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IMPORTANT ISSUES OF BUSINESS VALUATIONS FOR ATTORNEYS AND THEIR CLIENTS

by Richard Teichner, CPA, CVA, CDFAJ™

I. Introduction

Attorneys often need to help their clients establish values for businesses or business interests. This article discusses some of the issues which need to be addressed before attempting to arrive at business values.

Some examples of situations in which business values may need to be established, particularly in connection with the practice of law, are:

- Drafting or assistance with implementing buy-sell provisions in agreements between and among shareholders, partners and limited liability company members.
- Business acquisitions and mergers.
- Litigation matters where a measurement of economic damages is the diminution in the value of a business.
- Bankruptcy matters, such as when determinations need to be made as to whether to keep operating a business and/or sell it, or liquidate it.
- Marital dissolution proceedings.
- Condemnation proceedings.
- Gifting for estate planning purposes.
- Establishing values of a decedent's estate.

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BUSINESS VALUATION ISSUES

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Depending on the reason for the valuation, there are various factors that need to be considered, some of which are contained in the descriptions of the terms listed below. If an independent business valuation expert is called upon to assist in establishing a value and/or opine to a value, he or she must have access to all relevant information to be able to determine which factors apply in the particular situation. The attorney and client need to allow and encourage open communication between themselves and the valuator. Too often the intentions of the parties are not apparent, understood or properly articulated, and the facts and circumstances surrounding the true purpose of the valuation are not adequately disclosed. Also, the valuator should know the identities of all the parties to, and affected by, the valuation. Certainly, the valuator has a responsibility to seek all information necessary to do a thorough job, but all other parties involved have to be willing to collaborate in the effort of providing whatever information they and the valuator may deem to be pertinent.

II. Certain Terms Applying to Valuations

To aid the attorney and client during the process of establishing a business value, the following is a summary of some of the terms that generally apply to valuations:

Approach - there are three general approaches for establishing values, of which, depending on the circumstances, one of them or a weighted average of more than one of them can be used:

> **Income Approach**, whereby past or future income or cash flow streams are applied to a capitalization rate or discount rate.
>
> **Market Approach,** whereby values or sales of comparable businesses, or interests in comparable businesses, are the bases for value for the subject business.
>
> **Asset Approach** (or asset-based approach, adjusted net asset approach, and other variations on the term), whereby a value for each balance sheet item is determined (including intangibles which may or may not appear on the balance sheet) and then are added together (assets less liabilities).

Method (or Methodology) - examples of methods are:

> **For the Income Approach:** capitalization of earnings; capitalization of excess earnings (i.e., after calculating a return on assets); discounted future earnings plus residual value.
>
> **For the Market Approach:** use of comparable public company data and of comparable merger and acquisition data.
>
> **For the Asset Approach:** establishment of fair market value or replacement value or liquidation value of the assets and liabilities.

Standard of Value - examples of this are fair market value (i.e., buyer and seller are willing parties, but are not being compelled to enter into the transaction and have "reasonable knowledge of the relevant facts," as paraphrased and quoted from IRS Revenue Ruling 59-60 and sections of the estate and gift tax regulations), fair value (which can have different meanings, depending on the jurisdiction or the parties involved), intrinsic value (usually means value to the

holder), investment value (the value to a particular investor or a strategic buyer), forced liquidation value, voluntary (or orderly) liquidation value.

Premise of Value - there is some overlap in the meaning of this term with the term "standard of value" but, essentially, premise of value refers to whether the entity is to be valued on a going concern basis or a liquidation basis.

Capitalization and Discount Rates - these rates are used under the income approach and can be determined by various different means (a discussion about which is beyond the scope of this article).

