority: *O'Brien v. O'Brien*, 326 Conn. 81 (2017), *Weinstein v. Weinstein*, 275 Conn. 671 (2005), *Lopiano v. Lopiano*, 247 Conn. 356 (1998), *Bornemann v. Bornemann*, 245 Conn. 508 (1998), *Krafick v. Krafick*, 234 Conn. 783 (1995), *Sunbury v. Sunbury*, 216 Conn. 673 (1990), *Grant v. Grant*, 171 Conn. App. 851

(2017), *Mensah v. Mensah*, 145 Conn. App. 644 (2013), *Light v. Grimes*, 136 Conn. App. 161 (2012), *Martin v. Martin*, 101 Conn. App. 106 (2007), *Kremenitzer v. Kremenitzer*, 81 Conn. App. 135 (2004), *Kiniry v. Kiniry*, 71 Conn. App. 614 (2002), *Wendt v. Wendt*, 59 Conn. App. 656 (2000), *Zern v. Zern*, 15 Conn. App. 292 (1988), *Cuneo v. Cuneo*, 12 Conn. App. 702 (1987), and *Papageorge v. Papageorge*, 12 Conn. App. 596 (1987), and *Callahan v. Callahan*, 2013 Conn. Super. LEXIS 618 (Mar. 20, 2013); P.B. § 25-5(b)(1).

Discussion: See § 6.26, *below*.

□ Understanding different valuation methodologies:

- Assets may be simple to value, such as a bank account, where the balance represents the value.

- Conversely, certain assets may require an appraisal, and such values must be based upon fair market value. **Authority:** *Turgeon v. Turgeon*, 190 Conn. 269 (1983) and 26 C.F.R. § 20-2031-1(b). **Discussion:** See §§ 6.27[1] and 6.27[2], *below*.

□ Valuing assets:

- Each asset is not required to be valued separately.
- The court has discretion in determining the appropriate valuation method for assets.

- The court is not required to accept expert valuations of assets.

Authority: *Bornemann v. Bornemann*, 245 Conn. 508 (1998), *Krafick v. Krafick*, 234 Conn. 783 (1995), *Brooks v. Brooks*, 121 Conn. App. 659 (2010), and *Martin v. Martin*, 101 Conn. App. 106 (2007). **Discussion:** See § 6.27[3], *below*.

□ Considering tax and penalty issues in valuing assets:

- Penalties that occur for an early liquidation of a certificate of deposit or retirement account should be considered when valuing assets.

- There is no obligation to consider the tax consequences of the sale of an asset, especially where it is not being sold.

- The party who is awarded an asset will assume the cost basis in the property that the other party had in that asset. **Authority:** 26 U.S.C.

§§ 72(t), 1041, 1041(b), and 1041(c); *Rolla v. Rolla*, 48 Conn. App. 732 (1998) and *Clement v. Clement*, 27 Conn. App. 364 (1992); 26 C.F.R. § 1.1041-1T, A-7.

Discussion: See § 6.28, *below*.

□ Allocating property:

- The court may assign any part of the estate owned by one party to the other.

- An award cannot be made to third parties.

- An equal division is not required.

- Under appropriate circumstances, the court can award a party assets as a result of the use of funds during the marriage by the other party.

Authority: Conn. Gen. Stat. § 46b-81; *Ankatell v. Kulldorff*, 207 Conn. App. 807, cert. denied 340 Conn. 905 (2021), *Rivnak v. Rivnak*, 99 Conn. App. 326 (2007) and *Rosato v. Rosato*, 77 Conn. App. 9 (2003). **Discussion:** See § 6.29, *below*.

§ 6.25 Defining What Constitutes Property

The determination of what constitutes property is the first step in the three-step analysis of property division. *Krafick v. Krafick*, 234 Conn. 783 (1995). Considerations when defining property include, the nature and attributes of various forms of property, whether ownership is vested or sufficiently concrete as to constitute a reasonable expectation of ownership, or it is so

contingent and speculative as to be a mere expectation or hope.

Property for purposes of equitable distribution is defined expansively. “[R]ather than narrow the plain meaning of the term property from its ordinarily comprehensive scope, in enacting § 46b-81, the legislature acted to expand the range of resources subject to the trial court’s power of division, and did not intend that property should be given a narrow construction.” *Bender v. Bender*, 258 Conn. 733, 743 (2001), *Lopiano v. Lopiano*, 247 Conn. 356 (1998), and *Bornemann v. Bornemann*, 245 Conn. 508 (1998). The court has interpreted property to include pending civil actions. *Rousseau v. Perricone*, 148 Conn. App. 837 (2014).

§ 6.26 Considering Valuation Issues

[1] Considering Value—In General

Once an asset is determined to be one that the court may divide, the second consideration is valuing that asset. *Krafick v. Krafick*, 234 Conn. 783 (1995). Assets should be valued before they can be divided in an equitable and purposeful manner. A trial court that proceeds with a trial despite an acknowledged lack of disclosure by the parties, which prevents the valuation of certain assets, cannot have the requisite evidentiary basis to make financial orders. *Mensah v. Mensah*, 145 Conn. App. 644 (2013).

[2] Determining the Time of Valuation

The value of the assets is to be fixed at the time of the final decree, not at the time of the commencement of the action or at any other time during the pendency of the case. *Lopiano v. Lopiano*, 247 Conn. 356 (1998). Assets will not be valued as of the date of separation. *Zern v. Zern*, 15 Conn. App. 292 (1988). The filing of a motion for clarification will not change the valuation date from the date of dissolution. *Light v. Grimes*, 136 Conn. App. 161 (2012). Any discovery requests that have been served on a party will require compliance with the continuing duty to disclose until judgment enters. *Weinstein v. Weinstein*, 275 Conn. 671 (2005).

When there is a claim of a violation of the automatic orders due to the improper spending or dissipation of assets, it is difficult, if not impossible, to value those assets on the date of dissolution. However, it would likewise be speculative to value the assets on the date of dissolution. Evidence of the amount dissipated or spent should be presented to the court to craft an appropriate remedy for such violation. See *Grant v. Grant*, 171 Conn. App. 851 (2017). However, where a party is found to have violated the automatic orders in exercising stock options, taking into account the value of the stock options at the time of retrial is permitted as a remedy to the violation of the automatic orders, separate from a property division, see *O’Brien v. O’Brien*, 326 Conn. 81 (2017).

#Comment Begins

Warning: The *Grant* court did not address the issue of how and when to value dissipated or spent assets as it overruled the trial court finding of a violation of the automatic orders. However, *Grant* did not address the propriety of the trial court valuing the claimed dissipated assets at the time of the dissolution and failure to do so could lead practitioners to argue that the date the action is filed should govern in such situations. This case should not be read for that proposition, especially in light of the long-standing precedent to value assets on the date of dissolution.

#Comment Ends#Comment Begins

Warning: In *O'Brien*, there was no motion for contempt filed at the time of the dissolution trial, it was not filed until the retrial, as, b that time, the price of the stock in question had rebounded above the price at which the husband exercised the stock options. *O'Brien* should not be read so expansively as to permit the valuation of such assets at the time of retrial, in violation of *Sunbury v. Sunbury*, 216 Conn. 673 (1990) requiring assets to be valued on the date of dissolution.

#Comment Ends

P.B. § 25-5 has been revised effective July 16, 2019 to permit the purchase and sale of securities if it is in the usual course of business and the purchase or sale is: “(i) intended to preserve the estate of the parties, (ii) transacted either on an open and public market or at an arm’s length on a private market, and (iii) completed in such a manner that the purchase securities or sales proceeds resulting from a sale remain ... in the account in which the securities or cash were maintained immediately prior to the transaction.” P.B. § 25-5(b)(1)(A). If it was the parties usual practice to discuss investment decisions, but there is an urgency to the transaction, a party may make the transaction if there is a good faith reason to believe that the delay caused by the discussion would result in a loss to the estate, but must also immediately notify the other party of the transaction. P.B. § 25-5(b)(1)(B).

#Comment Begins

Warning: As a result of the practice book revision, *O'Brien* should be read carefully for its precedential value.

#Comment Ends

Certain assets are incapable of being valued as of the date of the dissolution, but should be valued as reasonably close to the date of dissolution as possible. *Cuneo v. Cuneo*, 12 Conn. App. 702 (1987). This is particularly true where an asset is appraised, which will occur well before the final dissolution.

Where there is a reversal of a trial court decision on appeal, the assets are to be valued as of the original date of dissolution, not the date of retrial, absent exceptional intervening circumstances. *Sunbury v. Sunbury*, 216 Conn. 673 (1990) and *Kiniry v. Kiniry*, 71 Conn. App. 614, 624–625 (2002). The mere increase or decrease in the value of the assets will not arise to exceptional intervening circumstances. *Kremenitzer v. Kremenitzer*, 81 Conn. App. 135 (2004). However, wrongful conduct on the part of one of the parties affecting the value of the assets as of the date of dissolution may constitute exceptional intervening circumstances for purposes of a court valuing the assets at the time of the rehearing. *Callahan v. Callahan*, 2013 Conn. Super. LEXIS 618 (Mar. 20, 2013).

#Comment Begins

Strategic Point: The time of valuation does not need to be the exact date of the judgment, but may be a time sufficiently close to the date of judgment. Because the court has 120 days in which to render its decision, the value of assets will not likely be the exact date of dissolution. However, any major change in an asset or its value should be brought to the attention of the court before the decision is rendered.

#Comment Ends

[3] Assessing Appreciation in Assets Since Separation

Although assets are to be valued on the date of dissolution, the court may consider the

efforts of the parties regarding post-separation contributions to the assets. *Papageorge v. Papageorge*, 12 Conn. App. 596 (1987). This will often apply to forms of deferred or incentive compensation awarded to an employee spouse after separation. *Wendt v. Wendt*, 59 Conn. App. 656 (2000). The rationale for looking at post-separation contributions is that it may be argued that the asset was acquired solely through the contributions and efforts of one spouse. *Bornemann v. Bornemann*, 245 Conn. 508 (1998). Additionally, post separation appreciation in the value of a home maintained by one party may be factored into the property division. *Martin v. Martin*, 101 Conn. App. 106, 121 (2007).

#Comment Begins

Strategic Point: The fact that assets are acquired post separation does not automatically mean they should be allocated to the party acquiring such an asset. It may be argued that the acquisition was the result of no extraordinary effort and therefore should not receive special consideration.

#Comment Ends

§ 6.27 Understanding Different Valuation Methodologies

[1] Understanding Different Valuation Methodologies—In General

The valuation process ranges from the simple and obvious to the complex and involved, depending on the asset being valued. The value of a savings account in a bank is obviously the balance in the account on a given day. However, other assets do not easily have fixed dollar values, or valuation is based on factors such as the condition and potential use of the asset. Such assets may require the use of appraisers, actuaries, or other valuation experts to determine value.

[2] Applying Fair Market Value

The appropriate methodology for valuing assets is fair market value. *Turgeon v. Turgeon*, 190 Conn. 269 (1983). “The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.” 26 C.F.R. § 20-2031-1(b).

#Comment Begins

Warning: There are other methods of value, such as fair value, employed by experts. Any expert retained should be advised of the fair market value standard to be employed in valuing assets in a dissolution action.

#Comment Ends

[3] Valuing Assets

Although the court, in considering the “estate” of each party, must by implication consider the economic value of the asset, the court does not have to assign specific values to the parties’ assets or value each asset separately. *Brooks v. Brooks*, 121 Conn. App. 659, 666 (2010). Merely reciting that the court has considered the estate of the parties is technically sufficient, although the appellate courts have encouraged trial courts to be specific in valuing the assets and in stating the method of valuation used. *Krafick v. Krafick*, 234 Conn. 783, 804 (1995). The parties should provide the court with detailed evidence of value, and failure to do so will later preclude either of them from asserting that the court reached its valuation based upon insufficient information. *Bornemann v. Bornemann*, 245 Conn. 508, 536 (1998).

In arriving at a value of the assets, the trial court has considerable discretion in selecting and applying an appropriate valuation method. *Brooks*, 121 Conn. App. at 666–667. The trial court’s findings as to valuation will be overturned only if it misapplies or ignores the evidence. *Bornemann*, 245 Conn. at 531–532 and *Brooks v. Brooks*, 121 Conn. App. at 667. Instead of having dueling experts, the parties may stipulate to the value of an asset. *Martin v. Martin*, 101 Conn. App. 106 (2007).

#Comment Begins

Strategic Point: In cases where the trial court has failed to provide the basis for its valuation, counsel should consider a motion for articulation. The basis for valuation may prove useful in prosecuting or defending a later motion to modify or may provide the basis for appeal.

