

Chapter 16

PROPERTY: VALUATION AND DISTRIBUTION UPON DISSOLUTION OF MARRIAGE

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§ 16.1 • INTRODUCTION

With the elimination of fault grounds to obtain a divorce, the practice of marital dissolution law has largely shifted from moral to economic issues. Where once parties debated issues of marital fault and spousal support, the parties now primarily debate over whether particular items of property should be classified as marital or separate, the value of the property, and how the property should be divided and/or distributed between the two spouses.

The division of property in a dissolution of marriage action may well be one of the most important issues in the proceeding. In fact, the Uniform Dissolution of Marriage Act (UDMA) provides that a spouse is not even entitled to a permanent maintenance award unless, after the property is divided, that spouse still lacks sufficient property to provide for his or her reasonable needs.¹

The magnitude of property division is amplified in that marital property may include tangible and intangible property acquired during the marriage. The list of possible assets that are considered property includes real estate; personal property; vehicles; bank accounts; investment and financial accounts; stocks; bonds; deferred benefits; employee stock option plan (ESOP), profit sharing, defined benefit, and defined contribution pension plans; IRA, SIMPLE, SEP, and 401(k) accounts; stock options; tax benefits; business ventures such as corporations, partnerships, professional practices, and family businesses; frequent flyer program awards; contract rights; personal injury and other legal claims; and the like.

§ 16.2 • EQUITABLE DISTRIBUTIONS

Colorado's property distribution statute is adopted from the Uniform Dissolution of Marriage Act and is contained within C.R.S. § 14-10-113. Colorado's Act, at C.R.S. § 14-10-113(1), provides:

[T]he court . . . shall set apart to each spouse his or her property and shall divide the marital property, without regard to marital misconduct, in such proportions as the court deems just after considering all relevant factors

Colorado is a “dual property” equitable distribution state. Under this concept, the judge, upon dissolution, and absent a property settlement agreement signed by both parties, may divide *marital* property between the parties but cannot divide the parties’ *separate* property. C.R.S. § 14-10-113(2) defines marital property as “*all property acquired by either spouse subsequent to the marriage except:*

- a) Property acquired by gift, bequest, devise, or descent;
- b) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
- c) Property acquired by a spouse after a decree of legal separation; and
- d) Property excluded by valid agreement of the parties.”

(Emphasis added.)

All property acquired by means other than those above, by either spouse after their marriage and prior to a decree of legal separation, is presumed to be marital property. Such presumption is valid regardless of whether title is held individually or by the spouses in a form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. This presumption may be overcome by a showing that the property in question was acquired by a method listed above.² Even then, an asset acquired prior to the marriage; or by gift, bequest, devise, or descent; or in exchange for property thereof, shall be considered as marital property to the extent that its present value exceeds its value at the time of the marriage or at the time of acquisition if acquired after the marriage.³

§ 16.3 • THREE-STEP PROCESS IN PROPERTY DISTRIBUTION

The equitable distribution of property requires a three-step process:

- 1) The classification of marital or separate property;
- 2) The valuation of the property; and
- 3) The equitable distribution of the property.

The first step requires a determination of whether the property in question is marital or separate.⁴ Property includes both assets and debts.⁵ Title alone is not dispositive as to the characterization of the property as separate or marital.⁶

The second step is to obtain the value of the property. C.R.S. § 14-10-113(5) provides that property shall be valued as of the date of the decree or hearing on the disposition of the property.⁷ However, if a party dissipates marital assets in contemplation of divorce, those assets must be valued as of the last date they existed as marital property.⁸

The third step focuses on the distribution of the marital property. Colorado requires an equitable distribution; equitable does not necessarily mean equal.⁹ In dividing the property, the court is instructed to set apart to each spouse his or her respective separate property and make a division of marital property, as the court deems just, after considering all relevant factors, including:

- a) The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;
- b) The value of the property set apart to each spouse;
- c) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse with whom any children reside the majority of the time; and
- d) Any increases or decreases in the value of the separate property of the spouse during the marriage or the depletion of the separate property for marital purposes.¹⁰

No one particular enumerated factor is intended to have more weight than the others; in the final analysis, the court has wide judicial discretion in providing an equitable distribution of property upon dissolution.¹¹ Further, these factors are not exclusive or exhaustive; the court may consider additional factors relevant to the distribution of the parties' property.¹² Though the court may not consider marital fault or misconduct when dividing property, the court may consider economic fault, strictly confined.¹³

§ 16.4 • FINANCIAL ACCOUNTS, FURNITURE AND HOUSEHOLD GOODS, AND MISCELLANEOUS PROPERTY

§ 16.4.1—Financial Accounts

C.R.C.P. 16.2, which went into effect January 1, 2005, requires extensive disclosure of all financial accounts. Additionally, propounding the standard pattern discovery requests approved by the supreme court pursuant to C.R.C.P. 16.2, 26, and 33 or 34, one may request financial statements, passbooks, deposit slips, canceled checks and check registers, stock certificates, stock option plans, vesting schedules, and brokerage account statements. If the information is not forthcoming, one may request that the opposing party sign a release of financial information so that the information may be obtained directly from the source. (See Exhibit 16A, General Financial Disclosure Authorization.) Once this data is gathered and analyzed, and the value is determined, the asset may be equitably divided.