> A capitalization rate is applied to an earnings figure that is expected most likely to occur, i.e., a projected earnings amount for the following year that is indicative of the earnings for all future years. Depending on the circumstances, this projected earnings figure can be based on the average or weighted average of prior years' net income, pre-tax income, EBIT, EBITDA, cash flows or some other measurement of earnings. Of course, the historical data needs to be adjusted for any anomalies or anything else that is not recurring or representative of future events.
>
> A discount rate is applied to the stream of future earnings for a specified number of years, and the sum of the present value of each year's discounted earnings is then added to the value of the business as of the end of the last year specified (i.e., terminal value). This terminal value is normally determined by applying a capitalization rate to the earnings in the final year and then discounting this capitalized earnings amount to present value.
>
> A discount rate applied to a stream of future earnings inherently includes a growth rate and thus is higher than a capitalization rate applied to a projected earnings amount (unless there is negative growth, in which case the discount rate would be lower than the capitalization rate).

Lack of Marketability (Or Non-marketability) Discount - the extent of the discount principally depends on the time it would take for the business or, more commonly, the business interest to become liquid to the seller, i.e., when cash from the sale is received.

Lack of Control Discount - applied when the ownership interest in the business is 50 percent or less. However, when a business interest being valued is less than 100 percent but 50 percent or greater, a discount may still be appropriate by virtue of having less than complete control. The lack of control, or non-controlling interest, discount is applied to the owner's pro rata portion of the total value of the entity. The amount of the discount is based on limitations associated with the business interest as a result of agreements, statutes, practicalities or other factors. This discount is applied before the marketability discount is applied, i.e., as if the minority interest were completely liquid.

Control Premium - this premium is generally applicable when an interest in a business being valued is or will become one of control or partial control (unless, as is sometimes the case, the value of the business is based on financial data that was already adjusted as if there had been a controlling interest).

In the process of determining how the above terms (and possibly others not mentioned here) might apply in a situation, the valuator needs to gather extensive information on the business or entity (both quantitative and qualitative), the industry in which it operates, economic conditions and other items that could have an impact on the value. This kind of information, along with knowledge obtained regarding the purpose(s) of the valuation and the parties involved, is assessed and analyzed in deciding the application of the various factors for determining value.

Sometimes the valuator is not able to obtain all the information necessary to arrive at a conclusion of value because of the unavailability of all necessary information or other limitations on the scope of the work performed. In such instances, the parties may accept (or must accept under the circumstances) either an estimate of value or a range of values, as long as the valuator is comfortable providing such qualified amounts based on the information obtained. In this regard, among the various organizations that establish reporting standards and terminology for credentialed valuators some differences exist in the way limited scope situations should be treated.

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However, for the most part, these organizations, among themselves, have established very similar principles and practices for valuation engagements and the valuation process.

The term "appraisal" as used in referring to the appraisal of business interests or other assets is often used interchangeably with the term "valuation." In some circles there are subtle differences between the terms, but for all intents and purposes they are synonymous, as are "appraiser" and "valuator."

III. Examples of Valuation Scenarios

To illustrate how the purpose of the valuation and intention of the parties have an effect on which of the above terms that might apply, please see the following examples:

A. Sales of Entire Businesses

A threshold question is whether the net assets or the capital stock, in the case of a corporation or another form of equity holding in the entity, is being sold. Besides the possibility of actual liabilities being assumed in one instance and not in the other having a direct effect on value, there are other items impacting the value relating to a potential sale of a business, such as (1) the existence of contingent liabilities and possible unknown liabilities at the time of consummation (usually more so in stock sales, but will depend on indemnifications and the ability to enforce them), (2) the presence of simultaneous agreements, such as consulting contracts for management per-

competition, and licensing arrangements, (3) if a company being sold is a corporation, whether it is a C or S corporation, and thus how are distributions to stockholders to be affected (4) whether the entity or the owners are subject to income taxes on earnings, e.g., determined by whether the company is a C corporation, S corporation, or partnership or limited liability company, and (5) the sales taxes and other transfer taxes that will be imposed.

Another issue that needs to be considered when establishing a value for a potential sale of a business is that often the buyer and seller and other parties involved may have presupposed that the sales/purchase price is to be based on fair market value or on some other standard of value. The term "fair market value" may suggest something different to the buyer than to the seller, so the party or parties for whom the valuation is being performed must be clear on the standard of value that is to be applied.