#Comment Ends

When arriving at a value, it is recognized that expert opinion is often not capable of exact quantification, like the balance in a bank account, but is estimated based upon the experts’ training, the asset being valued, and other quantifiable measures. *Varley v. Varley*, 189 Conn. 490 (1983). In determining value, the court may accept or reject evidence and is not bound to accept the determination of value as proffered by an expert. *Brooks*, 121 Conn. App. at 667. Generally accepted actuarial principles, such as employing a discount for mortality, projected interest rates, and the likelihood that an employee will remain employed, are sufficiently grounded in reason, logic, and probability that they may be used to value pension benefits. *Thompson v. Thompson*, 183 Conn. 96 (1981). Additionally, it is recognized that when valuing a closely held business, it may be appropriate to use discounts for lack of marketability and minority interests. *Brooks*, 121 Conn. App. at 668–670.

In assigning a value to an asset, the court may consider what part or percentage of an asset was earned during the marriage and may exclude that part of the asset that has not yet been earned at the time of the dissolution of the marriage. *Czarzasty v. Czarzasty*, 101 Conn. App. 583 (2007).

§ 6.28 Considering Tax and Penalty Issues in Valuing Assets

[1] Assessing Penalty Provisions

Certain assets may result in penalties for early withdrawal or liquidation. A certificate of deposit, if withdrawn before the maturity date, will usually have a penalty. A withdrawal from a retirement plan prior to age 59½ will incur a ten percent early withdrawal penalty. 26 U.S.C. § 72(t). If an asset is required to be liquidated as a result of the property division, any penalty provision should be taken into account in arriving at a value.

[2] Allowing for Tax Consequences on the Sale of Assets

When a trial court is allocating assets, there is no obligation that it consider the tax consequences of such award. *Rolla v. Rolla*, 48 Conn. App. 732 (1998). Should evidence of the tax ramifications regarding certain assets be necessary, an expert should testify to the specific tax implications. *Clement v. Clement*, 27 Conn. App. 364 (1992).

Assessing the tax consequences for a property division is important for several reasons. Although an asset may not be sold immediately, when it is sold there will likely be a capital gain or capital loss. Taking into account the tax repercussions will allow for a determination as to what

each party will receive on a net after tax basis. One consideration may also be whether any specific asset has a loss. Since those losses may be offset by capital gain, they prove to be a valuable tax planning tool.

#Comment Begins

Strategic Point: It is especially important to consider the tax ramifications and penalties where such assets are not to be divided equally. Likewise, trading an asset with tax ramifications for cash, without netting out the tax effects, will result in the property division being skewed in favor of the party receiving assets with no tax ramifications.

#Comment Ends

[3] Acquiring the Cost Basis of an Asset

A property division resulting in the transfer of assets between spouses incident to a dissolution is not a taxable event. 26 U.S.C. § 1041. A transfer is incident to a divorce if it occurs within one year after the date of dissolution or if the transfer relates to the cessation of the marriage and occurs within six years from the date of dissolution. 26 U.S.C. § 1041(c) and 26 C.F.R. § 1.041-1T, A-7. The spouse receiving the asset acquires the cost basis of the other spouse in that asset. 26 U.S.C. § 1041(b).

§ 6.29 Allocating Property

The court ~~has the ability to~~ can assign to either party property of the other. Conn. Gen. Stat. § 46b-81. Accordingly, by the express terms of the statute, an award of property cannot be made to third parties, including the parties' children. *Rosato v. Rosato*, 77 Conn. App. 9 (2003).

Connecticut uses equitable principles to divide property. However, equitable does not require an equal division of assets. *Rivnak v. Rivnak*, 99 Conn. App. 326 (2007).

Courts ~~have the ability to~~ can assess transactions which occurred during the marriage when allocating property in the final dissolution. Where one spouse made lump sum payments towards his mortgage, while objecting to the wife doing the same, and made contributions to the college accounts for his children which were not issue of the marriage, the court was well within its discretion to order the husband to pay the wife an amount equal to that which he had expended. *Ankatell v. Kulldorff*, 207 Conn. App. 807, cert. denied 340 Conn. 905 (2021).

#Comment Begins

Strategic Point: Many clients believe that all assets are to be divided equally. While an analysis of a property division may start with an assumption of an equal division, there are many statutory factors that may tilt an asset division in favor of one side or the other.

#Comment Ends#Comment Begins

Warning: There are many litigants who believe they can do “divorce financial planning” and that it will be of no consequence at the time of the dissolution. However, even though certain assets may have been expended, the court has the power to make alternative orders as ~~a~~ compensation under the correct circumstances. Additionally, clients should be advised that such behavior will not win over a judge.

#Comment Ends

PART VI: DEFINING, VALUING, AND ALLOCATING SPECIFIC ASSETS

DIVISION OF PROPERTY

§ 6.30 CHECKLIST: Defining, Valuing, and Allocating Specific Assets

6.30.1 Defining, Valuing, and Allocating Specific Assets

- Defining real property and evaluating third-party interests:
 - Real property may include the marital home, a second residence, a time-share, agricultural property, or a commercial property.
 - Third parties with interests in property, especially where a fraudulent conveyance is claimed, should be joined as parties. **Authority:** *Conn. Gen. Stat. § 46b-81*; *Gaudio v. Gaudio*, 23 Conn. App. 287 (1990) and *Aarestrup v. Harwood-Aarestrup*, 49 Conn. Supp. 219 (2005). **Discussion:** See §§ 6.31[1] and 6.31[2], *below*.
- Valuing real property:
 - Only an owner of property is competent to testify as to the value of the property.
 - A value arrived at by an appraiser is not required to be accepted by the court. **Authority:** *Porter v. Thrane*, 98 Conn. App. 336 (2006), *Damon v. Damon*, 23 Conn. App. 111 (1990), and *Sunbury v. Sunbury*, 13 Conn. App. 651 (1988). **Discussion:** See § 6.31[3], *below*.
- Awarding one party the primary residence:
 - The transfer of real property should be done by quit claim deed.
 - If a party does not sign a deed and the property is in Connecticut, the judgment may be recorded on the land records and that will effectuate the transfer of the property. **Authority:** *Conn. Gen. Stat. § 46b-81(b)*. **Discussion:** See § 6.31[4], *below*.
- Ordering a refinance of the primary residence:
 - If a party is retaining a property, they can be ordered to refinance the debt to remove the other party from an existing mortgage.
 - There must be evidence of the ability to refinance and of the affordability of the payment upon a refinance.
 - The refinancing can be ordered to occur over a period of time. **Authority:** *Valentine v. Valentine*, 164 Conn. App. 354 (2016), *Ricciuti v. Ricciuti*, 74 Conn. App. 120 (2002), *Usko v. Usko*, 2015 Conn. Super. LEXIS 388 (Feb. 24, 2015), and *Bassett v. Bassett*, 2006 Conn. Super. LEXIS 1717 (2006). **Discussion:** See § 6.31[5], *below*.
- Ordering the sale of the primary residence:
 - The court may order the immediate sale of the property if it is not affordable or represents the vast majority of the total estate.
 - The court may delay the sale of the property, typically to a date where the children complete a certain level of schooling.
 - Where a delayed sale is ordered, the judgment should specify all of the terms for the listing and sale of the property.
 - If there is a specified date by which the property must be sold, that date may not be changed.

- Provisions should be made for dividing the escrow balance upon the sale of the property. **Authority:** *Bologna v. Bologna*, 208 Conn. App. 218 (2021), *McLoughlin v. McLoughlin*, 157 Conn. App. 568 (2015), *Martin v. Martin*, 99 Conn. App. 145 (2007), *Werblood v. Birnbach*, 41 Conn. App. 728 (1996), *Roberts v. Roberts*, 32 Conn. App. 465 (1993), *Henin v. Henin*, 26 Conn. App. 386 (1992), and *Croke v. Croke*, 4 Conn. App. 663 (1985). **Discussion:** See § 6.31[6], *below*.

- Assessing the tax implications upon the sale of real property:

- The parties should exchange all documents regarding the cost basis and improvements for a property.

- Each party may receive a \$250,000 exclusion on the capital gain of the property if the use and ownership test is met:

- The property must have been owned and used as the principal place of residence for two of the last five years, which period of time need not be consecutive.

- Divorced spouses are permitted to assume the period of ownership and use of his or her former spouse regarding the property to satisfy the test for capital gain purposes. **Authority:** 26 U.S.C. §§ 121, 121(a), 121(d)(3)(A), and 121(d)(3)(B). **Discussion:** See § 6.31[7], *below*.

- Allocating real property other than the marital residence:

- Use of property other than the marital residence will likely dictate the disposition of the property.

- A commercial building from which one of the parties runs his or her business, will likely be awarded to him or her, with a provision to the other spouse for receiving his or her share of the property.

- There is no capital gain exclusion from the sale of real property that is not considered the principal residence.

- If the property has been depreciated, that must be taken into account when determining the tax consequences upon sale. **Authority:** 26 U.S.C. §§ 1001 and 1231; *Werkhoven v. Werkhoven*, 2011 Conn. Super. LEXIS 358 (2011). **Discussion:** See § 6.31[8], *below*.

- Defining, valuing, and distributing bank and other cash accounts:

- Cash may include that which is held at a bank or cash on hand.

- Accounts held for a minor child may not be allocated between the parties.

- Attention should be paid to Schedule B of the Federal Tax Return, Part III for reporting of foreign bank accounts.

- Cash assets will be valued based upon the balance on hand.

- Cash may be necessary to meet every day needs and living expenses.

- Authority:** *Louney v. Louney*, 13 Conn. App. 270 (1988); 31 C.F.R.

- §§ 1010.306(c), 1010.350(a), and 1010.860(g). Discussion:** See § 6.32, *below*.

- Defining, valuing, and distributing stocks, bonds, and other securities:

- Publically traded securities are typically held in brokerage accounts.

- Valuing a security may be done by looking at the closing price of a stock or bond on any given day.

- When dividing securities, the cost basis and resulting gain should be ascertained so that one party does not receive a disproportionate amount of the cost basis to the exclusion of the other party.

- The holdings need not be liquidated prior to transfer. **Authority:** 26 U.S.C. § 1(h). **Discussion:** See § 6.33, *below*.

- Defining pension and retirement benefits:
 - Pension benefits may be viewed as an asset or a future source of income.
 - Pension benefits are typically either a defined benefit plan or a defined contribution plan.
 - Defined benefits plans provide the employee with a payment, typically monthly, upon retirement based upon the duration of employment, earnings, and date of retirement, i.e., a pension plan.
 - Defined contribution plans provide the employee with a lump sum from which he or she may draw down upon retirement, i.e., a 401(k) plan.
 - Retirement benefits are sufficiently quantifiable to be divisible in a dissolution action.
 - Unvested pension benefits are subject to distribution in a dissolution.
 - An unvested deferred compensation plan contingent only upon an employee's continued employment is sufficiently concrete for inclusion in the property distribution.
 - A retirement benefit that does not exist at the time of the dissolution, but comes into existence due to post dissolution events, is not an asset subject to distribution.
 - A non-qualified and unfunded pension plan may be divided in a dissolution action.
 - The parties may agree that pension benefits will be valued as of the date of distribution, not the date of dissolution.
 - Military benefits are subject to distribution if the parties have been married for a period of ten years while one spouse was in the military.

Authority: 10 U.S.C. §§ 1408, 1408(a)(2)(C), and 1408(d)(2); *Reville v. Reville*, 312 Conn. 428 (2014), *Mickey v. Mickey*, 292 Conn. 597 (2009), *Bender v. Bender*, 258 Conn. 733 (2001), *Krafick v. Krafick*, 234 Conn. 783 (1995), *Thompson v. Thompson*, 183 Conn. 96 (1981), *DiNunzio v. DiNunzio*, 180 Conn. App. 64, *cert denied* 328 Conn. 930 (2018), *Kent v. DiPaola*, 178 Conn. app. 424 (2017), *Nadel v. Luttinger*, 168 Conn. App. 689 (2016), *Cunningham v. Cunningham*, 140 Conn. App. 676 (2013), *Ranfone v. Ranfone*, 103 Conn. App. 243 (2007), *Czarzasty v. Czarzasty*, 101 Conn. App. 583 (2007), *Hansen v. Hansen*, 80 Conn. App. 609 (2003), and *Sachs v. Sachs*, 60 Conn. App. 337 (2000). **Discussion:** See §§ 6.34[1] and 6.34[2], *below*.

- Valuing and allocating pension and retirement benefits:
 - A defined benefit plan may be valued by an expert using actuarial methods.
 - A defined contribution plan may be valued by the balance in the account.
 - There are three possible methods to distribute pension and retirement benefits:
 - The present value method is where the present value of the pension plan is offset by awarding the non-employee spouse other assets in lieu of the pension benefit.
 - The present division of deferred distribution method, where the current percentage of the pension benefit is determined, although the benefits are not received until the pension goes into pay status.
 - The reserved jurisdiction method, which would allow the court to divide pension benefits once they have matured, but is inappropriate because the court may not retain jurisdiction to divide assets.