§ 16.4.2—Frequent Flyer Benefits

Frequent flyer benefits, if determined to be a marital asset, are equitably divisible upon dissolution of marriage.¹⁴

§ 16.4.3—Contract Rights

Contractual rights that accrue during the course of a marriage are divisible property rights upon dissolution. Although the court cannot divide contractual rights for future services and commitments, those based on consideration given during the marriage are divisible.¹⁵

Attorney contingency fees are also a valuable contract right, and if the fees are acquired during marriage, they constitute a part of the marital estate. Further, attorney fees that have been converted into an account receivable are properly divisible upon dissolution.¹⁶

§ 16.4.4—Personal Injury Recoveries

An amount received by a spouse as a result of a settlement for personal injuries that occurred during the course of the marriage is marital property and is subject to equitable division irrespective of whether the reward is limited to pain and suffering.¹⁷ Such claims awarded for loss of consortium are likewise divisible marital property.¹⁸

§ 16.4.5—Furniture And Household Goods

Often, household goods and personal property can be divided by agreement of the parties. An attorney should counsel his or her client against incurring hundreds of dollars in attorney fees in arguing over property with *de minimis* value. Some property presents more difficult problems in both valuation and distribution. Consider the difficulties associated with family heirlooms, property with sentimental value, or pieces of artwork. Many times, these types of property can be attributed a value by a qualified person with expertise concerning the questionable item, such as an antique dealer or art appraiser. If the property is valued, a division may be constructed on a property recap spreadsheet, along with all other divisible property, to obtain an equitable dissolution. (See Exhibit 16B, Property Recap Spreadsheet Example.)

§ 16.5 • MOTOR VEHICLES

The value of motor vehicles can be determined by examining the so-called “Blue Book” value, now available on the Internet at www.kbb.com, or the NADA value, or by obtaining an expert appraisal. If the car is an antique or has been customized, there are auto appraisers who can offer expert valuation and testimony. Once the value is determined, the transfer of motor vehicles, similar to real estate, requires a transfer of title. The receiving spouse may obtain the signed title from the divested spouse, or the divested spouse may provide to the receiving spouse a power of attorney for motor vehicles that can be taken to the department of motor vehicles so title may issue solely in the receiving spouse’s name. This latter method is generally used because the parties who have a loan against their car do not hold the title. (See Exhibit 16C, Power of Attorney, Motor Vehicle.)

§ 16.6 • THE FAMILY RESIDENCE

For many married couples, the family or marital residence is the single most valuable possession in the marital estate. Aside from the economic value of the marital home, the residence often carries with it deep psychological roots. This is amplified when there are children involved. Most states, Colorado included, recognize the attachment that a spouse and children may have to the home. In dividing property, the court must consider “the desirability of awarding the family home or the right to live therein for a reasonable period to the spouse with whom any children reside the majority of the time.”¹⁹ Although such an arrangement may be beneficial to the children and the custodial spouse, it often creates an economic hardship and pressure in several ways. First, the costs of maintaining the home with the added expenses of a second residence for the other spouse may be prohibitive. Second, the spouse who was not awarded the marital home may still be obligated to pay or assist in paying the mortgage or forego the equity cash value within the residence until a future date. Third, the spouse who may be in a position to receive the house may have to make sacrifices to his or her existing lifestyle in an effort to maintain the house. Moreover, the spouse who does not receive the home may nonetheless be burdened by having his or her name maintained on the residential mortgage.

The fair market value of the family home, or other real estate for that matter, can be determined by an expert appraisal. Another method of valuation — a market analysis — may be used, which may be less expensive to obtain, though it may not provide the accuracy and quantitative analysis of an appraisal. While tax assessments may provide an indication of value, they are generally not as accurate. The parties may have an opinion of the value of their own home, and this opinion may be admitted in a hearing, as an exception to the general rule that lay witnesses may not testify to an opinion.²⁰

Real property must be transferred via a valid deed to be effective. Generally, the party divested of ownership must provide a special warranty or a quit claim deed vesting complete ownership with the other spouse. (See Exhibit 16D, Sample Quit Claim Deed.)