The definition of fair market value (FMV) is generally accepted as that which is a hypothetical value that is arrived at when the buyer and seller are willing parties, but are not being compelled to enter into the transaction and have "reasonable knowledge of the relevant facts." (Paraphrased and quoted from IRS Revenue Ruling 59-60 and sections of the estate and gift tax regulations.) In reality there are numerous possible scenarios to a sale, such as: a buyer may be looking for a strategic purchase and/or the seller may be looking for such a buyer who will pay a premium; the seller may be eager or forced to sell for some

have it as a means to provide a steady income in the form of compensation; or the buyer may want to be only a passive investor and is willing accept a steady but small rate of return.

Generally, when valuing a business for purposes of its being sold, the standard of value will be either FMV or investment value. FMV would be used, for example, when the seller has no particular preference as to a buyer and is not compelled to sell; an agreement calls for FMV; there needs only to be FMV as a starting point for negotiations (e.g., there may be compelling reasons to sell, the buyer might want to be active and might be looking for security); or the sale is to a related party, as the Internal Revenue Service requires FMV for income tax purposes (as well as for gift tax and estate tax reporting purposes). Investment value would normally be used when there is a possible synergistic buy/sell (although FMV could be a starting point) or when there is an investor looking for a particular rate of return.

The approach to be used when the standard is FMV will depend mainly on the purpose of the valuation and available data. Usually, the market approach is a primary consideration and should be used, at least as one of the approaches, but only if sufficient information about sales and/or values for comparable companies are available. For certain personal service businesses, and especially professional practices such as law, accounting and smaller medical practices, the market approach may not be a good indicator of value due to the shortage of sufficient market data. Also, this approach

may not always be practicable for other privately held businesses, because the number of companies that are very similar to the business being valued might be insufficient so that producing a meaningful comparison is not possible, or because important quantitative data about the companies are incomplete and/or information about relevant qualitative factors is lacking.

Generally, for privately held businesses, if the market approach is employable, it will be used in conjunction with the income approach, and the two approaches will be weighted (not necessarily equally) in arriving at the value. Even if comparable market data is relatively scarce, the market approach should be considered and, if at all possible, be given some weight or at least be used as a "sanity check" against the results arrived at in using the income approach. The asset approach may be used in conjunction with either or both the other two approaches. It is usually the sole approach used in situations such as when a business has a history of losses, or in a liquidation or in other piecemeal valuation situations. This is because the value of the net assets of the business would normally realize a greater fair market price than would the income stream (if any) of the business as a going concern.

As for the method applied, this will first depend on the approach that is used, as each approach has its own distinct available methods. For the income approach, the method will be determined based on the type of business being valued (e.g., service, manufacturing), its financial history, and various other influences. For the market approach, the data that is best available and most relevant is what should determine the method.

When valuing a start-up business or one whose major asset(s) is intellectual property, the method and other factors need to be considered very carefully. The valuator might be able to find other businesses or similar types of intellectual property, with historical data, having some characteristics similar to those expected of the subject business and/or might find justification for using an estimated future income stream for the subject business as a basis for the valuation. In most cases, however, the uncertainties are greater with start-ups and with virtually untested intellectual properties than with an established business or income stream. Accordingly, forecasts of expected income and other factors will need to be used as bases in arriving at a value.

B. Transfers of a Partial Interest in Businesses

When a partial interest in a business is being valued, such as for the purpose of a potential sale or gifting or estate tax reporting, lack of control and marketability discounts will normally be applied to the holder's portion (percentage) of the full value of the entire business. However, since a non-controlling interest holder is usually at the mercy of those in control, then applying a lack of control discount to the value of this interest, when it is based on expected cash flows (dictated by the owners who exercise influence), would normally be redundant and thus not indicated. The purpose of the valuation will determine whether: the method of applying a capitalization/discount rate to the expected cash flows attributable to the non-controlling interest should be used; whether the value of the entire business should be determined, and then a lack of control discount applied to the percentage interest in the business; or whether some other method is most appropriate. Another method, under the market approach, could be applied if there have been recent minority interest (or lack of control) transactions similar to the subject interest being valued, with the amounts from the similar transactions then used as the guideline.

