

# VALUATION: APPROACHES, ASSETS AND AUTHORITY

*Moderator:*

**R. SCOTT DOWNING**, *Dallas*  
McCurley, Orsinger, McCurley, Nelson & Downing, LLP

*Panelists:*

**THOMAS L. AUSLEY**, *Austin*  
Ausley, Algert, Robertson & Flores

**HARAN D. LEVY**, *Houston*  
UHY Advisors FLVS, Inc.

**CHRIS H. NEGEM**, *San Antonio*  
Attorney at Law

**HON. JOHN E. NEILL**, *Cleburne*  
Judge, 18<sup>th</sup> District Court

*Written by:*

**R. SCOTT DOWNING**  
**STEPHEN M. ORSINGER**  
**LINDSAY D. BARBEE**  
**RYAN S. KIRKHAM**  
McCurley, Orsinger, McCurley, Nelson & Downing, LLP  
5950 Sherry Lane, Suite 800  
Dallas, Texas 75225  
O: (214) 273-2400  
F: (214) 273-2470

State Bar of Texas  
**36<sup>TH</sup> ANNUAL ADVANCED FAMILY LAW COURSE**  
August 9-12, 2010  
San Antonio

**CHAPTER 60**



**R. SCOTT DOWNING**

McCurley, Orsinger, McCurley, Nelson & Downing, L.L.P.  
5950 Sherry Lane, Suite 800  
Dallas, Texas 75225  
214-273-2400  
scott@momnd.com

**Education:** University of Texas, at Austin (B. A. 1988)

University of Houston Law Center (J.D. 1991)  
Houston Law Review, Associate Editor  
American Jurisprudence Award Contracts  
American Jurisprudence Award Civil Trial Advocacy

**Board Certified:** Board Certified by the Texas Board of Legal Specialization Family Law  
(December 1999); re-certified December 2004

**Professional:**

McCurley, Orsinger, McCurley, Nelson & Downing, L.L.P.; 1995 - present; partner since 2000.

R. Scott Downing, P.C., Attorney at Law; 1992 - 1995

**Professional Activities and Honors:**

Martindale-Hubbel - AV rated  
Best Family Law CLE article, 2006, State Bar of Texas  
Texas Monthly Super Lawyers (2003, 2004, 2005, 2006, 2007, 2008, 2009)  
The Best Lawyers in America; 2007 - 2009  
D Magazine Best Lawyers in Dallas Under 40 (2004)  
Texas Monthly Top 100 Lawyers in Texas, 2009

**Professional Memberships and Affiliations:**

Fellow, American Academy of Matrimonial Lawyers  
Fellow, Texas Bar Foundation; Dallas; District 6 Nominating Committee Member 2009  
Director, Texas Academy of Family Law Specialists; 2005 to present  
Member, State Bar of Texas Family Law Council; 2005 - present  
Member, State Bar of Texas Family Law Section  
Barrister, Annette Stewart Inn of Court, 2006 - present; Treasurer, 2008 - present  
Member, Collaborative Law Institute, State Bar of Texas  
Member, Dallas Bar Association (Family Law)  
Member, College of the State Bar of Texas  
Member, American Bar Association  
Advisory Board Member, James Publishing, Inc., Texas Family Law Evidence, 1998  
Member, Texas Bar Association  
District 01A Grievance Committee Member; Chair; 2005 - 2011

### **Continuing Legal Education and Administration:**

Course Director: Family Law Essentials, State Bar of Texas Family Law Section; May 2006, May 2007

Co-Course Director: Texas Academy of Family Law Specialists Course; January 2007

Course Director: Marriage Dissolution Course, April 2009

Course Director, State Bar Annual Meeting - Family Law Program, June 2009

### **Articles and Speeches:**

*Property Puzzles: Characterization, Tracing, 30 Rules and More*, November 2009, Texas Center for the Judiciary Family Law Conference

*Characterization Workshop: Big, Small, Usual, and Unique; Mixed Characterization*, Moderator, August 2009, Advanced Family Law Course.

*Property Puzzles: Characterization, Tracing, 30 Rules and More*, June 2009, UT School of Law Family Law on the Frontlines Conference.

*Understanding Real Value*, August 2008, Advanced Family Law Course.