§ 16.7 • DIVISION OF DEFERRED COMPENSATION PLANS

Deferred compensation describes the situation in which employment services are presently rendered but payment for those services is put off to a future date. Tax benefits are usually the reason behind the deferral. Typically, current earnings in a deferred compensation plan that would ordinarily be taxable in the year earned are neither paid nor taxed until some future date. In addition, an employer often will make contributions to the plan for its employees.

The popularity of these plans rests in the deferral of taxation allowed on the qualified plans, which in turn allows an asset to grow far more rapidly. Considerations in retirement planning are also an important element in the growth of deferred compensation plans.

In today's labor market, pension benefits are often a well-established part of an employee's benefit package. Along with the marital home, pension or retirement benefits are the most significant assets available for distribution in many dissolution actions. The division of pension plans is one of the most complex and difficult areas of marital property distribution. The complexity of such plans in part stems from the tremendous variety and forms of plans offered by any particular employer. Another difficulty arises in finding an equitable means to divide the plan between the parties. Unlike many other assets, such as a car or residence, which may be valued at any given moment, a pension's value may be based on a distribution in the future when the employee retires. To add further complexity, some pensions are funded by contributions from the employer only, some from the employee only, and some from both employer and employee. Moreover, some funds require certain periods before the benefits are vested. In addition, there are "non-qualified" plans that may not be directly divisible between divorcing spouses.

Many pensions require a minimum period of employment before they vest in the employee. If vested, the employee's right to the pension will survive the loss of employment. Even if the pension is vested, there is not an immediate right to receive payment by the employee until the pension also matures. Most pensions require that the employee obtain a certain age or obtain a set number of service years before the pension matures.

Generally, all pensions that accrue during the course of the marriage are considered marital property subject to distribution.²¹ This generalization becomes complicated when dealing with pensions authorized by federal law. The Supremacy Clause of the U.S. Constitution forbids states from interfering with federal authority, including federal pension programs. The passage of the Retirement Equity Act of 1984, 29 U.S.C. § 1056, provides that if a state court accepts a qualified domestic relations order (QDRO), then the ERISA federal preemption will not apply. But another complexity is created by the pensions that are exempt from ERISA. These include federal civil service and military pensions and state employee plans such as PERA, FPPA, DPS Pension, and the like.

§ 16.7.1—Basic Terms And Concepts

Pensions are generally either defined contribution plans or defined benefit plans.

Defined Contribution Plan

A defined contribution plan provides separate accounts for each participant employee into which specified periodic contributions are made by the employee, employer, or both. Interest and appreciation in the invested assets is allocated to the participant's account. Upon maturity of the plan, the employee is entitled to an amount equal to the cumulative value of his or her share. Defined contribution plans include profit sharing plans, thrift plans, incentive plans, savings plans, 401(k) plans, stock bonus plans, money purchase pension plans, IRAs, Keoghs, and SEPs. The amount in the participant's account is termed the "participant's accrued benefit." Although contributory plans may provide reasonable restrictions about the times at which amounts can be withdrawn, they cannot require forfeiture of the employee's own contributions.

Defined Benefit Plan

Defined benefit plans provide a fixed periodic, usually monthly but sometimes annual, amount for the employee upon retirement for the remainder of the employee's life. A separate account is not designated for each employee, thus necessitating a valuation of the interest by calculating the present value of the future annuity. Important variables and assumptions that may affect the accuracy of the present value determination include life expectancy, discount rates, retirement age, and the possibility of divestment or forfeiture. Informal procedures and formal discovery aimed at obtaining the relevant documents is a vital first step in the valuation process. For the uninitiated family lawyer, consultation with a competent pension expert or actuary may be necessary to produce an accurate valuation.

Unlike defined contribution plans, defined benefit plans have definitely determinable benefits. The plans are funded by employer contributions, supplemented by investment earnings on the contributions. The covered employee receives a fixed benefit upon retirement. This benefit is generally measured by, and based on, factors such as the employee's number of years of service and the amount of compensation. Defined benefit plans usually carry the name "Retirement Plan," or "Defined Benefit Plan," or "Fixed Account Plan," within their titles. Most state retirement systems provide defined benefit plans.