In certain situations, there can be two or more tiers of lack of control discounts. Such situations are frequently seen in the gifting of partial interests in family limited partnerships or limited liability companies. An entity itself will own non-controlling interests in assets, which are discounted, and then the interest in the entity (with the value of its assets having been discounted) is further discounted for the fact that it is a non-controlling interest.

For lack of marketability discounts, and in many cases for lack of control discounts, there are vari-

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ous studies and other data that should be referred to and properly applied based on the specific set of circumstances of the partial interest being valued. Too often "rules-of-thumb" or data that are not complete are used or misapplied. A thorough analysis of all relevant information needs to be performed for arriving at appropriate and supportable discounts. In gift tax, estate tax and other tax cases, the tax court and appellate courts have recently been scrutinizing discounts more closely and are demanding that they are based on objective criteria.

C. Business Disputes and Litigation

In adversarial situations, there is often difficulty in obtaining all the information necessary to arrive at or opine to a value. When these conditions exist, there may be enough basic information to estimate a value, or to make assumptions under different likely scenarios that lead to a range of values.

Frequently, the nature of the dispute or litigation will determine the standard of value and other factors to be applied. In an action involving a damaged or dissenting stockholder, for example, each side could have different views on what should be the appropriate standard of value, approach, method, capitalization/discount rate, etc. If the action is brought under the statute of a state dealing with dissenting stockholder matters, the standard of value required is usually "fair value." This term "fair value" does not have the same meaning among different jurisdictions, and thus the valuator must have a clear understanding of how fair value is to be applied. In Nevada, fair value in connection with a dissenting stockholder's shares is defined in NRS 92A.320 as "the value of the shares immediately before the effectuation of the corporate action to which he objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion is inequitable." The problem with this definition is that, contained within it, there is the term "value," which is not defined. Conceivably, but highly unlikely, such a definition could mean that, if a company was earning large profits but never paid any distributions to its stockholders, a non-controlling interest would probably have a nominal if not a zero value.

When attempting to quantify economic damages from the loss of a company or a substantial reduction in the level of its business, one way the extent of the loss might be measured is by the diminution in value from the date immediately preceding the occurrence of the event to some specified date afterwards. (Clearly, this is only one way to measure the loss and, in many cases, not the preferable way.) Usually, for both valuation dates, FMV is used. However, arguably, a different standard of value (and other factors) might be considered more appropriate in the circumstances. For example, if an individual has owned a business that generated a relatively constant rate of return for many years, after his having drawn a "reasonable" salary, then the loss of the business to him might be based on what the business is worth to him (e.g., investment value), which is a steady rate of earnings using a low-risk capitalization rate. (The security of his receiving the consistent compensation from the business, his age and the likelihood of obtaining similar work elsewhere are some factors that would be used to assess damages in addition to the loss of the business.)

In marital dissolution matters, issues such as valuation dates, approach, and lack of control and non-marketability discounts greatly depend on the jurisdiction and the nature of the asset being

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valued. For example, in Nevada, the date of the valuation, generally, is as of the time close to the date of trial; discounts may or may not be appropriate for a business owned or controlled by one or both of the spouses. Also, in Nevada, as with many other states, if the income approach is used, the practice is that the earnings used in arriving at a value are not to be based on earnings projections.

IV. When to "Normalize" Financial Statements

As part of the process of performing a valuation for a business on a going concern basis, the earnings and other components of the financial statements are used as the basis for determining value. With the income approach, a capitalization/discount rate is applied to earnings, and such rate is arrived at, in part, by comparing elements of the financial statements and various financial ratios to corresponding data of other companies that are determined by the valuator to be comparable. With the market approach, the values and/or sales prices of other companies that are determined to be comparable to the subject business are used as the basis for its value. Usually, information on comparable companies is obtained from various sources that compile financial data by industry, SIC code, NAICS code or some other meaningful categorization.