*Making Summary Judgment Relevant Again*, August 2007, Advanced Family Law Course.

*Daubert / Experts*, December 2006, Ultimate Trial Notebook Course.

*Property Puzzles: Characterization, Tracing*, September 2006, Texas Advanced Paralegal Seminar

*Be Careful What You Ask For, You May Get It; Common Sense Discovery Requests and Responses*, August 2006, Advanced Family Law Course.

*Property Puzzles: Characterization, Tracing, 25 Rules and More*, March 2006, Marriage Dissolution Course.

*Being Creative with Unusual Remedies*, 2005, Advanced Family Law Drafting Course

*Property Puzzles: Characterization, Tracing, 25 Rules and More*, August 2005, Advanced Family Law Course

*Recent Developments in Family Law*, March 2004, State Bar College "Spring Training" Course

*Rubbish or Rembrandt: The Art of Evaluating a Custody Case*, August 2004, Advanced Family Law Course

*Mission Impossible: Choosing and Admitting Expert Witnesses*, December 2004, Ultimate Trial

Notebook, Family Law

*Top Ten Ways to Screw Up a Premarital Agreement*, 2003, Advanced Family Law Drafting Course

*Discovery in Mid-Size Cases Under the New Rules*, 1999, Civil Discovery Under the New Rules-  
University of Houston

*Creative Decision Making in Custody Arrangements; Psychological Theories; Their Admissibility  
After Daubert; and Alternatives to Trial*, 1998, American Academy of Matrimonial Lawyers

*Family Law Issues That Impact the Professional Athlete*, 1998, Volume 15, No. 2, Journal of the  
American Academy of Matrimonial Lawyers

*Peculiar Characterization Issues Involving Athletes and Entertainers*, 1997, Advanced Family Law  
Course

*Preparing for the Petitioner's Financial Temporary Orders Hearing*, 1997, Marriage Dissolution  
Course

*Evidence Without Witnesses*, 1997, Advanced Evidence and Discovery Institute

*Pensions, Stock Options & Divorce*, 1997, TSCPA Conference

Dallas Bar Association Case Law Update, 1997

*Ad Litem*, 1996, Marriage Dissolution Course

*Attorney Ad Litem and Guardian Ad Litem Practice*, 1996, Advanced Family Law Course

*Preparation for and the Direct Examination of Husband (Black Hat) in a Hidden Assets, Fraud, and  
Breach of Fiduciary Duty Case*, 1996, TAFLS 10<sup>th</sup> Annual Trial Institute

*Custody Litigation, Case Evaluation, Discovery, Controlling Costs, Trial Strategy, etc.*, 1996,  
University of Houston Family Law Practice Institute

*Legislative Changes*, 1995, Grand Prairie Bar Association

**Personal:**

Born: July 14, 1965, Austin, Texas

Wife: Maureen

Children: Ryan, Kaleigh, Park, and Will



***THOMAS L. AUSLEY***  
**AUSLEY, ALGERT, ROBERTSON & FLORES, L.L.P.**  
**3307 Northland Drive, Suite 420**  
**Austin, Texas 78731**  
**(512) 454-8791**  
**(512) 454-9091 Facsimile**  
**[tausley@ausley-algert.com](mailto:tausley@ausley-algert.com)**  
**[www.ausley-algert.com](http://www.ausley-algert.com)**

## **EDUCATION**

Texas Tech University, B.B.A. in Finance, 1965  
University of Texas School of Law, J.D., 1968