Vesting and Maturation

The valuation and distribution of pension benefits is affected significantly by whether the plan is vested or non-vested, mature or un-matured. A plan is vested if the employee's discharge or termination would not forfeit the benefits. Non-vested pension benefits are contingent upon the employee's continuing his or her employment. A benefit is matured when the employee, upon retirement, has an unconditional right to receive the benefit. Colorado holds that pensions, whether or not vested, contributory or noncontributory, are marital property subject to division insofar as the right to benefits was acquired during the marriage.²²

§ 16.7.2—Other Types Of Deferred Compensation Plans**Employee Stock Ownership Plan (ESOP)**

An employee stock ownership plan, more commonly referred to as an "ESOP," is generally classified as a defined contribution plan. The employer makes a tax-deductible payment to the ESOP each year sufficient to let the ESOP purchase stock in the employer company for the benefit of its plan participants. The vesting of an ESOP during the marriage results in the accumulation of marital property.

Stock Options

The most common form of stock options is the Incentive Stock Option (ISO). This option grants employees the opportunity to buy stock at a predetermined price under an offer continuing for a stated period of time. A typical stock option will grant the employee the right to buy the stock at any time during the life of the option, usually five to ten years. The advantage to the employee is that, if the stock goes up, the employee can exercise the option to buy the shares at a

fixed price (strike price) and then resell the stock on the open market. The profit is generally taxed at ordinary income tax rates rather than the more beneficial capital gain rates.

There are many variations in a stock option plan, including time of exercise limitations (waiting periods); manner of exercise (installment formula); manner of triggering the option (incentive stock options); and restrictions that affect rights in the stock (full rights accrued only after a specific time).

Exercise during the marriage of a stock option or stock appreciation right granted during the marriage will generally result in marital property.²³ Stock options and warrants to purchase additional shares are valued as stock as if traded on an exchange. Valuing options and warrants may require expertise.

Restricted securities, investment letter stock, control stock, and private placement stock present special problems of valuation. The provision in the controlling stock or option agreement that dictates waiting periods until liquidation is a valuation factor. Cost upon liquidation further necessitates discounting the value of publicly sold unrestricted stock to arrive at a proper determination of value.

IRA

Individual retirement accounts (IRAs) should not be overlooked as an asset at the time of divorce. Furthermore, IRAs can be used in conjunction with other retirement plans for planning purposes. Two principal factors should be noted with respect to IRAs. First, an IRA payment (except Roth IRAs) is fully includible as ordinary income of a recipient, with no special tax benefits attached. The owner of an IRA can withdraw funds at any time in any amount, but, with little exception, if the owner withdraws funds before age 59½, the owner must pay an additional 10 percent penalty tax on the amount of the withdrawal. Second, an IRA is available for a rollover from another qualified retirement plan.

An exception to the penalty provisions in the Internal Revenue Code allows a tax-free transfer of an IRA between spouses or former spouses incident to a divorce. The owner may transfer all or any part of an IRA to a former spouse under a decree of divorce or under a written instrument incident to the divorce. The transfer does not have to be pursuant to a QDRO; however, there must be a divorce decree.²⁴ The tax-free transfer of an IRA allows the parties to realign ownership of their IRAs in any manner desired.

Stock Bonus Plan

A stock bonus plan provides benefits similar to a profit sharing plan; however, the benefits are distributed in stock of the employer's company. Employer contributions are not necessarily dependent upon the profits of the business.

Miscellaneous and Other Retirement Plans Created by Statute

Federal deferred compensation plans, created by statute, include Civil Service retirement plans, military retirement benefits, Foreign Service retirement benefits, railroad retirement bene-

fits, and Social Security benefits. The provisions of the REA do not apply to these non-ERISA plans. Such plans are still divisible, and the plan administrator will usually provide the appropriate forms that are acceptable to the plan. The use of any transfer device, such as an assignment of interest or court order, either voluntarily or court imposed, should suffice. Similarly, the state has many non-ERISA plans: PERA, FPPA, and DPS Pension, to name a few. Division of these assets is also more limited than ERISA plans.

Other types of retirement programs include post-employment contracts; retirement plans for the self-employed (HR-10 plans); and simplified employee pension (SEP) plans, to name a few.

§ 16.7.3—Valuation And Distribution Of Pensions

Methods of Division

There are three basic approaches to the division of marital pension benefits.²⁵

Net Present Value Method

First, if the court can determine the present value of the benefit, taking into account future contingencies such as vesting, maturity, and mortality, it may award the non-employee spouse a lump-sum share of the benefits or offset that share with other marital property. In a defined contribution plan, the present value is the value of the account balance on the valuation date. In a defined benefit plan, there is no individual account, and the present value must be calculated, preferably by an expert.²⁶

Deferred Distribution Method

A second method the court may utilize is to award the non-employee a specific share or percentage of the benefits if, as, and when received. The “time-rule” formula would be used to apportion benefits under the deferred distribution method.²⁷

Reserved Jurisdiction

Finally, the court may defer distribution to divide the benefits and reserve jurisdiction of the matter until the time the employee actually receives the benefits in the future.²⁸

Discovery Needed for Valuation

To properly value a plan, the employee should provide an Authorization for Release of Pension or Retirement Information (see Exhibit 16E, Authorization for Release Re: Pensions). However, at a minimum, the following discovery must be obtained:

- 1) The “summary plan description” of the retirement plan;
- 2) A statement of credited service employment time;
- 3) The salary history of the employed individual;
- 4) The employee’s birth date; and
- 5) The employee’s accrued benefit at normal and early retirement as of the date of valuation.

