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Finding Hidden Income and Secreted Assets in Divorce



Mediating the Marital Balance Sheet

by Andy Flink

In any divorce that involves an active financial lifestyle acquiring assets or substantial debts, the equitable division of how we allocate these items can be an overwhelming prospect. Even in the simplest of cases, coming up with a fair and reasonable way to get the parties and attorneys to agree can be a time consuming and arduous task. With a fair amount of distrust already in the mediation room, we combine that aspect with figures that are always a “moving target.” Even when I have financial experts representing each side we can spend hours debating what each of the values should or should not be. Keeping these facts in mind, here are 10 of the most common areas of debate with suggestions as to how we can best agree on each of the components that we typically deal with. Our goal is to arrive at a single sheet of paper that settles every line item, each with its own monetary valuation that both sides will agree on.

The House Value

Are we selling the home or is one of the parties keeping the home? Valuing the house should be simple, and I suggest that if one of the parties is planning to stay, they complete an appraisal prior to mediation. Coming into the session without this piece means we have to rely on a third party valuation whether it be Zillow, assessed tax value or what the neighbor just sold their “exact same home” for. These alternative valuations have a tendency to work against the exiting party, who now might also have to wait until the remaining party has had time to refinance before they are compensated for their share of the property.

Terms of sale, whether from one party to the other or in the open market, do not need to be positional; we are simply dealing with an asset and its value (perhaps the net value when sold or cost of repairs if necessary), not a convoluted formula to the benefit of one party and to the

detriment of the other. Two other considerations: if we cannot agree on who will keep the home, will the court ultimately decide that the home should be sold? And having nothing to do with the monetary aspect of a deal, what is in the best interest of the children? Sometimes the best conclusion is figuring a way for one of the parties to stay to allow as little disruption to the children as possible. It is a factor we should always discuss in settling the issue of the home in mediation.

The Retirement Accounts

Cash accounts have a value of 100 cents on the dollar. Retirement accounts do not. Varying complications exist with the valuation and potential transfer of any retirement based account, whether it be an IRA or 401K. However, we can use these assets to the advantage of both parties. If the tax rate of a receiving party is lower than the person who currently owns the account, the receiving party’s dollar-for-dollar valuation is higher. Second, concurrent to a divorce, the receiving party may be able to utilize a one-time withdrawal without any penalty (but with tax ramifications pursuant to their bracket). This function allows us room to be creative to allow a win/win for both husband and wife. Be sure in each and every case to review this information with a financial expert prior to agreeing to the division of the retirement accounts.

The Credit Card Debt

Equitably dividing this debt should be simple, but the incomes of the parties and positions as to who accumulated this liability can shift the percentages significantly. The most common obstacle I see in mediation when we discuss debt is each side’s perception of what should and should not be considered marital. A creative solution is to ask direct questions about each card to understand the history of the account(s), how the current amounts were accrued and how the parties paid (or did not pay) the balances due. Sizeable debt can also be consolidated, which may be used as a strategy to “take on” more debt only to then request more assets as the equalizer. Regardless, how debt is divided and subsequently disposed of in a divorce is merely another aspect of the division. Who is willing to take which debt is where we need to be, irrespective of the parties’ plans after divorce.

The Bankruptcy

Post-divorce a party may be considering a bankruptcy filing. Since the focus on #3 above should be on merely determining how debt is to be divided, one party may have no choice over the long term other than to file for bankruptcy protection. Provided there is no effect on the other party, this may be the only alternative that remains in a scenario where the unsecured debt is insurmountable. I find that it is always a good idea to ask



and retain as confidential information should the parties make such a request.

The Indemnification

Indemnifying one individual from a tax, credit or mortgage liability within a final agreement is only as good as the performance of the responsible party, but does add an additional layer of protection. Should the person responsible for the secured debt be in default, you can be guaranteed that the creditor will go after the other party for payment. This topic is important to share when we are dividing any debt responsibility, and can be an issue pertaining to past items such as prior years' tax filings, especially when there is a substantial difference in the parties' incomes.

The Personal Property

I usually break this down into four categories: pots and pans, my stuff vs. your stuff, a houseful of stuff, and items of significant value. The debate over pots and pans should never be a debate. My stuff vs. your stuff, if it is what we each own (clothing, personal items, etc.), should also not be a time consuming process in mediation. But . . . the houseful of stuff, if not divided or discussed prior to the session, can be problematic and cause a disagreement in value. This is especially true when one party is staying in the home. The person leaving behind years of purchased furniture, appliances, electronics, etc. may attach a stratospheric value as a balance sheet line item and will seek an equalizer in another area. If there is debate on this issue, have each side prepare a list and work on it when you are in caucus with the other side. Items of significant value should be treated like any other large asset (e.g. the marital home). As part of valuing the marital assets, there needs to be supporting documentation to verify the amount in question. If not, we are merely guessing, and you can be assured that each side's assessment of the values will vary drastically.

The Miles

There is usually a cost to dividing miles, and since (using Delta miles as an example) each mile is worth \$.01, the expense associated with dividing these miles can outweigh the mere division itself. A party that has a million miles essentially owns an asset worth \$10,000.00. But, the individual that has 100,000 miles owns an asset worth only \$1,000.00. Be aware of the cost to transfer miles or points when debating this issue. One solution that seems to work well is to provide access to these miles for future use by each/either party, thus avoiding the cost of transferring miles altogether.

The Alimony Equalizer

Alimony can be utilized as a terrific alternative to assist in equalizing the balance sheet. This is especially true, again, where there is a significant difference in the incomes of the parties. Since the paying party is not responsible for taxes on alimony paid (assuming that the terms are compliant and not subject to recapture) they are by

definition in a higher tax bracket than the recipient. The net dollars paid are of greater value to the recipient, and can be a good way to bring the overall division to an equitable split. To some parties in mediation, however, the mere concept of alimony, regardless of the advantages, will be viewed as an emotional non-starter.

The Tax Ramifications

Be wary of how taxes may or may not affect the net balancing of any division. If the assets in play are significant enough for the parties to consider enlisting the input of a tax advisor, we would be foolish not to perform an overall evaluation in the division. While this is sometimes impossible to implement during a mediation, if we discover that the dollars involved are of significant exposure to tax, we should pause and reconvene after a thorough calculation. Taxes can be one of the most misunderstood aspects of any division and should always be carefully analyzed.

The Moving Parts

As each of the issues herein should be assessed and carefully reviewed, be mindful that the components of each have a propensity to play into one another. Since we are constantly moving the pieces around to make them fit and satisfy everyone, each aspect is yet another moving part and may be shifted around and re-evaluated several times during the mediation. This maneuvering helps us achieve a final result, and if we do it effectively to the satisfaction of all involved, we may finally arrive at our goal which is that "one sheet of paper."

Not all equitable divisions are complicated, but others can be quite involved. My hope is that the ideas and suggestions that are explained herein can be used to help us achieve a reasonable and fair end result. The numbers are not emotional; but the people dealing with the numbers, especially the parties, can be very emotional. Minimizing the emotions by helping the parties see the overall picture, by using spreadsheets and simple calculations, can help them "get there." No two equitable divisions are ever the same, but of the hundreds and hundreds of mediations I have conducted, one fact remains a constant: the Husband ALWAYS retains the Big Green Egg. *FLR*



Andy Flink is a trainer mediator and roster member of 17 area Superior Court ADR programs including Fulton, DeKalb, Forsyth and Cherokee County. Familiar with the aspects of divorce from both a personal and professional perspective, Flink is experienced in business and divorce cases and has an

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