Certain elements of the financial statements and other financial data of the subject business may not be considered "normal" for such a business, i.e., not equivalent to the corresponding financial information of comparable companies. The valuator needs to consider whether certain adjustments should be made to the subject business' financial statements so that they are stated on a basis equivalent to that of the comparable companies. An example of these types of items that may warrant adjustment are owner salaries and perquisites. Other such adjustments are usually more prevalent when the form of earnings used as a factor in determining value is something other than cash flows. In these situations (which can be under the income approach, and are most certainly under the market approach as discussed earlier), the adjustments usually are made for conforming the financial statement reporting to generally accepted accounting principles, or to account for unusual or nonrecurring transactions or events.

There are circumstances where adjustments are not made, even though they would be necessary to properly "normalize" the financial statements. For example, an adjustment would not be made for compensation where a minority interest is transferred, with the minority interest holder (and particularly the transferee) having a lack of control. Some other circumstances where adjustments, or certain adjustments, are not, or might not be, appropriate are when the standard of value is investment value, the approach is the asset approach, or when the purpose for the valuation is for litigation, property settlement in a marital dissolution, and bankruptcy.

When determining the applicability of certain normalizing adjustments, particularly for owner salaries and perquisites, one needs to consider the implications of having reduced the expenses for these items vis-à-vis absentee owners or the IRS. Parties such as these who could gain access to the valuation documentation might draw inferences that the expenses actually incurred were excessive. Of course, the fact that certain expenses were reduced for the purpose of preparing a valuation does not automatically mean that owner compensation or other expenses were excessive. Also, inferences should not be drawn that the adjustments for reducing expenses were made to increase earnings and thus (artificially) augment the value. There are many valid reasons for expenses to be normalized for valuation purposes. For example, in the case where actual owner compensation has been reduced for the normalized financial statements, the owner may have been performing various functions for many years and to replace him with other newly hired personnel would cost less; may have special skills or personal customer relationships and, if there were a sale, would be retained on a consulting basis at a much reduced compensation amount, which, when added to a replacement's compensation, would be less than the owner's current compensation; or, may have taken insufficient compensation in prior years to preserve the company's working capital and thus his compensation in recent years included the shortfall. The parties involved in the valuation need to make certain they not only allow for the appropriate normalization adjustments but also can support them.

V. Conclusion

Whether the need arises to arrive at a value for a business agreement or transaction, a litigation or family law matter, or estate planning or estate reporting purposes, the parties involved should make every effort, to the extent possible and practicable, to work together

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in providing and seeking all relevant documents and other information. The valuator's job is to ask questions and request documentation that are germane and thus, with the cooperation of all involved, a comfort level can usually be achieved to enable the valuator to opine to and/or arrive at a conclusion of value. Also, the smoother the process, the less the fees will be of all the professionals involved.

When a determination is made that a business valuation is necessary, you and your clients need to keep in mind that, unless a thorough job can be done, the value arrived at will probably not stand up to a potential challenge. As a result, when, for example, the purpose of the valuation is related to some sort of business agreement or a transaction, inequities will inevitably occur, which can lead to disputes and litigation. When an inadequately arrived at value is introduced in a business litigation matter, an unfavorable outcome of the case might be the result. Certainly, in estate planning and estate tax reporting situations, if values are disputed by the IRS, an inadequate or unsupportable valuation could lead to a hefty tax bill that the client never expected. Frequently, you are in a position to make certain that the valuator will be provided enough lead time to gather together and analyze all necessary documents and other information in order that the valuation can be done properly.

In addition to your assistance with the promoting of dialogue among the parties involved and encouraging their participation in the valuation process, you can assume a role in educating your client on the importance of a presentable valuation in the legal matter for which you are representing him or her.