Steps to Valuation

- 1) Determine the accrued monthly benefit to be received at early and normal retirement if the employee were to terminate employment on the date of dissolution;
- 2) Determine the life expectancy of the employee;²⁹
- 3) Determine the earliest age and normal retirement age and determine the number of years between the employee's current age and retirement age (this represents the deferral period);
- 4) Multiply the monthly marital accrued benefit by the present value factor for the life expectancy of the employee (this is the present value of the pension, assuming it will begin immediately);
- 5) Calculate the discount factor for the deferral period that must elapse before the pension begins (this is the present value of the pension during the deferral period);
- 6) Subtract the present value during the deferral period (step 5) from the present value of the pension (step 4) (this represents the present value of the deferred annuity as of the valuation date); and
- 7) If applicable, multiply the present value of the deferred annuity (step 6) by a survivorship rate from a mortality table to reflect the risk of forfeiture (this represents the present value of the deferred annuity as of the current date reduced to reflect the risk of forfeiture).

Determining the Marital Share

Even if the present value of the pension plan is determinable, the work does not end there. The next step is to calculate the portion earned during the marriage. The present value must be multiplied by the "coverture" fraction to reach the present value entitlement for the non-employee spouse.

The coverture fraction represents that portion of the value of the benefits attributable to the marriage. The numerator of the fraction reflects the total period of time the employee participated in the plan during the marriage and the denominator is the total period the employee participated in the plan.³⁰ The coverture fraction is then multiplied by the monthly benefit of the plan. This number is then divided by 1/2 in order to determine the non-employee spouse's share.

§ 16.7.4—Use Of A Qualified Domestic Relations Order (QDRO)

A QDRO is an order that creates or recognizes the existence of an alternate payee's right, or assigns to the alternate payee the right, to receive all or a portion of the benefits payable with respect to a participant under the plan.³¹ The requirements of a QDRO, pursuant to I.R.C. §§ 414(p)(2) and (3), are:

- 1) The QDRO must specify the name and last known mailing address of the participant and the alternate payees;
- 2) The QDRO must specify the amount or percentage of the benefits the alternate payee is to receive, or the manner to determine the amount or percentage;
- 3) The QDRO must specify the number of payments or the period for which the order is effective;

- 4) The QDRO must specifically identify the retirement or pension plan subject to the QDRO;
- 5) The QDRO cannot require a plan to provide any type or form of benefit or option not provided within the plan;
- 6) The QDRO cannot require the plan to provide increased benefits, determined on an actuarial basis; and
- 7) The QDRO cannot require the payments of the benefits to an alternate payee that are payable under an earlier QDRO to another and different alternate payee.

Failure to follow these requirements will result in the DRO's being deemed not qualified and the property division will be ineffective. Consulting a competent actuary may be necessary to avoid an incomplete QDRO.

Upon receipt of the QDRO, the plan administrator must notify the participant and the alternate payee, and if the order is deemed qualified, then the plan administrator must distribute the money to the alternate payee in accordance with the QDRO.

Survivor Benefits

Many plans have survivor annuities. The survivor annuity is a benefit that will be paid upon the death of the participant to the surviving spouse. The survivor benefit can be awarded to an alternate payee *only* if the QDRO specifically states that the alternate payee is awarded such rights. In some instances, the plan will also have a pre-retirement survivor benefit, which itself can be an important property interest.

Tax Effects

I.R.C. § 402(e)(1) provides that the alternate payee is treated as the distributee of any benefit received under a QDRO. As such, the alternate payee is taxed on benefits received. However, the alternate payee can often make a rollover into a qualified IRA upon receiving a lump sum from the plan if paid within one year, without tax consequences. The alternate payee may roll all or a portion of the lump-sum benefit into an IRA. However, any portion not rolled into an IRA, or left remaining in the plan, will be taxed.

§ 16.8 • VALUING A BUSINESS AND PROFESSIONAL GOODWILL

§ 16.8.1—Basic Approaches To Business Valuations

The three basic approaches to valuing a business are:

- 1) Cost: the market value of underlying assets, the adjusted book value;
- 2) Market: compare the business with exchanges of comparable businesses; and
- 3) Income: estimate the value by considering the income on cash flow to the prospective buyer.