- The future value of a stream of income should be determined by an actuary. **Authority:** *Bender v. Bender*, 258 Conn. 733 (2001), *Krafick v. Krafick*, 234 Conn. 783 (1995), *Thomasi v. Thomasi*, 181 Conn. App. 822 (2018), *Cimino v. Cimino*, 155 Conn. App. 298 (2015), and *Brady-Kinsella v. Kinsella*, 154 Conn. App. 413 (2014). **Discussion:** See §§ 6.34[3] and 6.34[4], *below*.
- Implementing the transfer of pension and retirement plans and assessing tax ramifications:
 - Liquidation of a retirement plan prior to age 59½ will result in a ten percent penalty.
 - This penalty does not apply if the funds are withdrawn by the alternate payee at the same time the Qualified Domestic Relations Order is implemented.
 - Deferred compensation plans are non-transferable.
 - Any division of a pension or retirement plan must be made by Qualified Domestic Relations Order or Domestic Relations Order.
 - If gains and losses are not ordered with a QDRO, the court may award interest after the case was appealed.
 - Transfers of IRA accounts do not need a Domestic Relations Order.
- Authority:** 26 U.S.C § 72(t), 1056(d)(3)(C), and 1056(d)(3)(D); *Anketell v. Kulldorff*, 223 Conn. App. 345 (2024). **Discussion:** See §§ 6.34[5] and 6.34[6], *below*.
- Defining, valuing, and distributing stock options and other employee plans:
 - Stock options and other employee plans earned during the marriage are assets subject to distribution.
 - Unvested stock options that require no additional services will be considered as an asset earned during the marriage.
 - Vested but non-matured options are assets subject to division.
 - Stock options may be valued using their intrinsic value or the Black-Scholes method.
 - Typically, stock options are non-transferable so the employee spouse will hold the stock option to be exercised when the non-employee spouse directs.
 - When stock options are non-transferable, a provision in the judgment as to the payment of the taxes due on the stock options is necessary.
- Authority:** *Snyder v. Commissioner*, 93 T.C. 529 (1989), *Bornemann v. Bornemann*, 245 Conn. 508 (1998), *Rubin v. Rubin*, 204 Conn. 224 (1987), *Czorzasty v. Czorzasty*, 101 Conn. App. 583 (2007), *Calo-Turner v. Turner*, 83 Conn. App. 53 (2004), *Gilbert v. Gilbert*, 73 Conn. App. 473 (2002), *Wendt v. Wendt*, 59 Conn. App. 656 (2000), *Hopfer v. Hopfer*, 59 Conn. App. 452 (2000), *Taylor v. Taylor*, 57 Conn. App. 528 (2000), and *Chammah v. Chammah*, 1997 Conn. Super. LEXIS 1896 (1997). **Discussion:** See § 6.35, *below*.
- Defining, valuing, and dividing business interests:
 - A closely held business may have value depending upon what the business does, who its customers are, and whether there is any value distinct from the owners of the business.
 - Businesses may be valued using one of any number of methods:
 - Book value, which represents the assets on the books less the liabilities.
 - Liquidation value, which is the price at which the assets of the business will sell.

- The comparable sales method, which reviews sales of comparable businesses to determine the value.
- The discounted cash flow method, by which a weighted average of past income is used to project the future income stream of the business.
- The capitalization of earnings method, where a capitalization rate, representing a rate of return that an investor would require on the earnings of the business, is employed to determine value.
- The capitalization of excess earnings method, where the earnings in excess of that required to hire an employee to replace the owner is used and any earnings received by the owners in excess thereof are capitalized to determine value.
- Buy-sell agreements that are arms length agreements may be used to determine value.
- Revenue ruling 59-60, which sets forth eight factors to be considered when valuing a closely held business for estate and gift tax purposes.
- Minority and lack of marketability discounts may be appropriate in valuing some closely held businesses.
 - Typically, a business valuator will be needed to determine the value of a closely held business. **Authority:** *Eslami v. Eslami*, 218 Conn. 801 (1991), *Turgeon v. Turgeon*, 190 Conn. 269 (1983), *Fucci v. Fucci*, 179 Conn. 174 (1979), *Merk-Gould v. Gould*, 184 Conn. App. 512 (2018), *Brooks v. Brooks*, 121 Conn. App. 659 (2010), *Siracusa v. Siracusa*, 30 Conn. App. 560 (1993), *Brash v. Brash*, 20 Conn. App. 609 (1990), *Ferrucci v. Ferrucci*, 11 Conn. App. 369 (1987), *Ellsworth v. Ellsworth*, 6 Conn. App. 617 (1986), and *Stearns v. Stearns*, 4 Conn. App. 323 (1985); Revenue Ruling 59-60. **Discussion:** See §§ 6.36[1], 6.36[2], and 6.36[3], *below*.
- Assessing double dipping issues and allocation of business interests:
 - When the income is used to determine the value of the business and the same income is used for the payment of alimony, such considerations may be considered double dipping, but courts will rarely find that double dipping occurs.
 - Business interests will typically be allocated to the party who is employed in the business.
 - If both parties are owners, the court will usually award one party the business with a payout to the other spouse, which payout may be contingent upon the other spouse not competing with the business for a certain period of time. **Authority:** *Oudheusden v. Oudheusden*, Conn. (2021), *Eslami v. Eslami*, 218 Conn. 801 (1991), *Wood v. Wood*, 160 Conn. App. 708 (2015), *McRae v. McRae*, 129 Conn. App. 171 (2011), *de Repentigny v. de Repentigny*, 121 Conn. App. 451 (2010), *Sander v. Sander*, 96 Conn. App. 102 (2006), and *Greco v. Greco*, 82 Conn. App. 768 (2004). **Discussion:** See §§ 6.36[4] and 6.35[5], *below*.
- Including personal injury awards:
 - Personal injury awards, which are undetermined, constitute a presently existing property right subject to distribution in a dissolution.
 - The court may divide the award irrespective of the purpose for which it was awarded.
 - Worker's compensation claims, even if of an undetermined value, are a contractual right subject to distribution in a dissolution. **Authority:** *Smith v. Smith*, 249 Conn. 265 (1999), *Lopiano v. Lopiano*, 247 Conn. 356 (1998), *Costa v. Costa*, 57 Conn. App. 165 (2000), *Tyc v. Tyc*, 40 Conn. App. 562 (1996), and

Raccio v. Raccio, 41 Conn. Supp. 115 (1987). **Discussion:** See § 6.37, below.

□ Including gifts, inheritances, and trusts:

- Assets, even if received as gifts, inheritances, or trusts, are subject to distribution in a dissolution.

- A future potential inheritance is not an asset subject to distribution.

- A vested estate interest which is subject to litigation is not sufficiently concrete to allow it to be considered in a property distribution.

- Trust assets must be sufficiently concrete and not subject to divestment to be considered an asset subject to distribution, although it is possible a court may consider a discretionary trust interest.

- The court will consider a spouse's contribution to assets that the other spouse received by gift, inheritance, or trust. **Authority:** Conn. Gen. Stat.

§ 46b-36; *Powell-Ferri v. Ferri*, 326 Conn. 457 (2017), *Ferri v. Powell-Ferri*, 317 Conn. 223 (2015), *Watson v. Watson*, 221 Conn. 698 (1992), *Bartlett v. Bartlett*, 220 Conn. 372 (1991), *Eslami v. Eslami*, 218 Conn. 801 (1991), *Blake v. Blake*, 207 Conn. 217 (1988), *Rubin v. Rubin*, 204 Conn. 224 (1987), *North v. North*, 183 Conn. 35 (1981), *Zeoli v. Commissioner of Social Services*, 179 Conn. 83 (1979), *Krause v. Krause*, 174 Conn. 361 (1978), *Coleman v. Coleman*, 151 Conn. App. 613 (2014), *Karen v. Parciak-Karen*, 40 Conn. App. 697 (1996), *Cooley v. Cooley*, 32 Conn. App. 152 (1993), *Roach v. Roach*, 20 Conn. App. 500 (1990), *Weinstein v. Weinstein*, 18 Conn. App. 622 (1989), and *Jackson v. Jackson*, 17 Conn. App. 431 (1989). **Discussion:** See § 6.38, below.

□ Evaluating life insurance policies and annuities:

- Life insurance may be used in a property division or as security for the alimony and child support orders.

- Annuities have a value based upon the policy contract. **Authority:** Conn. Gen. Stat. § 46b-82(a); *Mauro v. Mauro*, 16 Conn. App. 680 (1988).

Discussion: See § 6.39, below.

□ Allocating 529 Accounts:

- 529 accounts belong to the person establishing the account, unlike UGMA and UTMA accounts.

- Use of the funds for a qualified beneficiary/student can be done tax free; withdrawal for other purposes will be taxable to the account owner.

- Courts may treat 529 accounts as part of the property division.

Authority: *Greenan v. Greenan*, 150 Conn. App. 289 (2014), and *IRS Fact Sheet: 529 Plans: Questions and Answers* (2014). **Discussion:** See § 6.40, below.

□ Evaluating personal property:

- Absent valuable furniture and furnishings, the parties should create lists of the property that they would like to retain.

- Antiques or works of art should be appraised and allocated based upon value. **Authority:** *Rathblott v. Rathblott*, 79 Conn. App. 812 (2003).

Discussion: See § 6.41, below.

□ Evaluating intellectual property:

- Contractual rights to intellectual property, such as royalties, copyrights, or trademarks, may be subject to division even if the value is speculative or not immediately known. **Authority:** *Gallo v. Gallo*, 184 Conn. 36 (1981).

Discussion: See § 6.42, below.

□ Evaluating liabilities:

- The court may allocate debt to each of the parties.

- Consideration will be made of the manner and purpose for which the

debt was incurred. **Authority:** *Beede v. Beede*, 186 Conn. 191 (1982), *Bento v. Bento*, 125 Conn. App. 229 (2010), *Rozsa v. Rozsa*, 117 Conn. App. 1 (2009), and *Casey v. Casey*, 82 Conn. App. 378 (2004). **Discussion:** See § 6.43, *below*.

□ Excluding professional degrees:

- Professional degrees are not considered assets subject to distribution.
- The degree does not guarantee a particular income in the future.

Authority: *Simmons v. Simmons*, 244 Conn. 158 (1998). **Discussion:** See § 6.44, *below*.

□ Assessing alternatives with fraud or a fraudulent conveyance:

○ The person to whom the property was fraudulently transferred should be joined as a party in the action.

○ A fraudulent conveyance occurs when a transfer is made at the time the transferor knew he or she had a debt, the transfer was not for fair consideration, and the transferor is unable to pay his or her debts as a result of the transfer.

○ A fraudulent conveyance must be proven by clear and convincing evidence.

○ If a fraudulent conveyance is not proven, the court may still take into account the value of the asset when making the property division.

○ A third-party creditor may collaterally attack a dissolution judgment as a fraudulent conveyance.

○ Motions to open may be filed within four months of judgment.

○ Fraud or mutual mistake must be demonstrated if the motion to open is filed more than four months from the date of judgment.

○ Parties may stipulate to open the judgment. **Authority:** Conn. Gen. Stat. §§ 52-212 and 52-212a; *Reinke v. Sing*, 328 Conn. 376 (2018) (*Canty v. Otto*, 304 Conn. 546 (2012), *Kaczynski v. Kaczynski*, 294 Conn. 121 (2009), *Greco v. Greco*, 275 Conn. 348 (2005), *Watson v. Watson*, 221 Conn. 698 (1992), *Molitor v. Molitor*, 184 Conn. 530 (1981), *Stoner v. Stoner*, 163 Conn. 345 (1972), *Forgione v. Forgione*, 162 Conn. App. 1 (2015), *cert. denied*, 320 Conn. 920 (2016), *McLoughlin v. McLoughlin*, 157 Conn. App. 568 (2005), *Cottrell v. Cottrell*, 133 Conn. App. 52 (2012), *Jacobowitz v. Jacobowitz*, 102 Conn. App. 332 (2007), *Richards v. Richards*, 78 Conn. App. 734, *cert. denied*, 266 Conn. 922 (2003), *Gaudio v. Gaudio*, 23 Conn. App. 287 (1990), *Farrell v. Farrell*, 36 Conn. App. 305 (1994), and *Miller v. Miller*, 22 Conn. App. 310 (1990).

Discussion: See §§ 6.45[1] and 6.45[2], *below*. See also, § 12.30[3], *below*.

□ Failure to allocate an asset at the time of the dissolution:

○ A jointly held asset that is not awarded to either party at the time of the dissolution will continue to be held jointly.

○ If the asset jointly owned is real property, a partition action will be necessary if the parties cannot agree on how the property is to be divided.

○ A dissolution judgment severs the joint tenancy in property owned between the spouses. **Authority:** Conn. Gen. Stat. § 47-14g; *Hackett v. Hackett*, 42 Conn. Supp. 36 (1990). **Discussion:** See § 6.46, *below*.