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DIVISION OF RETIREMENT BENEFITS

By Robert Cerceo, Esq.

Introduction

Today, most jobs include some kind of retirement benefits, but not all plans are created equally. The *time rule* guides us on the division of the funds. *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989) and *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990). A qualified domestic relations order ("QDRO") is required to split funds under "qualified" plans from *private* employers, whether they are Defined Benefit Plans ("gold watch" monthly check style retirements) or Defined Contribution Plans ("401k-style").

Similar but different specialized enforcement orders are required for a state public employee [under the Public Employees Retirement System ("PERS")], a federal employee [who requires a Court Order Acceptable for Processing ("COAP") approved by the Office of Personnel Management ("OPM")], and for a current or retired member of the Armed Forces [who needs certain specific language which can be stated in the in the decree, or a separate order, to be processed through the Defense Finance and Accounting Service ("DFAS")]. These orders, and transfers, must be done correctly, and with a view toward avoiding accidentally triggering massive tax consequences.

Probably the largest malpractice trap relating to retirement benefits is survivorship benefits. One current issue is that *Wolff v. Wolff*,

112 Nev. 1355, 929 P.2d 916 (1996) holds that an Alternate Payee's portion of the retirement benefits is permanently transferred to the Alternate Payee, creating an interest that should be paid to his or her estate if the Alternate Payee predeceases the Member, but PERS will *not* enforce such clauses. As a *practice tip*, you need to address this incongruity in the decree by way of settlement, or a briefing to the court.

Juggle Pre-Tax and Post-Tax Eggs in Two Baskets

Failing to remember the difference in value between pre-tax assets (e.g., IRA accounts) and post-tax assets (e.g., regular savings accounts) is an invitation to disaster. For most wage-earners, pre-tax assets are only worth about 75¢ on the dollar, so taking a $10,000 retirement benefit in exchange for $10,000 cash is probably a bad idea. Instead, divide pre-tax and post-tax assets separately; if they must be weighed together, remember to convert the pre-tax assets into post-tax values before putting them on the balance sheet. A useful device is the SCHILLER, DU CANTO AND FLECK *Effective Tax Rate Chart*, available by calling (312) 641-5560, or consult with an actuarial expert.

The Nevada Revised Statutes

There is little Nevada statutory law specifically directed to retirement benefits. Instead, they fall under the general definition of community property in NRS 123.220 as "all property" acquired after marriage, with certain exceptions. They are divided under NRS 125.150, which directs a presumptively equal distribution of community property.

NRS Chapter 286 provides the framework for the PERS pension benefits. NRS 125.155, enacted in 1995, establishes a set of special rules applicable only to PERS retirement benefits in divorce. Section 1 of that statute requires any divorce order to be based on the "time rule" and prohibits basing a division "upon any estimated increase" based on post-marital service. Section 2 states that the divorce court may require that benefits for a spouse not be paid until the participant *actually retires*, and may safeguard the spousal share if it does so order, by way of a bond, life insurance, or other security, or (by agreement of the parties only) by increase in the spousal share to compensate for the delay in payments. Section 3 provides that a spousal share ordered under that statute terminates upon death of either party, unless a retirement option providing for survivorship benefits is agreed or ordered. Since 1987, PERS has required spousal consent to the form of retirement chosen. NRS 286.541. However, the absence of spousal consent only prevents the member from choosing any desired retirement option for 90 days. *See* NRS 286.545.

ERISA

Virtually every private employee-benefit plan in the United States today is qualified under, and governed by, the Employee Retirement Income Security Act of 1974, known as "ERISA," codified at 29 USC §1001, *et seq*. ERISA provides that pension benefits may not be "assigned or alienated." 29 USC §1056(d)(1). Many courts found a common law exception for domestic relations orders, but the legal landscape was confused until the passage of the Retirement Equity Act ("REA"), Pub. L. 98-397, 98 Stat. 1426 (1984), which provides that certain domestic relations orders, containing specific terms, must be accepted and honored by ERISA-qualified pension plans.