§ 16.8.2—Valuations Considering Goodwill

Closely held business interests, especially professional practices, frequently present both the parties and the courts with problems in the characterization and valuation of such property interest, especially in considering the value of goodwill. The valuation of professional practices and closely held business interests is one of the most difficult problems the courts and lawyers face in the equitable distribution of marital assets. Generally, the valuation requires the testimony of experts. However, most experts have not agreed on a uniform method of valuation. Well-qualified experts who use identical methods of valuation reach widely different conclusions as to the value of the same business assets. Despite the difficulty in valuation, courts uniformly hold that the difficulty of establishing a value does not relieve the courts from the obligation.

There is no precise definition of goodwill; however, generally speaking, goodwill is an intangible asset of a business or professional practice. In the 19th century, goodwill was defined as, “nothing more than the probability that the old customers will resort to the old place.”³²

The Colorado Court of Appeals in *In re Marriage of Nichols*,³³ a case of first impression in Colorado, held that the goodwill of the husband’s professional practice was distributable upon dissolution. The court rationalized that “[p]rofessional practices that can be sold for more than the value of their fixtures and accounts receivable have salable goodwill . . . they have a pecuniary value.”³⁴ In later decisions, these concepts have been applied to professional practices, even though they are not salable, on the concept that there is a “value to the owner.”

Typically, valuation contemplates the determination of a fair market value (*i.e.*, the price at which the property would change hands between a willing buyer and a willing seller, both having reasonable knowledge of the relevant facts and neither under compulsion to make the transaction). Thus, determining the value of a closely held corporation, where there is a lack of a willing buyer, is problematic. In Colorado, the value of goodwill is not dependent on what a buyer would pay. The important consideration is whether the business has value to the spouse beyond the tangible assets.³⁵ The courts have come up with a number of acceptable methods to reach the value of goodwill in smaller businesses.

Book Value

Courts are reluctant to accept book values in determining the valuation of a business. Especially in small businesses, the book value fails to account for goodwill and investment values in terms of actual profit, and does not deal with the question of discounting the value of a minority interest holder.³⁶

Capitalization of Excess Earnings

Excess earnings represent the earnings that a business could produce over a period of time if a disinterested manager whose aim was to maximize profits operated it.³⁷ Widely accepted, earnings are the most important factor in the valuation of an operating business. This method involves applying to the earnings of the business a capitalization rate, or multiplier, that reflects the stability of past business earnings and the predictability of future earnings. Under this approach, the value of goodwill is based in part on the amount by which the earnings of the

spouse operating the business or profession exceed that which would have been earned by a person with similar education, experience, and skill, as an employee in the same general locale.

The capitalization of excess earnings approach is one of the methods recommended by the American Institute of Certified Public Accountants and is the method relied on by the Internal Revenue Service to value a business for tax purposes.³⁸

Buy-Sell Agreements

A buy-sell agreement typically provides for the business entity to purchase the withdrawing parties' shares at a predetermined price. Such arrangements are frequent in partnership agreements and other closely held businesses. The courts will generally consider such agreements in arriving at a valuation, but they are not conclusive. The price fixed in a partnership or corporate buy-sell agreement is not considered binding for equitable division purposes where the other spouse did not consent to its terms. A trial court may independently value goodwill notwithstanding its exclusion from the buy-sell agreement.³⁹