§ 6.31 Defining, Valuing, and Distributing Real Property

[1] Defining Types of Real Property

Real property may include the marital residence, second homes, commercial property, time-shares, agricultural properties, or other investment real estate. The use to which the property

is subject and the financial demands of setting up separate residences will usually dictate how the property will be allocated between the parties. If finances permit, one of the parties may remain in the marital residence, particularly if it is also the home of minor children.

[2] Evaluating Property Owned with Third Parties

The court may only allocate property between the parties to the dissolution action. *Conn. Gen. Stat. § 46b-81*. To the extent third parties have an interest in the real estate, the court cannot distribute the third party's interest in a dissolution action absent joinder of that party and finding a fraudulent conveyance. *Aarestrup v. Harwood-Aarestrup*, 49 Conn. Supp. 219 (2005). Such third parties should be joined in the action so that all claims including those regarding fraudulent conveyance may be determined. *Gaudio v. Gaudio*, 23 Conn. App. 287 (1990).

Where parents or other third parties have provided the parties with funds to purchase or improve the home, the court may not repay such funds to the third persons. However, to the extent the funds provided were in the form of loans that are secured, the court may order one or both of the parties to assume responsibility for the repayment of the debt.

[3] Valuing Real Property

The first place in which the value of real property is stated is on the financial affidavits of the respective parties. However, only an owner of property is competent to testify as to the value of that particular property. *Porter v. Thrane*, 98 Conn. App. 336 (2006). Accordingly, if there is real property in the name of the other spouse, an appraisal will be necessary to provide the court with a competent value of the property, should the non-owner believe the value to be markedly different from the owner stated value.

#Comment Begins

Strategic Point: Parties to a dissolution action will occasionally reference real property on a financial affidavit in which he or she does not have title, but claims an equitable interest. In such instances, a motion should be filed seeking to have reference to such real property on the financial affidavit redacted, because a person is not competent to give a value of property in which they do not have an ownership interest.

#Comment Ends

The court is not required to accept the valuation proffered by an expert witness, especially where the expert is unaware of significant particulars regarding the home, such as the number of rooms. *Sunbury v. Sunbury*, 13 Conn. App. 651 (1988).

#Comment Begins

Strategic Point: Instead of engaging in a battle of the experts, the parties may jointly hire a neutral expert to value real property. This has the advantage of incurring only one cost for an appraisal and a better chance that it will be reflective of fair market value and not skewed in favor of one party.

#Comment Ends

The court may take into account tax consequences in arriving at values for real property. *Damon v. Damon*, 23 Conn. App. 111 (1990). This is particularly true when the property is ordered sold.

[4] Awarding One Party the Primary Residence

If one party is awarded real property located in Connecticut, the other party should sign a quit claim deed transferring ownership at the time the dissolution enters. In the event a recalcitrant party refuses to sign the deed, the divorce decree may be recorded on the land records and that will serve to transfer the property. [Conn. Gen. Stat. § 46b-81\(b\)](#). This provision does not apply to property located outside of Connecticut. Since the court cannot judicially transfer property located outside of Connecticut, a deed will need to be signed.

#Comment Begins

Strategic Point: Prior to the dissolution, if there is out of state real property, counsel where the property is located should be hired to prepare the deed, so that it may be signed off when the dissolution enters.

#Comment Ends#Comment Begins

Strategic Point: If the primary residence is jointly owned and there is a mortgage on the property, the recipient of the property should indemnify the other party with respect to the mortgage. If that party's ability to pay the mortgage is questionable, there should be a provision in the judgment that if the mortgage payment is late, the property will be immediately listed for sale.

#Comment Ends

[5] Ordering a Refinance of the Primary Residence

Where a party is awarded the primary ~~residence~~, or residence or is permitted to remain in the residence for a period of time, whether a refinance of the mortgage is necessary should be considered. The ability of a party to refinance or to secure a mortgage for the purchase of a new residence may be a significant consideration in allocating real property. A court may order the party who is retaining the property to refinance a mortgage as part of the dissolution. [Ricciuti v. Ricciuti](#), 74 Conn. App. 120 (2002). However, in making such an order, the court must have evidence of a refinancing arrangement and the financial ability of a party to meet that obligation. [Ricciuti](#), 74 Conn. App. at 128. However, if the court orders either the refinance and, failing that, then a sale of the home, the evidence of the ability to refinance is unnecessary. [Valentine v. Valentine](#), 164 Conn. App. 354 (2016). In ordering a refinance of the property, the court may provide a period of time for it to be completed. [Bassett v. Bassett](#), 2006 Conn. Super. LEXIS 1717 (2006). A separation agreement providing for one party to use good faith efforts to refinance within one year, requires that party to continue efforts to refinance even after a year, where the initial refinancing efforts were unsuccessful. [Usko v. Usko](#), 2015 Conn. Super. LEXIS 388 (Feb. 24, 2015).

#Comment Begins

Strategic Point: When allowing a party a period of time within which to refinance, an order must provide what will happen if the refinance cannot occur, such as the property being placed on the market for sale, and how the terms of sale will be dictated. Without such a provision, there will be no means to compel the sale of the home.

#Comment Ends#Comment Begins

Strategic Point: A provision such as in *Usko* which requires only the use of best efforts with no

attendant consequences for failing to obtain a refinance should never be used. Without the ability to enforce some action in the absence of a refinance, such provision is meaningless.

#Comment Ends

A second purpose of a post dissolution refinance may be to provide the other party with cash for a down payment on a new residence for the moving party. Alternatively, a refinance or otherwise removing the moving party from responsibility on the existing mortgage may be necessary to allow the moving party to obtain financing on a new residence.

#Comment Begins

Strategic Point: When representing the party who may be seeking a new residence, determine what, if any, constraints there may be on obtaining financing for the new residence if he or she remains on the mortgage for the primary residence. Typically, in analyzing the debt to income ratio, lenders include any debt on which the party is a signatory, irrespective of the terms of a separation agreement. While there may be indemnification provisions in the separation agreement, such provisions do not affect a lender's ability of seeking payment from a signatory who is the beneficiary of such indemnification. A party should consider the need of expert testimony regarding the ability of obtaining financing on a new residence should he or she remain a signatory on the old residence. This may have the desired impact of a court ordering the refinance of the marital residence by the party retaining the same.

#Comment Ends

[6] Ordering the Sale of the Primary Residence

Depending upon the financial circumstances of the parties, the court may award a party the right to live in the home for a period of time before it must be sold, typically to allow the children to complete their schooling. *Werblood v. Birnbach*, 41 Conn. App. 728 (1996) and *Henin v. Henin*, 26 Conn. App. 386 (1992). Where there is a deferred sale date, that date is non-modifiable as part of the property division. *Croke v. Croke*, 4 Conn. App. 663 (1985). A wife was unsuccessful in seeking a modification of the definition of net proceeds when the parties' agreed to delay the sale of the property and the mortgage changed from interest only to interest and principal, resulting in the wife having paid down \$170,000 of the principal on the mortgage. *Bologna v. Bologna*, 208 Conn. App. 218 (2021).

#Comment Begins

Strategic Point: Whether the property is to be sold right after the dissolution or years after, the separation agreement or court orders should specify what constitutes net proceeds from the sale. For instance, should one party receive the entirety of the decrease in the mortgage principal for the period he or she made the mortgage payments? Who is entitled to the credits for real estate taxes, water, sewer or other utilities? Thinking through what a closing statement provides for in terms of credits and adjustments will help in crafting these provisions.

#Comment Ends

If assets are limited and both parties need immediate cash, a sale of the marital residence may be necessary. If the home must be sold, the separation agreement or court decision should be reasonably specific in guiding the parameters of sale, since property divisions are not modifiable. Such parameters may include: how to determine the listing broker; how to set the listing price; how repairs or improvements will be determined and financially allocated between the parties;

how decreases in the listing price will be determined; and a requirement to accept an offer if it is within a certain percentage of the then listing price. Since property divisions are final, it is wise to provide that the court will retain jurisdiction to resolve any issues on the sale of the home so as to implement the intent of the judgment, distinct from modifying a property division. *Martin v. Martin*, 99 Conn. App. 145 (2007) and *Roberts v. Roberts*, 32 Conn. App. 465 (1993).

#Comment Begins

Strategic Point: To prevent post judgment disputes regarding the listing and sale of the property, the listing broker and listing price should be determined prior to the dissolution entering. Additionally, any repairs or improvements needed to sell the home should be agreed upon in advance.

#Comment Ends#Comment Begins

Warning: Putting automatic step-downs in listing price and the affirmative requirement to accept an offer within a certain percent of the then listing price may seem reasonable at the time of a settlement, but this becomes public information which could have a negative impact on the sale of the property, as a potential buyer could make a lower offer that must be accepted by the parties pursuant to the terms of the separation agreement.

#Comment Ends

When a property is to be sold, provision should be made for the division of the escrow proceeds and to whom they should be reimbursed upon sale. Such escrow monies could include real estate taxes and insurance. Typically, it should be returned to the party making the mortgage payments which generated the escrow. *McLoughlin v. McLoughlin*, 157 Conn. App. 568 (2015). In addition, there may be adjustments to the closing statement in the form of credits for such things as heating oil which will remain in the tank at the time of sale. Such adjustments, likewise, should be allocated to the party making the original payment.

[7] Assessing Tax Implications upon the Sale of Real Property

If the home is to be sold, the parties should exchange all documents regarding the cost basis and capital improvements to the property. Each individual has a capital gain exclusion of \$250,000 on his or her primary residence. 26 U.S.C. § 121. However, to take advantage of the exclusion, the “ownership and use test” must be met for the five years prior to the sale, but need not have been met at the same time. To satisfy the ownership and use test, the property must be owned and used as the principal residence for two of the last five years in the aggregate. 26 U.S.C. § 121(a). Spouses to a divorce will be able to assume the ownership and use of the property by the other spouse for purposes of the capital gain exclusion. 26 U.S.C. § 121(d)(3)(A). Additionally, if the divorce instrument allows one spouse use of the property, the other spouse shall be treated as using it for purposes of the capital gain exclusion. 26 U.S.C. § 121(d)(3)(B).

#Comment Begins

Strategic Point: If the primary residence is going to be sold, it is best to title the property in joint names, which will allow a total of \$500,000 of capital gain to be excluded, should it be needed.

#Comment Ends

[8] Allocating Real Property Other Than the Marital Residence

The allocation of second homes, commercial property, or other investment real estate will usually be dictated by the present or intended use to which the property is subject and which party wants the property for such use. A party who is the primary owner of a closely held business that is housed in the commercial property, will likely request the real estate be assigned to him or her along with the business interest. In such cases, this is a viable alternative where there are sufficient assets to assign to the other party. If the other assets are insufficient, the party receiving the commercial property may need to make installment payments over a reasonable time, and provide a note and a mortgage to the other party, to compensate the other party for his or her share of the property. *Werkhoven v. Werkhoven*, 2011 Conn. Super. LEXIS 358 (2011). There is no capital gain exclusion for second homes and commercial property. 26 U.S.C. § 1001. Oftentimes these types of assets are depreciated, which should be taken into account when evaluating the tax consequences of the sale of this property. 26 U.S.C. § 1231.

§ 6.32 Defining, Valuing, and Distributing Bank and Other Cash Assets

[1] Defining Bank and Other Cash Assets

Cash may be in bank accounts, safety deposit boxes, or even in a safe or drawer at home. Cash is the most readily available, liquid, risk-free, and exchangeable asset. There are no taxes to be paid upon liquidation.

#Comment Begins

Strategic Point: It should be determined whether there is a history of holding cash and in what magnitude. While it will be difficult to prove that there is cash, the more circumstantial evidence of cash that can be provided will support such an assertion.

#Comment Ends

There must be a distinction between accounts held for the parties and those held for any minor children. The court may not order a party to hold accounts for the children and use the funds to pay college if that order violates the purpose of the account and impermissibly orders post-majority support. *Louney v. Louney*, 13 Conn. App. 270 (1988).

[2] Discovering Bank and Other Cash Assets

Typically, the tax returns of the parties will indicate the interest generating bank accounts which the parties own.

In addition, an overlooked portion of tax returns is on Schedule B, Part III, which asks if a taxpayer had a foreign bank account or trust. Any person with a foreign account is to file form TD F 90-22, which is the report of foreign bank on financial accounts (hereinafter “FBAR”). 31 C.F.R. § 1010.350(a). Anyone with a foreign account with a balance at any time during the year in excess of \$10,000 must file the FBAR. 31 C.F.R. § 1010.306(c). Failure to disclose such an account can result in a penalty not to exceed \$100,000, but which is the greater of the balance in the account or \$25,000. 31 C.F.R. § 1010.860(g).

[3] Valuing Bank and Other Cash Assets

Valuing bank accounts and cash assets is straightforward, requiring a review of recent

statements. However, the bank statements for a three to five-year period should be reviewed to determine if there are any unusual deposits or withdrawals that could signify the presence of other accounts. If there is a certificate of deposit, the value should take into account any early withdrawal penalty.