Under the ERISA/REA statutory scheme, any judgment, decree, or order dealing with alimony or support for a spouse, former spouse, child, or other dependent made according to local domestic relations law is considered a "domestic relations order" under federal law. *See* 29 USC §414(p)(1)(B). It becomes a "qualified order," or "QDRO," and must be recognized and enforced by an ERISA-qualified pension plan, when it creates or recognizes one of the listed classes of persons as an "Alternate Payee" with a right to receive all or any portion of the benefits normally payable to a participant in that plan.

An order is *not* "qualified" if it requires a plan to provide a type or form of benefit not otherwise available under the plan, or requires the plan to provide a greater (actuarially computed) sum of benefits, *or* requires payment of benefits to an Alternate Payee that are required to be paid to *another* Alternate Payee under a prior QDRO. *See* 29 USC §1056(d)(3)(D).

Individual Retirement Accounts - IRAs

Individual Retirement Accounts ("IRAs"), and "Keogh" plans are private retirement plans that do not really fit in with the other kinds of retirement benefits discussed above. Keoghs are essentially like other private retirement plans, but for sole proprietors, partnerships,

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or "S" corporations. An IRA can be divided in a divorce action through a simple order in the decree, or other order; no QDRO or other special form of order is required. There are a variety of special tax rules, however, requiring direct rollover without ever touching the recipient's hands in order to avoid incurring tax effects.

> **PRACTICE TIP**
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> An alternative exists to the simple division and rollover of funds (where there is no penalty or tax impact for the transaction, unless an early withdrawal is made). The decree can direct a withdrawal of a sum certain from the IRA and direct payment to Wife. She then presents the order to the institution for release of funds. If the order and withdrawal are done in the same tax year, there should be no early withdrawal penalties and the tax burden for the pre-tax sum removed from the IRA is borne by the Wife. As she exists in a lower tax bracket, Husband can provide more money to Wife to give her a "lump sum start," provided that the distribution does not "bump" her into a higher tax bracket.

Civil Service Plans

For civilian employees of the federal government, there is an "old" system (Civil Service Retirement System, or CSRS, for those who began service before January 1, 1984) and the "new" system (Federal Employees' Retirement System, or FERS, for those who began service on or after January 1, 1984). *See* 5 USC §§8331, 8401. Both are operated by the Office of Personnel Management ("OPM"). The most obvious difference between them is that participants in CSRS *do not* participate in the social security program, while those in FERS *do* participate. Both systems provide a survivor annuity election, which is automatic for current spouses at retirement unless both spouses "opt out." *See* 5 USC §8341(h)(1); 5 USC §8445.

In 1992, sweeping changes were made to the regulations governing division of Civil Service retirement benefits, making virtually every prior reference on the subject out of date, and potentially dangerous to clients if relied upon. *See* Court Orders Affecting Retirement Benefits, 57 Fed. Reg. 33,570 (July 29, 1992) (codified at 5 CFR Parts 831, *et seq.*). A court order dividing Civil Service benefits is called a "COAP" ("Court Order Acceptable for Processing"). Any COAP should provide orders dealing with each of the three types of benefits addressed in the regulations: the lifetime benefits ("employee annuity"), the potential refund of employee contributions, and death benefits ("former spouse survivor annuity").

A Thrift Savings Plan ("TSP") also was created by the FERS statute. The TSP is a defined contribution (cash style) type of plan for federal employees; FERS employees get matching federal contributions up to a certain level. While the program is open to CSRS employees, there are no matching contributions for them. It is expressly excluded by the regulations governing the CSRS and FERS retirement benefits. 5 CFR §838.101(d). It is administered by a board entirely separate from the OPM (the Federal Retirement Thrift Investment Board), which has its own governing statutory sections and regulations. 5 USC §8435(d)(1)-(2), 8467, 5 CFR Part 1653, Subpart A. There are no "survivorship" benefits, *per se*, for a TSP account, as it is a cash plan like a 401(k).