NOTES

1. See C.R.S. 14-10-114; *In re Marriage of Jones*, 627 P.2d 248 (Colo. 1981).
2. C.R.S. § 14-10-113(3); *In re Marriage of McCadam*, 910 P.2d 98 (Colo. App. 1995).
3. C.R.S. § 14-10-113(4); *In re Marriage of Fleet*, 701 P.2d 1245 (Colo. App. 1985).
4. C.R.S. § 14-10-113(2).
5. *In re Marriage of Jorgenson*, 143 P.3d 1169 (Colo. App. 2006).
6. *In re Marriage of Thompson*, 568 P.2d 98 (Colo. App. 1977), and *Martinez v. Gutierrez-Martinez*, 77 P.3d 827 (Colo. App. 2003).
7. *In re Marriage of Hunt*, 909 P.2d 525 (Colo. 1995).
8. *In re Marriage of Campbell*, 140 P.3d 320 (Colo. App. 2006).
9. *In re Marriage of Lodholm*, 536 P.2d 842 (Colo. App. 1975), and *In re Marriage of Eisenhuth*, 976 P.2d 896 (Colo. App. 1999).
10. C.R.S. § 14-10-113(1).
11. *In re Marriage of Jackson*, 698 P.2d 1347 (Colo. 1985).
12. *In re Marriage of Casias*, 962 P.2d 999 (Colo. App. 1998).
13. *Marriage of Jorgenson*, 143 P.3d at 1173.
14. *In re Marriage of Balanson*, 996 P.2d 213 (Colo. App. 1999), *aff'd in part and rev'd in part by In re Balanson*, 25 P.3d 28 (Colo. 2001).
15. See *In re Marriage of Sewell*, 817 P.2d 594, 596 (Colo. App. 1991), and *In re Marriage of Anderson*, 811 P.2d 419 (Colo. App. 1990).
16. *In re Marriage of Vogt*, 773 P.2d 631 (Colo. App. 1989).
17. *In re Marriage of Fjeldheim*, 676 P.2d 1234 (Colo. App. 1983).
18. See *In re Marriage of Simon*, 856 P.2d 47 (Colo. App. 1993).
19. C.R.S. § 14-10-113(1)(c) (2004); *In re Marriage of Anderson*, 541 P.2d 1274 (Colo. App. 1975).
20. See, e.g., *In re Marriage of Plummer*, 709 P.2d 1388 (Colo. App. 1985); *In re Marriage of Lewis*, 66 P.3d 204 (Colo. App. 2003).
21. *In re Marriage of Grubb*, 745 P.2d 661 (Colo. 1987); *In re Marriage of Blake*, 807 P.2d 1211 (Colo. App. 1990).

22. See *In re Marriage of Kelm*, 912 P.2d 545 (Colo. 1996); see also *In re Marriage of Hunt*, 909 P.2d 525 (Colo. 1995).
23. *In re Marriage of Renier*, 854 P.2d 1382 (Colo. App. 1993).
24. See I.R.C. § 408(d)(6).
25. *Marriage of Hunt*, 909 P.2d at 530-531.
26. *In re Marriage of Nordahl*, 834 P.2d 838 (Colo. App. 1992).
27. *Marriage of Hunt*, 909 P.2d at 528.
28. *Id.* at 549.
29. See C.R.S. § 13-25-103.
30. *Marriage of Hunt*, 909 P.2d at 531, and *In re Marriage of Warkocz*, 141 P.3d 926, 930 (Colo. App. 2006).
31. See 29 U.S.C. § 1056(d)(3)(B)(i)(I) (1997) and I.R.C. § 414(p)(1)(A).
32. *Cruttwell v. Lye*, 34 Eng. Rep. 129 at 134 (1810).
33. *In re Marriage of Nichols*, 606 P.2d 1314 (Colo. App. 1979).
34. *Id.* at 1315.
35. *In re Marriage of Martin*, 707 P.2d 1035 (Colo. App. 1985).
36. *In re Marriage of Huff*, 834 P.2d 244 (Colo. 1992).
37. *In re Marriage of Bookout*, 833 P.2d 800, 803 (Colo. App. 1991).
38. *Marriage of Huff*, 834 P.2d at 256.
39. See *In re Marriage of Keyser*, 820 P.2d 1194 (Colo. App. 1991).

EXHIBIT 16A • GENERAL FINANCIAL DISCLOSURE AUTHORIZATION

GENERAL FINANCIAL DISCLOSURE AUTHORIZATION

TO: Any, person, financial institution, or entity having information regarding the undersigned persons.

RE:

You are hereby authorized and directed to furnish to the persons and firms indicated below, or to any person designated in writing by them, but to no others, for inspection and/or copying, any and all records, reports, or writings regarding the financial or economic status, past or present, of the parties or entities referenced above, and concerning any business or enterprise in which they have or have had any interest.

You may furnish them with copies of any and all such records. The requesting authorized person shall be solely responsible for all such copying costs for himself/herself.

Any person or entity receiving written documents pursuant to this Authorization shall immediately supply a copy of each and every document received to the attorney for the other side, or if the other side is proceeding Pro se, then they shall supply such copies to that person. The cost of copying documents shall be borne by the person or entity originally requesting the document unless otherwise agreed or ordered. All information received pursuant to this Authorization shall be kept confidential and limited to the parties designated here, persons acting pursuant to written authorization under this agreement, or the Court.

A photostatic or facsimile copy of this Authorization shall be considered as effective as the original. This Authorization shall be effective until _____ after which date it is automatically revoked.

The following person(s) are authorized to receive this information:

Dated this _____ day of _____, 2004.

Signature of Date

STATE OF COLORADO)
) ss.
COUNTY OF)

The above and foregoing General Financial Disclosure Authorization was subscribed and sworn to before me this ___ day of _____, 2004, by _____.