[4] Allocating Bank and Other Cash Assets

Dividing the bank accounts is usually straightforward, since the amount is easily determined and fungible. Because of these characteristics, cash is a valuable asset to have to meet immediate living expenses and for unexpected but pressing future needs. For these reasons, each party will typically want some of the available cash. When dividing cash, consider each party's present needs, future expenses, and ability to earn cash in the short run to make up for receiving less of the total available at the time of dissolution.

Failure to allocate a bank account at the time of the dissolution will result in ownership to continue based upon title. There is no statutory provision similar to real estate that would break the survivorship designation on an account after the dissolution.

#Comment Begins

Strategic Point: When preparing for trial or preparing an agreement, it is wise to have a list of all assets, including bank accounts, to make sure they are included in the asset division.

#Comment Ends

§ 6.33 Defining, Valuing, and Distributing Stocks, Bonds, and Other Securities

[1] Defining Stocks, Bonds, and Other Securities

Shares in publicly traded companies are typically held in brokerage accounts. Brokerage accounts may also hold cash created when securities are sold. The brokerage account may contain a liability if the owner has a margin account, secured by existing investments, that was used to borrow money to buy additional securities.

[2] Valuing Stocks, Bonds, and Other Securities

The value of brokerage accounts is easily ascertained by reading the current brokerage statement and may be updated using the current price per share. The tax consequences upon liquidation of these accounts is an important consideration that should not be overlooked when dividing specific securities. Depending on the cost basis of each investment, and the length of time each investment has been held, there could be significant unrealized taxes associated with the securities assigned to a party. [26 U.S.C. § 1\(h\)](#). This information must be secured and reviewed prior to division, so that the tax ramifications may be equitably allocated.

[3] Distributing Stocks, Bonds, and Other Securities

The investments can be divided between the parties so that each party receives his or her ~~proportioned~~[proportional](#) share of each holding. If that is not preferable, a provision requiring the account to be allocated to attribute to each party his or her proportional share of the capital gain should be included. In this way the risks, expected rewards, and tax consequences can be equitably apportioned between the parties. In transferring stock accounts, there is typically no need to liquidate the holdings prior to transfer. Liquidating the stock will result in a taxable event

to the owner of the stock, not the recipient.

§ 6.34 Defining, Valuing, and Distributing Pension and Retirement Benefits

[1] Defining Pension and Retirement Benefits

Pension benefits can be viewed either as an asset to be divided or as a future source of income from which the alimony will be paid. Retirement plans include pensions, 401(k)'s, Keoghs, IRA's, Roth IRA's, SEP, 403(b), and 457 plans.

An important determination, especially for retirement plans, is classification and distribution. A retirement benefit must be classified as an asset and valued accordingly, even though the distribution of such an asset may be offset by other orders. *DiNunzio v. DiNunzio*, 180 Conn. App. 64, cert. denied 328 Conn. 930 (2018). Likewise, it may be valued and considered as a stream of income. *Kent v. DiPaola*, 178 Conn. App. 424 (2017).

#Comment Begins

Strategic Point: If a pension is in pay status, it must still be valued as an asset. However, it may be used to offset any alimony award to be made.

#Comment Ends

Most retirement plans can be categorized as either defined benefit or defined contribution plans. Defined benefit plans are characterized by a specific dollar benefit payable periodically (usually monthly) beginning at a specified retirement age and until the time of the plan beneficiary's death. With defined contribution plans, funds are contributed to an individual account under the name of the employee, sometimes with a matching contribution by the employer. The contributions accumulate dollar for dollar and are reported as an account balance. These funds are owned by the individual employee. Depending on the plan, the employer contributions may vest at the time of contribution or after a specified period of time. Examples of defined contribution plans include 401(k) accounts and 403(b) accounts for teachers.

#Comment Begins

Strategic Point: The plan documents for any relevant account should be obtained to determine the vesting rights and any other special attributes of the account.

#Comment Ends

[2] Including Retirement Benefits as Property

One of the most valuable assets to be divided in a dissolution action are retirement benefits. An issue that must be decided is whether the particular retirement asset should be included as property subject to division. However, it is possible that such deferred compensation may be viewed as a source of income for alimony purposes. The same compensation may not be viewed as both a source of income for alimony payments and a property division. *Nadel v. Luttinger*, 168 Conn. App. 689 (2016). Despite the uncertainties of pension benefits in terms of them being dependent upon the employee living to retirement age and the duration of his or her retirement, these benefits are capable of being actuarially quantified for a property division. *Thompson v. Thompson*, 183 Conn. 96, 100–101 (1981). Provided a benefit is susceptible to reasonably accurate quantification and thus not too speculative, pension benefits are considered property. *Krafick v. Krafick*, 234 Conn. 783 (1995).

#Comment Begins

Strategic Point: It is possible that certain forms of deferred compensation, awarded prior to the time dissolution, will be allocated in the property division, while deferred compensation awarded subsequently will be considered for alimony purposes. In this instance, the deferred compensation utilized for property division and alimony must be specifically delineated so there are no future issues.

#Comment Ends

Vested and unvested pension benefits are considered property subject to distribution. *Bender v. Bender*, 258 Conn. 733, 749–750 (2001). A deferred compensation plan that was unvested at the time of the dissolution, and subject only to a spouse’s continued employment, was considered property subject to distribution. *Czarzasty v. Czarzasty*, 101 Conn. App. 583 (2007). A non-qualified and unfunded pension may be divided even if the exact amount to which each party will be entitled is undetermined. *Cunningham v. Cunningham*, 140 Conn. App. 676 (2013). A pension plan which, at the time of the dissolution, was nonqualified and unvested should have been disclosed on the husband’s financial affidavit and failure to do so could amount to fraud. *Reville v. Reville*, 312 Conn. 428 (2014).

#Comment Begins

Warning: The *Reville* decision creates a malpractice trap for the unwary practitioner. A pension plan which is not qualified, not funded and unvested was determined to have been erroneously omitted from the husband’s financial affidavit. This particular pension plan was funded out of profits during the year in which it was paid. In order to protect against any future motions to open on the basis of fraud, counsel should carefully review a client’s retirement entitlements, no matter how speculative, and determine the manner by which it should be reflected on a financial affidavit.

#Comment Ends

A portion of a retirement benefit that does not exist at the time of the dissolution, but comes into being as a result of post dissolution events will not be considered property. *Mickey v. Mickey*, 292 Conn. 597 (2009). This would include disability benefits, as part of the retirement benefit, where the disability occurred after the date of dissolution. *Mickey*, 292 Conn. at 613. The court is permitted to divide only presently existing property interests, not expectancies, which must be the specific benefits already acquired. *Mickey* 292 Conn. at 618–619. However, an award of 50 percent of a pension plan valued and payable to the non-employed spouse when the employed spouse retires, was found to be appropriate. *Ranfone v. Ranfone*, 103 Conn. App. 243 (2007).

#Comment Begins

Warning: *Ranfone* can be viewed as an outlier in that it specifically allowed distribution of assets acquired after the dissolution in contravention of statute and case law. Care should be taken when relying on this case.

#Comment Ends

Although assets are to be valued as of the date of dissolution, which normally precludes parties from receiving pension benefits that accrue after the date of dissolution, the parties may

provide in their separation agreement that the pension will be divided at a time to occur after the dissolution. *Hansen v. Hansen*, 80 Conn. App. 609 (2003). Likewise, nothing prevents the parties in their agreement from dividing present and future benefits. *Sachs v. Sachs*, 60 Conn. App. 337 (2000).

Military benefits are property subject to division. 10 U.S.C. § 1408. The award must be based upon the disposable pay of the retiree. 10 U.S.C. § 1408(a)(2)(C). However, the parties must have been married for at least ten years during which time the service person was in the military. 10 U.S.C. § 1408(d)(2).

[3] Valuing Pension and Retirement Benefits

For a defined benefit plan, the present economic value of the future income stream is valued by an expert, using generally accepted actuarial methods to arrive at a lump sum value of the pension. *Krafick v. Krafick*, 234 Conn. 783, 800 (1995). This requires the expert to take into account the time until the employee's retirement, his or her life expectancy, projected interest rates, and the probability of forfeiture. The value of other retirement plans is the balance in those accounts, taking into consideration any vesting requirements.

However, a claim that a retirement plan may be worth more in the future may not be proper without a showing of the future value of all plans at retirement. *Cimino v. Cimino*, 155 Conn. App. 298 (2015).

#Comment Begins

Warning: The *Cimino* court entertained the wife's contention that the trial court should have considered the value of the husband's defined contribution plan at its future value when he retires. By upholding the trial court on the basis that she did not include the increased value for her own plan at retirement, seemingly implies that this would be a permissible consideration by the court. However, Conn. Gen. Stat. § 46b-81 clearly states that assets are to be valued on the date of dissolution, not some future date.

#Comment Ends

To the extent that part of a pension or retirement plan was accumulated prior to the marriage, courts may take that into account by applying a coverture fraction or using the subtraction method. The coverture fraction determines the percentage of the employee's total participation in the retirement plan compared to the amount accumulated during the marriage. The resulting fraction represents that which was accumulated during the marriage for equitable distribution. The subtraction method values the pension plan based upon the difference in the value on the date of dissolution versus the date of marriage. Any separation agreement or court orders should specify the method of valuation. *Thomasi v. Thomasi*, 181 Conn. App. 822 (2018).

#Comment Begins

Strategic Point: Many pension plans predicate value on the number of years of service and the highest five years of earnings. Typically, the highest five years of earnings typically come later in the employee's career. As such, where the employee was employed briefly prior to the marriage, the subtraction method may provide a higher marital benefit.

#Comment Ends

[4] Allocating Pension and Retirement Benefits

There are three methods by which the pension benefits may be distributed, only two of which are approved in Connecticut:

1. The present value method. *Krafick v. Krafick*, 234 Conn. 783, 800 (1995). The value of the retirement benefit is set off against other assets which are awarded to the non-employee spouse. *Krafick*, 234 Conn. at 800. This value method has the advantage of effecting a severance of the parties' economic ties. *Krafick*, 234 Conn. at 801. However, the disadvantage is that it requires the court to base its division of benefits, which may at the time of the divorce be unvested, upon actuarial probabilities rather than known events, thus placing the risk of forfeiture on the employee spouse. Also, this method is not possible if there are insufficient assets remaining to use as a set-off.

2. The present division of deferred distributions. *Krafick*, 234 Conn. at 803. Under the present division method, it is determined at the time of the divorce the percentage share of the pension benefits each party is to receive when the benefits go into pay status at the time of the employee's retirement. *Krafick*, 234 Conn. at 803. A significant advantage of the present distribution method is that it imposes on the parties equally the risk of forfeiture. *Krafick*, 234 Conn. at 803–804. The present division of future benefits method is useful when there are insufficient other assets to use as a set-off, or when there is insufficient evidence to establish the value of the pension benefits. *Krafick*, 234 Conn. at 804. This method may also be beneficial to a non-employee spouse so that he or she receives a stream of income at retirement.

3. The reserved jurisdiction method. *Krafick*, 234 Conn. at 803. This method allows the court to reserve jurisdiction to divide the pension once benefits have matured. *Krafick*, 234 Conn. at 803. However, because a court is unable to retain jurisdiction to order a property division in the future, this method is inappropriate. *Bender v. Bender*, 258 Conn. 733, 761–762 (2001).

A party who erroneously included her wife's pension on his financial affidavit may not obtain a clarification or change in the distribution of the retirement plans since she induced the error made by the court. *Brady-Kinsella v. Kinsella*, 154 Conn. App. 413 (2014).

#Comment Begins

Strategic Point: The *Brady-Kinsella* case demonstrates why financial affidavits must be carefully prepared. Do not take the clients word for the assets and their values, demand to see documentation.

#Comment Ends

[5] Assessing the Tax and Penalty Ramifications of Retirement Benefits

There are significant tax and penalty repercussions associated with retirement accounts that must be assessed in any property division. Retirement plans carry a ten percent penalty for early withdrawal, which is prior to age 59½ and which must be paid in the year of liquidation. 26

U.S.C. § 72(t). When added on top of other taxable income, the liquidated funds may be taxed at a significantly higher bracket than if the employee had waited until retirement. For these reasons, the present value of funds in defined contribution plans may be discounted for taxes when negotiating a division between the parties.

One potentially useful advantage of transferring funds in a defined contribution plan incident to the divorce is that the recipient spouse may liquidate some or all of the transferred funds without penalty. 26 U.S.C. § 72(t). However, this must be done at the time the Qualified Domestic Relations Order (hereinafter “QDRO”) or Domestic Relations Order (hereinafter “DRO”) is established. If the liquidation occurs after the funds are transferred into a new account for the non-employee spouse, it will be subject to the ten percent penalty. The transferee spouse may also have a lower income tax bracket than the employee spouse, thus reducing the tax liability. Depending on the tax ramifications, this exception to the penalty provision may be a way to provide immediate funds to the recipient spouse.