Military Retirement Benefits

Members of the Armed Forces have retirement benefits under the Uniformed Services Former Spouses Protection Act ("USFSPA"), 10 USC §1408, Pub. L. No. 97-252, 96 Stat. 730 (Sept. 8, 1982). The USFSPA is both jurisdictional and procedural; it both permits the state courts to distribute military retirement to former spouses, and provides a method for enforcement of these orders through the military pay center. The USFSPA itself does not give former spouses an automatic *entitlement* to any portion of members' pay; those rights (for division of military retirement pay as property, or that alimony or child support are to be paid from military retired pay) come from state law, but rights granted by state law are limited by federal law. The federal regulations relating to the USFSPA are found at 32 CFR §63.6. There is a survivorship benefits program under the military retirement system, known as the Survivor's Benefit Plan ("SBP"), and set out at 10 USC §1447, *et seq*. Additionally, military members may, after the year 2001, participate in the Thrift Savings Plan ("TSP") like Civil Service employees, and thus have both a defined contribution plan *and* a defined benefit kind of plan.

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Book Review:

The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families

By Marshal Willick, Esq.

Back in 1989, ABA Family Law Section Chair Mike Barber conceived of a book encompassing all the intricacies of a divorce involving a member of the military; he asked me to write it. Several years later, the scope proved impossible, and the book was scaled back to encompass solely military retirement benefits. The ABA published it in 1998.

It took another decade, but the ***rest*** of military-related divorce practice (***and*** an update and alternate perspective on pension matters) was covered— very well— in the excellent and comprehensive treatise by Mark E. Sullivan, THE MILITARY DIVORCE HANDBOOK: A PRACTICAL GUIDE TO REPRESENTING MILITARY PERSONNEL AND THEIR FAMILIES (ABA 2006; $149.95; www.ababooks.org).

This book is a necessary addition to the library of any practitioner who touches a divorce case involving the military— and with the world's largest Air Force base down the street in Las Vegas, most of us do, or will. There are literally hundreds of thousands of members of the military, including Reserve and Guard units; the military divorce rate is on the rise, and ***everyone*** moves to Nevada.

The book is a well-organized presentation of subjects starting with preliminary matters of location, service, etc., the details of the Servicemembers' Civil Relief Act of 2003, Custody and Visitation, Family Support, Domestic Violence, Divorce, Tax, and Pension issues— in 639 pages. In plain English, it provides substantive law, strategy and tactics, practice tips, and references to other resources, with comprehensible explanations of the often-ponderous military bureaucracy and terminology. Cites, forms, checklists, and links are found throughout the book, which includes a reference CD of appendices.

If anything, the book is a victim of its own success— having addressed all those things that Mr. Barber thought should be addressed in 1989, it is so large in scope that it is necessarily focused on issues current as of its publication date, and limited in the detail it can spare on any single subtopic. For example, the area of concurrent receipt of disability and retired pay is a true "moving target"— the statutory law is changing year by year, and the case law is just developing— but the book provides an invaluable primer to anyone facing these issues, and updates are promised.

In short, if you are handling a divorce involving a member of the military, this book should be not just in your library, but on your desk.

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Marshal S. Willick, Esq. is the Principal of the WILLICK LAW GROUP, a firm in Las Vegas practicing exclusively in the field of family law. One of the original AAML members in Nevada and nationally published on Family Law topics, Mr. Willick can be reached at 3591 East Bonanza Rd., Ste. 200, Las Vegas, NV 89110-2198. E-mail can be directed to: *Marshal@WillickLawGroup.com.*

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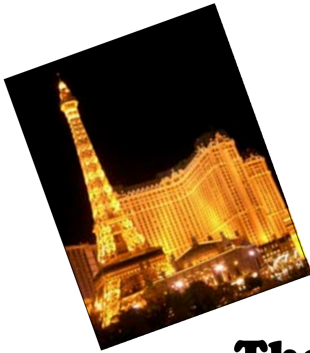

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