My Commission expires: _____

Notary Public

EXHIBIT 16B • PROPERTY RECAP SPREADSHEET EXAMPLE

ASSETS	CHARACTER	SOURCE	GROSS VALUE	DEBT	NET VALUE	HUSBAND SEPARATE	WIFE SEPARATE	MARITAL VALUE	HUSBAND	WIFE
Real Estate										
Marital Residence	Marital	Appraisal	250,000	125,000	125,000			125,000		125,000
Furniture and Household Goods										
Furniture and Household Goods	Marital	Financial Affidavits	10,000		10,000			10,000	5,000	5,000
Motor Vehicles										
Hummer	Marital	Respondent	25,000	10,000	15,000			15,000	15,000	
Bank Accounts										
Wife's Account	Marital	Estimate	2,500		2,500			2,500		2,500
Husband's Account	Marital	Estimate	3,000		3,000			3,000	3,000	
Wife's Investment Account	Separate	Wife's F.A.	100,000		100,000		100,000			
Stocks and Bonds										
Stock A	Marital	stock quote	12,000		12,000			12,000	6,000	6,000
Stock B	Marital	stock quote	6,000		6,000			6,000	3,000	3,000
Retirement Accounts										
Employee Fixed Account Plan	Marital									
Wife's 401(k) Plan	Marital	Plan Documents	15,000		15,000			15,000	7,500	7,500
Professional Practice Interests										
Respondent's	Marital									
Petitioner's	Marital									
TOTAL ASSETS			423,500	-135,000	288,500			188,500	39,500	149,000
DEBITS										
Total Credit card debts	Marital	Statements	(50,000)	(50,000)	(50,000)			(50,000)	(25,000)	(25,000)
TOTAL DEBITS			(50,000)	(50,000)	(50,000)			(50,000)	(25,000)	(25,000)
TOTAL ASSETS LESS DEBITS			373,500	(185,000)	238,500			238,500	64,500	174,000
Amount to Create 50/50 Division									54,750	(54,750)
PROPERTY DIVISION								238,500	119,250	119,250

EXHIBIT 16C • POWER OF ATTORNEY, MOTOR VEHICLE

POWER OF ATTORNEY

(Motor Vehicle)

I, _____, of _____ County, State of _____ appoint as my attorney-in-fact, to apply for a Certificate of Title and/or to endorse and transfer title for the following described vehicle: Year ____, Make _____, Model _____, Vehicle Identification Number (VIN) _____.

I represent in such transfer assignment that the title to this vehicle is free and clear of all liens and encumbrances, except:

_____.

I affirm that the information contained in this Power of Attorney is true and correct. This Power of Attorney is made under the penalties of perjury in the second degree as defined by C.R.S. § 18-8-503.

Date: _____

Signature

EXHIBIT 16D • SAMPLE QUITCLAIM DEED

QUITCLAIM DEED

THIS DEED, Made this ___ day of _____, 2005, between Joe Smith of the City and County of Denver and Jane Smith of the City and County of Denver, State of Colorado, grantor(s) and Jane Smith, whose legal address is 1234 Street Ave., Denver, CO 12345 of the City and County of Denver and State of Colorado grantee(s).

WITNESS, that the grantor(s), for and in consideration of the Decree of Dissolution of Marriage, City and County Denver, Case No. 04 DR 0000, the receipt and sufficiency of which is hereby acknowledged, have remised, released, sold and QUITCLAIMED, and by these presents do remise, release, sell and QUITCLAIM unto the grantee(s), her heirs, successors and assigns forever, all the right, title, interest, claim and demand which the grantor(s) have in and to the real property, together with improvements, if any, situate, lying and being in the City and County of Denver and State of Colorado, described as follows:

LOT 1, BLOCK 10, 5TH FILING, OAK TREE SUBDIVISION
City and County of Denver, State of Colorado

also known by street and number as: 1234 Street Ave., Denver, CO 12345
assessor's schedule or parcel number:

TO HAVE AND TO HOLD the same, together with all and singular the appurtenances and privileges thereunto belonging, or in anywise thereunto appertaining, and all the estate, right, title, interest and claim whatsoever of the grantor(s), either in law or equity, to the only proper use, benefit and behoof of the grantee(s) her heirs and assigns forever.

IN WITNESS WHEREOF, the grantor(s) have executed this deed on the date set forth above.

Joe Smith

Jane Smith

State of Colorado)
) ss.
County of Denver)

State of Colorado)
) ss.
County of Denver)

The foregoing instrument was acknowledged before me this ___ day of _____, 2005 by Joe Smith.
My commission expires: _____
Witness my hand and official seal.

The foregoing instrument was acknowledged before me this ___ day of _____, 2005 by Jane Smith.
My commission expires: _____
Witness my hand and official seal.

Notary Public

Notary Public