#Comment Begins

Strategic Point: Some, but not all, plans permit the bifurcation of transferred funds into two payments, one directly to the recipient and a second payment with the balance of the funds to an IRA account for the recipient. Other plans permit only one payment and thus force the liquidation of all the funds being transferred or the transfer of all the funds into an IRA.

#Comment Ends

[6] Implementing the Transfer of Pension and Retirement Plans

Because deferred compensation plans are non-transferable or unalienable, the division must be made by way of a QDRO or DRO. 29 U.S.C. § 1056. To be a valid QDRO, it must:

1. State the names and addresses of both spouses, known as the participant (employee) and alternate payee (non-employee).
2. Set forth the amount or percentage of the retirement benefit to which the alternate payee is entitled.
3. State the payment or period to which the order applies.
4. State the plan affected by the QDRO.
5. Not provide the alternate payee with a benefit that the plan does not have.
6. Not provide for increased benefits.
7. Not require payment of a benefit to which another alternate payee is entitled.

29 U.S.C. §§ 1056(d)(3)(C) and 1056(d)(3)(D).

#Comment Begins

Strategic Point: The requirements of a QDRO and the particulars of each retirement plan are

different. Without intimate knowledge of QDRO's, the practitioner is advised to hire an attorney who specializes in QDRO's to prepare the QDRO in each dissolution case.

#Comment Ends

The one exception to the requirement of a QDRO or DRO is the transfer of IRA funds from the IRA of the transferor's account into the IRA of the transferee's account, provided the transfer is directly from the trustee of one account to the trustee of the other account.

If the plan being transferred is a defined contribution plan, such as a 401(k), the alternate payee of the QDRO has a choice regarding the funds; they can remain in his or her own separate 401(k) or rolled over into an IRA. Maintaining the funds in the 401(k), subjects the alternate payee to the same rules and restrictions regarding loans and distributions as the employee. However, by rolling the funds over into an IRA, there are no such restrictions on the access to the funds.

Often, the implementation of a QDRO will not occur until sometime after the dissolution. In the event of an appeal, the QDRO will not be implemented as property division orders are stayed pending the resolution of appeal. The issue then becomes how the party who will benefit from the QDRO is compensated for any gains and losses from the time of the original order until it is implemented. Where a trial court provided a specific amount for a party to receive by QDRO and said it "could" be adjusted to reflect gains or losses, the appropriate way to compensate the party was by awarding interest on the amount from the date of judgment. *Anketell v. Kuldorff*, 223 Conn. App. 345 (2024).

Strategic Point: When crafting proposed orders for the court, specify exactly how post judgment gains and losses will be considered. If the original QDRO is a percentage of the retirement plan, then provide that the gains and losses are shared in that same percentage. If the original QDRO is a specific amount, then provide that the gains and losses are based upon the percentage of that specific amount to the total in the retirement plan on the date of the dissolution. Finally, make sure that the any additional contributions to the retirement plan post judgment is not included.

§ 6.35 Defining, Valuing, and Distributing Stock Options and Other Employee Plans

[1] Defining Stock Options and Other Employee Plans

Employee plans such as stock options, employee stock purchase plans, and deferred compensation plans can prove to be valuable assets. What is dispositive in considering these assets is the contractual right to receive the stock option or employment plan, even though it is contingent on the continued employment until vesting.

An initial question relative to stock options and other incentive plans is whether the asset at issue was earned for services performed during the marriage or those which will occur in the future. Stock options earned during the marriage are included in the definition of property subject to division. *Bornemann v. Bornemann*, 245 Conn. 508 (1998). Options which have not matured but are vested are subject to distribution. *Gilbert v. Gilbert*, 73 Conn. App. 473 (2002). A second question is whether the asset is a mere expectancy, in which case it is not considered an asset subject to division. *Rubin v. Rubin*, 204 Conn. 224 (1987). However, if the employee spouse has a contractual right to the asset despite contingencies, the court may divide the asset in a dissolution. *Bornemann*, 245 Conn. at 516.

The fact that such an asset may or may not be vested is not dispositive of it being considered an asset for equitable distribution purposes. *Bornemann*, 245 Conn. at 517–518, *Hopfer v. Hopfer*, 59 Conn. App. 452 (2000), and *Czarzasty v. Czarzasty*, 101 Conn. App. 583 (2007). Unvested options, which require no additional services to be provided by the employee spouse, would be considered earned during the marriage. *Bornemann*, 245 Conn. at 518. An employee’s performance based deferred compensation certificate is also property, even if it would not vest until after the dissolution. *Czarzasty v. Czarzasty*, 101 Conn. App. 583 (2007).
#Comment Begins

Strategic Point: If the non-employee spouse is to receive a share of the stock options, he or she should also receive a percentage of any future award by a new employer that replaces these benefits in the event the employee spouse changes jobs prior to exercising these options. In that way, the employee switching jobs cannot divest the non-employee spouse of assets which are intended to replace what was left “on the table” at the prior employment. Without such a provision, the non-employee spouse would be unable to share in the replacement benefits.

#Comment Ends#Comment Begins

Strategic Point: When analyzing specific corporate profit sharing and incentive plans, the documentation relative to the company plan in question should be obtained.

#Comment Ends

[2] Valuing Stock Options and Other Employee Plans

There are two possible valuation methods for stock options. One is using their intrinsic value, simply by subtracting the cost of the option from the current market value of the stock. Another alternative is using the Black-Scholes method, a somewhat complicated actuarial method of looking at “the interrelationship of the fair market value of the stock to be purchased, the exercise price of the option, the amount of dividends to be paid on the stock over the life of the option, the ‘risk-free’ rate of return at the time the option is granted, the volatility of the stock to be purchased, and the term of the option.” *Snyder v. Commissioner*, 93 T.C. 529 (1989) and *Wendt v. Wendt*, 59 Conn. App. 656 (2000). In most situations the intrinsic value of options makes common sense and is the methodology used by the courts. *Chammah v. Chammah*, 1997 Conn. Super. LEXIS 1896 (1997).

[3] Distributing Stock Options and Other Employee Plans

There are several considerations to be made when distributing stock options and other employee benefits. One manner by which stock options and other employment benefits may be allocated is by use of a coverture factor. *Wendt v. Wendt*, 59 Conn. App. 656 (2000). The coverture factor distinguishes between the time representing post-separation or post-dissolution efforts for unvested stock options from the time prior to the dissolution or separation. *Wendt*, 59 Conn. App. at 665–666. The coverture factor can be defined as follows: the numerator represents the period from the date of grant to the date of dissolution or date of separation, and the denominator represents the period of time from the date of grant to the date of vesting. The resulting percentage would be the amount of the grant earned during the marriage and subject to distribution. The coverture factor need not be based upon the date of separation. *Calo-Turner v. Turner*, 83 Conn. App. 53 (2004). When a separation agreement states that the options will be divided when they become vested, irrespective of whether they are exercisable at the time of the

dissolution, that provision will be upheld. *Taylor v. Taylor*, 57 Conn. App. 528 (2000).

#Comment Begins

Strategic Point: Most stock options and other employee benefits are non-transferable to the non-employee spouse. Accordingly, any distribution must take into account that lack of transferability, which also implicates that only the employee will have a tax event upon the liquidation of a stock option or other deferred plan. The judgment should provide that any payment to the non-employee spouse should be net of actual taxes as a result of the liquidation. This can be accomplished by having the employee spouse prepare two tax returns, one with all income included and one with all income except for the benefits which the non-employee spouse received in that year. The difference in tax between the two tax returns is the amount of tax caused by the receipt of these benefits. Another alternative is to multiply the effective federal and state tax rates on the tax return by the income received by the non-employee spouse as a percentage of the total income to determine his or her share of the taxes. Otherwise, the employee spouse will assume the entire tax liability, and the resulting property division will not be as anticipated because of the tax ramifications.

#Comment Ends#Comment Begins

Warning: The manner of exercising stock options must be determined when considering how they are allocated. Some stock options will pay the option holder a sum of money representing the difference between the stock price at the time of exercise and the stock price. Other options require the payment of the option amount and the employee will then receive the shares of stock.

#Comment Ends

§ 6.36 Defining, Valuing, and Dividing Business Interests

[1] Defining Business Interests

The distinguishing feature of a closely held business is that ownership is held by only a few people who also control its operations. A closely held business may be organized as a sole proprietorship, a partnership, a limited liability company, a professional corporation, or an S or C corporation. The type of entity is important for liability and tax purposes. The shares of a closely held business are not publicly traded, and thus not easily valued. In the case of a professional practice, ownership is restricted to persons authorized to render the type of professional services which the business provides, and shares may only be transferred to other qualified professionals. A closely held business or professional practice may have significant value as an asset or no value at all. As an example, a business which is a sole proprietorship with one client who provides nearly 90 percent of the business, is not an asset which can be valued as it cannot be sold. *Brash v. Brash*, 20 Conn. App. 609 (1990).

[2] Valuing Business Interests

[a] Valuing Business Interests—In General

Because the value of a closely held business is not readily ascertainable, the issue arises as to whether to value the business. The issue cannot be overlooked by either party.

The methodology for valuing a business interest will be dependent upon the type of business involved. One component in valuing businesses may be goodwill, which is the enhanced

value of a business by reason of the quality of goods and services. *Eslami v. Eslami*, 218 Conn. 801 (1991). Personal goodwill, which is attached to the person within the entity, is not considered an asset subject to distribution. *Eslami*, 218 Conn. at 814–815. Entity goodwill, which is attached to the business irrespective of who the owners are, is an asset subject to distribution. *Eslami*, 218 Conn. at 814–815.

Valuing a business is part financial analysis, part application of knowledge with the industry in question, part economic forecasting, part common sense, and part art form. There are different financial methodologies for valuing the tangible and intangible assets of the business. In addition, control of the business, sale restrictions, buy-sell agreements, and other practical considerations must be considered.

[b] Using Book Value

The book value method is the simplest way to value a business. In this analysis, the total tangible and cash assets carried on the books of the business are offset by the liabilities, resulting in a net asset value or in net liabilities, which is typically reflected on the balance sheet. The court may use book value in determining the division of assets. *Ferrucci v. Ferrucci*, 11 Conn. App. 369 (1987).

However, attention must be paid to the manner in which assets are valued on the balance sheet. They quite often are reflected at cost less depreciation, which does not yield the current fair market value of the asset. In these instances, the asset should be separately appraised.

Valuing business assets at cost was erroneous as it did not represent the value of the asset on the date of dissolution. Without the finding of exception intervening circumstances or a claim of dissipation, using cost value is improper. *Merk-Gould v. Gould*, 184 Conn. App. 512 (2018).

The book value method is easy to understand and easy to prove. The business' regular accountant is often a good expert witness to testify as to the business' balance sheet. However, book value ignores the intangible value of the business, such as the value of future earnings and goodwill, which may be the most valuable asset of the business.

[c] Using Liquidation Value

Liquidation value represents the value of the asset of the entity if they were sold separate from the business. By definition, this method ignores goodwill and future earnings, and usually assumes that the assets are worth more separately than the business is worth as a going concern.

[d] Using the Comparable Sales Method

The comparable sales method is based on the sales of similar businesses. If the market comparisons are based on truly similar businesses, this approach is a reliable indication of value because it is based on information actually in the marketplace, rather than the theoretical calculations and judgment of an expert. The chief problem with this approach is finding similar businesses that have been sold within a reasonable timeframe with which to make a comparison. Most commentators take the position that unless at least three or more sales of similar businesses can be found, there is insufficient data on which to base an opinion.

[e] Using the Discounted Cash Flow Method

In using the discounted cash flow method, the evaluator forecasts the future income stream of the business, typically based upon a weighted average of the last five years of income,

and then applies an appropriate discount rate to convert the future earnings into current values. This method has been criticized for relying too heavily on conjecture and is particularly unsuited to smaller entities where future earnings may fluctuate and are not capable of reliable forecasting.

[f] Using the Capitalization of Earnings Method

In the capitalization of earnings method the valuator determines the actual average net earnings of the business, usually over the past several years, and then applies a reasonable capitalization rate to the average net earnings to arrive at the value of the business. The capitalization rate is the rate of return an investor would expect to receive on his investment, given the particulars of the business for sale, the risks involved, and the prevailing market conditions for competing investments. Determining a reasonable capitalization rate is a complex process taking into consideration the rate of return on investments such as treasury notes, and publicly traded securities, while adjusting for the risks involved with the business to be purchased, the industry in question, and the economic outlook, and other factors. The multiple factors involved leaves room to argue whether these factors have been properly applied.

The court has specifically approved the capitalization of income method. *Turgeon v. Turgeon*, 190 Conn. 269 (1983) and *Ellsworth v. Ellsworth*, 6 Conn. App. 617 (1986).

[g] Using the Capitalization of Excess Earnings Method

The capitalization of excess earnings method seeks to determine the true intangible asset value of the business or “goodwill.” This method is similar to the capitalization of income method but first subtracts from income a normal salary for what it would cost to have an employee do the owner’s work. The reasoning behind this method is that a comparable salary and a reasonable rate of return on tangible assets could be earned by the owner elsewhere, without buying the business. Therefore, these excess earnings are the true profit or value of the business itself to the owner. The net tangible assets of the business (total of tangible assets less total liabilities) are also determined and are added to the value of the excess earnings to yield the value of the business.

The failure to make a distinction between personal goodwill and entity goodwill could result in counting the same basis for a financial award twice, once as an asset of the estate subject to a property division and a second time as the basis for an alimony award. *Eslami v. Eslami*, 218 Conn. 801 (1991). Where goodwill is associated with the business entity and a buyer would be willing to pay in excess of the tangible assets of the business, goodwill “may constitute an element of value distinct from the tangible assets” of the business and should be included in the valuation of the business. *Eslami*, 218 Conn. at 814. However, goodwill attributable only to a person is not an asset subject to distribution. *Eslami*, 218 Conn. at 814–815. The capitalization of excess earnings method “seeks to determine the price a prospective purchaser would pay to acquire the stream of income in excess of the amount he would expect to earn by engaging in the profession through other avenues” and is therefore an acceptable method. *Eslami*, 218 Conn. at 815.

[h] Determining the Applicability of Buy-Sell Agreements

All of the above methodologies and considerations may be rendered moot if the owners of a business have signed agreements to value the business upon a voluntary withdrawal, retirement, or sale by one of the owners. These agreements are commonly referred to as a “buy-sell” agreement. Depending on the wording, particular circumstances, and history of application of such agreements, they may or may not be conclusive proof of the value of the shares in question. *Stearns v. Stearns*, 4 Conn. App. 323 (1985). On the other hand, the value fixed in such

agreements may be low to protect the business or based on incomplete or dated information, and may fail to take into account the intangible value of the business such as goodwill. The value based on the agreement thus may or may not bear a relationship to the true value of the shares based on an objective valuation of the business as a going concern.

[i] Applying Revenue Ruling 59-60

[Revenue Ruling 59-60](#) lists eight factors that will be assessed in valuing a closely held business:

- “1. The nature of the business and the history of the enterprise from inception.
2. The economic outlook in general and the condition and outlook of the specific industry in particular.
3. The book value of the stock and the financial condition of the business.
4. The earning capacity of the company.
5. The dividend paying capacity.
6. Whether or not the enterprise has goodwill or other intangible value.
7. Sales of stock and the size of the block to be valued.
8. The market price of stock or corporations engaged in the same or similar line of business having their stocks actively traded in a free and open market either on an exchange or over the counter.”

[Revenue Ruling 59-60.](#)

However, it should be remembered that the purpose of the factors in [Revenue Ruling 59-60](#) is for valuing business interests for estate and trust federal tax purposes, not divorces.

[j] Applying Lack of Marketability and Minority Interest Discounts

Frequently, the value of business interests will be discounted due to its lack of marketability and minority interest. The lack of marketability discount is because there is no ready market, like a stock exchange, in which such an asset may be easily sold. The minority interest discount recognizes the lack of power an individual who owns less than 51 percent of the business has in decision making. The court should consider these discounts when arriving at a value for a closely held business. [Brooks v. Brooks](#), 121 Conn. App. 659 (2010). However, where both parties own the business, there is no need to apply a minority discount. [Siracusa v. Siracusa](#), 30 Conn. App. 560 (1993).

[3] Determining the Value of the Business

When valuing property, the trial court must arrive at its own conclusions by weighing the opinion of appraisers and the claims of the parties, applying its own general knowledge, and then

employing the most appropriate method of determining value. *Turgeon v. Turgeon*, 190 Conn. 269 (1983). The trial court may accept, in its discretion, whatever testimony and recognized appraisal method it finds appropriate. *Ellsworth v. Ellsworth*, 6 Conn. App. 617 (1986). If only one method is presented to the trial court and not objected to, the court may rely on that method. *Stearns v. Stearns*, 4 Conn. App. 323, 329 (1985). In addition to the appraisal provided by expert testimony, the trial court should also consider all other outside factors and circumstances relevant to valuing a business. *Fucci v. Fucci*, 179 Conn. 174 (1979).

[4] Assessing Double Dipping Issues

Double dipping occurs when the business interest is considered an asset for the property division and the alimony payor's income is used to determine the value of the business. Except in very rare instances, Connecticut courts have been unwilling to find an impermissible double dipping. *McRae v. McRae*, 129 Conn. App. 171 (2011). Only where an alimony recipient receives the business, which provided the sole income of the alimony obligor, and where there is an award of alimony based upon the income from the business, has the court found double dipping. *Greco v. Greco*, 82 Conn. App. 768 (2004). This rationale was continued in *Oudheusden v. Oudheusden*, Conn. (2021), where the Supreme Court reiterated that it is only double dipping when the alimony recipient also receives the asset from which the income is derived. Additionally, the Supreme Court addressed what it considered to be dictum in *Eslami v. Eslami*, 218 Conn. 801 (1991), which distinguish between personal goodwill, not an asset for purposes of distribution, versus entity goodwill which is an asset subject to distribution.

#Comment Begins

Strategic Point: The problem with these cases that look at double dipping is a myopic view on how the valuation method occurs. Most businesses, for dissolution purposes, are valued using an income approach in which the excess earnings from the company, that which is above a regular salary for someone doing the work of the owner, is then used, applying valuation principles, in determining the worth of that cash flow to a buyer. In other words, to have that excess cash flow by virtue of being an owner of the business, how much are you willing to pay now to have that cash flow in the future. Logically, if you are looking at a value now of what you anticipate the future earning stream to be, it is that same earnings stream that is paying alimony and support. Thus, if the business is counted as an asset as well as the income from that asset being used to pay alimony, that same income stream is being counted twice.

#Comment Ends

One of the typical methodologies used to value businesses is the capitalization of excess earnings method. Despite an expert providing the court with two values, one based upon normalized earnings and the other based upon actual income, the court used the actual income to determine alimony and the higher business value for the property division, which was not found to be double dipping. *Sander v. Sander*, 96 Conn. App. 102 (2006).

#Comment Begins

Strategic Point: The issue of “double dipping” must be kept in mind when valuing a business or professional practice with only one owner. If the business does not have profit or income over and above what is a reasonable income attributable to the work of the owner, the business entity itself probably has no asset value other than its tangible assets.

#Comment Ends

[5] Allocating Business Interests

The objective of valuing a closely held business or professional practice is the same as any other asset: to determine its value so that an equitable distribution of all the assets can be made based on the facts. A business interest is an asset which may be allocated in a property division. *Wood v. Wood*, 160 Conn. App. 708 (2015). However, dividing the value of a closely held business or professional practice presents special issues. The owner of the business will not typically want to distribute some of the shares of the business to the non-owner spouse. Parties who are divorcing do not usually make good business partners after the divorce.

A different set of issues present when both parties own the business. One manner in which the business may be allocated is by awarding it to one party with buy-out payments to the other party, who may be subject to a non-compete. *de Repentigny v. de Repentigny*, 121 Conn. App. 451 (2010).

There are several ways to compensate the non-business owner for his or her share of the business asset value. If the business itself has sufficient assets or income, a redemption by the business of the non-owner spouse's interest may be possible. Installment payments by the owner to the non-owner spouse is another solution, provided the business generates sufficient income to make such payments possible. If installment payments are utilized, such payments should be secured with the assets of the business or other security, such as a mortgage on the business owner's real property. A common solution is to assign other assets to the non-owner spouse to compensate for the value of the business assets assigned to the business owner. This is viable where there are sufficient other assets and the value of the business is modest. Periodic alimony or an increase in the amount of periodic alimony may be used to compensate the non-owner spouse. In some cases a combination of solutions may be needed.

§ 6.37 Including Personal Injury Actions/Workman Compensation Claims

Personal injury actions and workman compensation claims will be viewed as assets subject to distribution if their award or claims is certain, even if undetermined in amount. Personal injury actions, while the amount may be undetermined at the time of the dissolution, constitute a presently existing interest for purposes of property distribution. *Raccio v. Raccio*, 41 Conn. Supp. 115 (1987). Although the amount of the claim is undetermined, the rights of the injured spouse have accrued in a presently existing property interest. *Raccio*, 41 Conn. Supp. at 122. Irrespective of the purpose of the award, either for pain and suffering or lost wages, the court is empowered with dividing the personal injury award owned by either party. *Lopiano v. Lopiano*, 247 Conn. 356 (1998). A personal injury award received as a result of a joint lawsuit by the parties is properly considered an asset subject to distribution. *Costa v. Costa*, 57 Conn. App. 165 (2000).

Workerman's compensation claims, even if on appeal and undetermined in value, are contractual rights, subject to distribution in a dissolution action. *Tyc v. Tyc*, 40 Conn. App. 562 (1996). Likewise, the proceeds from an employment lawsuit which has been received is property subject to equitable distribution. *Smith v. Smith*, 249 Conn. 265 (1999).

§ 6.38 Including Gifts, Inheritances, and Trusts

Because Connecticut is an all property equitable distribution state, the question of separately acquired property is an issue in many cases. The court has the authority to divide all property from any source and acquired at any time. Although neither spouse acquires an interest

in assets owned by the other spouse by virtue of the marriage, this statutory provision does not preclude the court from dividing in a dissolution action inheritances, gifts, and assets owned at the time of the marriage. *Jackson v. Jackson*, 17 Conn. App. 431 (1989) and Conn. Gen. Stat. § 46b-36. ~~Thus~~Thus, the court has the authority to take into consideration and to divide assets that many spouses think of as their separate property because there is no concept of separate property in Connecticut law. *Watson v. Watson*, 221 Conn. 698 (1992) and *North v. North*, 183 Conn. 35 (1981). A court equally divided between the parties an inheritance received by the husband four years prior to the parties' separation and expressly rejected the husband's request that inherited assets be treated as separate property. *Coleman v. Coleman*, 151 Conn. App. 613 (2014).

#Comment Begins

Strategic Point: Often, clients have a preconceived notion that any assets they had at the time of the marriage, such as gifts or inheritances, are separate property. They should be immediately disabused of this notion and should be told that the court has authority to divide those assets and award the spouse a share of them.

#Comment Ends

A party cannot seek to exclude assets because they were gifted from family or received from an inheritance or trust. *Watson v. Watson*, 221 Conn. 698 (1992). However, interests which are contingent on future events outside the control of a party, or which constitute a mere expectancy, are deemed too speculative to constitute property. *Rubin v. Rubin*, 204 Conn. 224 (1987). The naming of a party in a will that could be changed at any point in the future is a contingency and therefore, not property subject to division. *Krause v. Krause*, 174 Conn. 361 (1978). Accordingly, evidence of a spouse's parents' net worth to show what he or she might inherit is impermissible. Likewise, the court may not award a spouse a percentage of a future potential inheritance that may or may not be received by the other spouse. *Rubin*, 204 Conn. at 230. Where a spouse's interest in an estate has already vested but is subject to ongoing litigation, such an interest is contingent and not capable of valuation as it is dependent upon the outcome of the litigation. *Eslami v. Eslami*, 218 Conn. 801 (1991). Conversely, an inheritance that has vested but is not yet received, could be included as an asset. *Bartlett v. Bartlett*, 220 Conn. 372 (1991). An inheritance by one spouse is property which the court may allocate between the parties at the time of the dissolution. *Karen v. Parciak-Karen*, 40 Conn. App. 697 (1996). The court is not prohibited from awarding one spouse a share of assets titled in the other's name, no matter when acquired. *Roach v. Roach*, 20 Conn. App. 500 (1990).

A trust that permits the trustee to decant the assets into another trust is sufficient to allow such action to be taken by the independent trustees and therefore move marital assets out of the estate. *Powell-Ferri v. Ferri*, 326 Conn. 457 (2017). The original trust in *Ferri* permitted the trustees to decant the assets. The trustees established a new spendthrift trust into which the original trust was decanted. As a result of the new trust being spendthrift, the assets of the trust could not be considered as property for purposes of equitable distribution. In a parallel civil action, where the wife sought to find a new cause of action for tortious interference with an expectancy, the Connecticut Supreme Court, in dicta, indicated that the dissolution court may consider the discretionary trust in fashioning its orders. *Ferri v. Powell-Ferri*, 317 Conn. 223 (2015).

#Comment Begins

Warning: The *Ferri* companion civil case, in failing to find a cause of action for tortious interference with an expectancy, determined there were adequate remedies in the dissolution

action. Those remedies include contempt of the automatic orders and the consideration of the trust assets in making the other orders. However, the amount decanted from the trust was several million dollars and it is unlikely that there are adequate assets to compensate for those which were decanted.

#Comment Ends#Comment Begins

Strategic Point: In trust and estate law, with a discretionary trust, a distinction is made based upon the presence or absence of an ascertainable standard. An ascertainable standard provides the circumstances under which a beneficiary may compel a distribution from a trust, such as for the maintenance of the health, comfort, and manner of living of the beneficiary. *Zeoli v. Commissioner of Social Services*, 179 Conn. 83 (1979). Arguably, when there is an ~~ascertainable standards~~ ascertainable standard, since a distribution may be compelled by the beneficiary, it is a property interest. However, no Connecticut court has made such a finding in a dissolution action.

#Comment Ends

While a court may view differently assets a party had at the time of the marriage or received by gift or inheritance from an asset acquired during the marriage, it does not mean that these assets will be excluded from a property division. This is especially true where the other spouse made contributions to enhance those assets. *Weinstein v. Weinstein*, 18 Conn. App. 622 (1989). It is more likely that a court will place less emphasis on the asset acquired prior to the marriage, where there are fewer assets or greater needs that cannot otherwise be met. *Blake v. Blake*, 207 Conn. 217 (1988).

#Comment Begins

Strategic Point: When proposing a potential property division that includes separately acquired property, it is important to be specific and to give the court sufficient evidence to support the proposed asset division between the parties. For example, if there is an inheritance or gift received by one of the parties and the other party made a contribution to its preservation and appreciation, it is important to provide the court with evidence of the value of the property upon acquisition and the value at the time of the dissolution of the marriage. This will give the court a method to measure the appreciation in value and a basis to award the non-acquiring party a part of this asset based upon its appreciation or other factors.

#Comment Ends

Many practitioners attempt to treat property acquired prior to the marriage, inheritances or gifts, as “separate property” to be carved out of the assets considered for property division in a dissolution. However, such a resolution is unlikely to occur. There are many factors to take into account regarding the distribution of these assets. One factor is the timing of the receipt of such asset; if it has occurred recently, it is more likely that the party receiving the asset will be able to retain most of the asset rather than if it was received early in the marriage. The length of the marriage can be impactful such that a shorter marriage is more likely to result in a party retaining more of such assets than in a longer marriage. The totality of the other assets will likewise play a role in the determination of the allocation of the so-called “separate assets,” such that the larger the estate in relation to such assets the more likely the recipient will retain more of such asset.

Trust interests may take a variety of forms. The basic issue for a trust is to determine the precise nature of the interest, whether it is revocable or irrevocable, whether it is subject to

divestment, and the amount the beneficiary may receive and when. If a trust interest is revocable, it is a mere expectancy and is not considered property subject to division. *Rubin*, 204 Conn. at 232. A trust interest which has vested and is available to the party is an asset subject to division or available to be considered in a modification of alimony, even where the asset has not yet been distributed. *Eslami*, 218 Conn. at 807–808. If a trust interest may be subject to divestment by a primary beneficiary who has the power to invade principle or if there is a power of appointment, the trust is not a property interest subject to division. *Cooley v. Cooley*, 32 Conn. App. 152 (1993).

§ 6.39 Evaluating Life Insurance Policies and Annuities

Life insurance can serve two possible purposes in a dissolution action. The first is to provide security for the alimony and support orders. Conn. Gen. Stat. § 46b-82(a). The second is as an asset subject to allocation in a property division. It is permissible for a court to order a party to be named as beneficiary on a life insurance policy even if alimony is not awarded. *Mauro v. Mauro*, 16 Conn. App. 680 (1988).

Whole life insurance policies have a cash surrender value which increases as premiums are paid over the life of the policy. The owner of the policy may borrow against the cash surrender value of the policy, or terminate the policy and receive the cash balance. Life insurance companies have other hybrid products, such as universal life insurance, which have varying asset value depending on the specific product. Term life policies provide death benefits if the insured dies during the term the policy is in effect, but they have no cash surrender value and thus no value as an asset.

Annuities have the value based on the policy contract. The value of an annuity may or may not be apparent from the face of the policy. If it has a present surrender value, that may be its value. Other policies may require valuation by an actuary or other expert.

§ 6.40 Allocating 529 Accounts

Each state has established 529 accounts, which are qualified tuition programs, as a means to establish funds for post-high school educational expenses. The benefit of these plans is that the income grows tax-free and there is no tax if withdrawal is made for qualified educational costs of the beneficiary/student. *IRS Fact Sheet: 529 Plans: Questions and Answers (2014)*. Unlike UGMA (Uniform Gifts to Minors Act) and UTMA (Uniform Transfers to Minors Act) accounts, a 529 account belongs to the person who establishes the account. A court ordering that such accounts be maintained for the benefit of the children is not an educational support order, but is in the nature of a property division. *Greenan v. Greenan*, 150 Conn. App. 289 (2014).

#Comment Begins

Strategic Point: Care must be taken when making orders regarding a 529 account. Since it is not an account owned by the child, the actual owner has control over the funds. If the intent is for it to be used to fund education, it would seem prudent to consider the 529 accounts as part of an educational support order rather than a property division. There should also be a provision as to the disposition of the account after paying the educational expenses, i.e., dividing it between the parties. However, any such distribution not for educational purposes will incur taxes, which should be taken into account.

#Comment Ends

§ 6.41 Evaluating Personal Property

In most cases the parties will be able to decide between themselves on a division of furniture and furnishings prior to the time of the final dissolution of marriage. This process can be aided if each party prepares a list of the items he or she wants to retain, the parties exchange lists, and an agreement is reached. Even in cases where there are valuable antiques, artwork, and collectibles, the parties often have an estimate of the value of such items and are able to reach a satisfactory agreement by trading pieces. If there are items of unusual or extraordinary value, an appraiser can be employed to provide an estimate of fair market value to resolve valuation issues. Such items can be separated, assigned their fair market value, and listed apart from the other ordinary household possessions. Motor vehicles often can be assigned to the party who usually uses the vehicle. The property division must occur at the time of the dissolution and may not be deferred post-judgment. *Rathblott v. Rathblott*, 79 Conn. App. 812 (2003).

#Comment Begins

Strategic Point: If the parties have settled all other issues, but an agreement regarding personal belongings cannot be reached by the time of the final hearing, a provision must be included in the settlement agreement to arbitrate the division of personal belongings post-judgment. The court loses jurisdiction over the property division at the time of the decree, and an arbitration provision is essential in such situations to provide a final resolution of these issues.

#Comment Ends

§ 6.42 Evaluating Intellectual Property

Occasionally, assets present themselves that are unusual or unique, difficult to value, or have other special issues, such as intellectual property including patents, copyrights, or trademarks. A patent or licensing agreement may be part of a business or an ongoing project to be valued together. In cases where such assets need to be appraised, the solution often lies in finding an expert or an experienced person who specializes in the particular field or specialty. Other times, intellectual property provides income that can be shared through an order of alimony. However, where a party is entitled to royalties, even if the amount is undetermined, it is a contractual right and therefore property subject to division. *Gallo v. Gallo*, 184 Conn. 36 (1981).

§ 6.43 Evaluating Liabilities

The Connecticut courts have the power to allocate debt to each of the parties. *Beede v. Beede*, 186 Conn. 191, 196–197 (1982). In allocating debt, the court will consider the manner and purpose for which the debt was incurred. *Rozsa v. Rozsa*, 117 Conn. App. 1 (2009). If the debt was unreasonably incurred by one party, the court may require that party to be responsible for the debt. *Casey v. Casey*, 82 Conn. App. 378 (2004). However, in order for a party to be responsible for debt, the existence of the debt must be proven. *Bento v. Bento*, 125 Conn. App. 229 (2010).

§ 6.44 Excluding Professional Degrees

In Connecticut, advanced degrees, such as a medical degree or law license, will not be considered an asset subject to distribution. *Simmons v. Simmons*, 244 Conn. 158 (1998). Unlike a pension plan, which represents a contractual right to future income, the existence of an advanced degree does not confer any right to a particular income. *Simmons*, 244 Conn. at 167.

§ 6.45 Assessing the Alternatives with Fraud or a Fraudulent Conveyance

[1] Proving Fraudulent Conveyance

In some cases, assets legally titled in neither party's name can be considered property subject to distribution. If a party has transferred property to a third person prior to filing the action or prior to the entry of judgment, without consideration, to keep it from the authority of the court, it may be a fraudulent conveyance.

When title to property has been transferred to a third person, either prior to the institution of the dissolution action or during such action, the transferee should be made an additional party defendant to the dissolution action, and a separate count containing the allegations constituting the fraudulent conveyance should be asserted. *Gaudio v. Gaudio*, 23 Conn. App. 287 (1990). The burden of proof is by clear and convincing evidence and is on the party alleging fraud. *Farrell v. Farrell*, 36 Conn. App. 305, 309 (1994). The trial court should state the burden of proof used in making the decision that a fraudulent conveyance occurred, but if it fails to do so, it will be presumed to have used the correct burden of proof. *Kaczynski v. Kaczynski*, 294 Conn. 121 (2009).

In order to prove a fraudulent conveyance, the court must find that:

1. The transfer was made at a time the transferor knew he or she had a debt;
2. The transfer was not for fair consideration; and
3. As a result of the transfer, the transferor is unable to pay his or her debts.

Molitor v. Molitor, 184 Conn. 530 (1981).

In the event that a party cannot meet the burden of proof, he or she is not without recourse. While the court may not have authority to set aside such a conveyance, the court, utilizing its equitable powers, may nonetheless include the value of such property in its analysis of the marital estate, and may compensate the other party for the loss of such value accordingly. *Watson v. Watson*, 221 Conn. 698, 709 (1992), and *Kaczynski v. Kaczynski*, 124 Conn. App. 204 (2010). However, a prerequisite to adding back in the value of the property is a finding of a fraudulent conveyance. *Greco v. Greco*, 275 Conn. 348 (2005). A party who fraudulently conveyed property cannot later complain that the court should have set aside the conveyance instead of ordering the payment of a sum certain to the other party. *Miller v. Miller*, 22 Conn. App. 310 (1990). Likewise, the ~~executing~~execution of a mortgage, for no consideration can form the basis to require the property to be transferred to the other spouse free of the mortgage. *Stoner v. Stoner*, 163 Conn. 345 (1972). Similarly, the court may just order the payment of a sum of money when finding a fraudulent conveyance. *Jacobowitz v. Jacobowitz*, 102 Conn. App. 332 (2007).

A collateral attack on the dissolution judgment may be made if a debtor claims that the dissolution amounted to a fraudulent transfer. *Canty v. Otto*, 304 Conn. 546 (2012). Such a fraudulent transfer may be claimed irrespective of whether the asset was transferred by agreement or after trial. *Canty*, 304 Conn. at 571.

#Comment Begins

Strategic Point: There are occasions where the parties use the dissolution as a financial planning tool to evade responsibility for debts. Such “financial planning” may be scrutinized by a debtor resulting in the transfers being overturned.

#Comment Ends

Care should be taken when preparing financial affidavits. If a party has listed an asset on a financial affidavit, but later states that the property does not belong to him or her, the court may find a fraudulent conveyance. *Cottrell v. Cottrell*, 133 Conn. App. 52 (2012).

[2] Filing Motions to Open on the Basis of Fraud

After a dissolution action, a party may believe that assets or income were not appropriately disclosed and thus a fraud was committed. If the motion to open is filed within four months of the rendering of the judgment, the court may permit the judgment to be opened if it deems reasonable. Conn. Gen. Stat. § 52-212a. However, if the motion is filed more than four months after the judgment is rendered, the moving party must demonstrate that there has been fraud or a mutual mistake. *McLoughlin v. McLoughlin*, 157 Conn. App. 568 (2015), and *Richards v. Richards*, 78 Conn. App. 734, cert denied, 266 Conn. 922 (2003).

Issues pertaining to fraud and the filing of a motion to open does not implicate subject matter jurisdiction, but rather the court’s statutory authority. *Reinke v. Sing*, 328 Conn. 376 (2018). Conn. Gen. Stat. § 52-212 permits the opening of a judgment if the parties otherwise submit to the court’s jurisdiction. Accordingly, parties may agree to the opening of a judgment and a court finding of fraud is not required. *Reinke v. Sing*, 328 Conn. 376 (2018).

#Comment Begins

Warning: *Forgione v. Forgione*, 162 Conn. App. 1 (2015), cert. denied, 320 Conn. 920 (2016) denied an agreement to open a judgment by the agreement of the parties claiming the court lacked subject matter jurisdiction. This decision is expressly overruled by *Reinke*.

#Comment Ends

For a more thorough discussion on motions to open for fraud, See, § 12.31[3], below.

§ 6.46 Failing to Allocate an Asset at the Time of Dissolution

If the parties or court fail to allocate an asset that is in the joint names of the parties at the time of the dissolution, the parties will continue to own the asset jointly. Of concern is the post judgment treatment of the asset. If it is a jointly owned property, such as a bank account, it can be easily divided. However, if it is real estate, absent agreement, a partition action must be brought. *Hackett v. Hackett*, 42 Conn. Supp. 36 (1990). Real estate that is owned by the parties jointly after a dissolution action will be as tenants in common, the divorce severing the joint tenancy. Conn. Gen. Stat. § 47-14g.