## **PROFESSIONAL ASSOCIATIONS**

Member, State Bar of Texas since 1968  
Board Certified by Texas Board of Legal Specialization  
Family Law, 1980 (re-certified most recently 2010)  
Fellow, American Academy of Matrimonial Lawyers  
Vice Chairman of the Collaborative Law Committee, 2010  
Officer of the Texas Chapter:  
Treasurer, 2001-2002  
Secretary, 2002-2003  
President-Elect, 2003-2004  
President, 2005-2006  
Member, Board of Governors of American Academy of Matrimonial Lawyers  
National Chapter  
Fellow, International Academy of Matrimonial Lawyers  
Member, American Bar Association - Family Law Section  
Associate, American Board of Trial Advocates  
Member, Board of Trustees for the Collaborative Institute of Texas (2003-2007)  
Charter Member, Texas Family Law Foundation  
Member, Board of Trustees (2006-2009)  
Member, College of the State Bar of Texas  
Member, Family Law Section Council, State Bar of Texas (2003-2010)  
Secretary, 2008-2009; Treasurer, 2009-2010; Vice-President, 2010-2011  
Fellow, Texas Bar Foundation  
Fellow, American Bar Foundation, 2006-2009  
Life Fellow, State Bar of Texas  
Life Fellow, American Academy of Matrimonial Lawyers Foundation  
Listed in the Martindale-Hubbell Bar Registry of Preeminent Lawyers  
Member, Texas Academy of Family Law Specialists  
President, Travis County Family Law Advocates (2000-2001)  
President, Political Action Committee (2001-2002)  
Member, State Bar Task Force on Reorganization of the Office of General Counsel (1994)  
Member, Austin Bar Association  
Member, Williamson County Bar Association

## LEGAL PROFILE & HONORS

Forty-one years' experience in the practice of law in Austin, Texas  
Practice includes primarily family law, including collaborative divorce, civil litigation, mediation and arbitration.  
Listed in *The Best Lawyers in America*, Family Law Section, 1987-present  
Named by *Texas Monthly Magazine* as: "Texas Super Lawyers" (2003 - present), one of the "Top 50 Central/West Texas Region" (2004 and 2007), and one of the "Top 100 Lawyers in Texas" (2007).  
Named "Lawyer of the Year in Central Texas" by Best Lawyers, 2009  
Listed in *Austin Monthly*, The Best Lawyers in Austin - Family Law, 2002  
Received the Outstanding Fundraiser Award given by the Association of Fundraising Professionals, Austin Chapter, 2008  
Received President and Chair's Courage and Integrity Award given by Planned Parenthood Federation of America, 2004  
Received Good Guys and Gals Award given by the National Women's Political Caucus, Texas Chapter, 2004  
"AV" rating, Martindale-Hubbell Legal Directory  
Finalist, 1<sup>st</sup> annual "Ethics in Business Awards": Individual (Samaritan Counseling Center and St. Edwards University)

## LEGAL SEMINARS AND WRITINGS

Author and speaker, 1995 State Bar of Texas' Advanced Family Law Drafting Course - *The Use of Paralegals in Family Law Cases*  
Author and speaker, 1997 State Bar of Texas' Advanced Family Law Course - *Valuation and Appraisals*  
Author, 1998 State Bar of Texas' Advanced Family Law Courses (August) - *Ethical Traps in Family Law Cases: Avoiding Land Mines*  
Author, 1998 State Bar of Texas' Advance Family Law Course (December) - *In the Trenches: Winning Techniques in Family Law Litigation*  
Author, 1999 State Bar of Texas' Advanced Family Law Course - *Securing and Collecting What Your Client Got*  
Author and speaker, 2000 Ultimate Trial Notebook for Family Law - *The Use of Paralegals in Family Law Cases*  
Speaker, 2003 State Bar of Texas' Advanced Family Law Course - *Characterization and Tracing*  
Author and speaker, 2004 Advanced Family Law Course - *Professionalism in Family Law*  
Speaker, 2004 1<sup>st</sup> Annual Collaborative Law Seminar - *The Use of Collaborative Law in Your Practice*  
Author and speaker, 2004 Ultimate Trial Notebook - *Pretrial and Scheduling Orders*  
Speaker, 2004 University of Texas Family Law on the Front Lines - *Collaborative Law*  
Author and speaker, 2005 Collaborative Law Spring Retreat - *Leadership and Self-Renewal for Collaborative Professionals*  
Author and speaker, 2005 University of Texas Family Law on the Front Lines - *Impaired Clients: Ethical Issues and Advocacy*  
Author and speaker, 2005 Associate Judge's Training - *The Hague Convention*  
Author and speaker, 2005 State Bar of Texas' Advanced Family Law Course - *Ethics & the Enhancement of the Attorney-Client Relationship*



Speaker, 2006 Paralegal Association of the Permian Basin - *Ethics*  
Speaker, 2006, Texas Academy of Family Law Specialists' Trial Institute - *Litigation Alternative - Collaborative Law* (Reno, Nevada)  
Moderator of Judges' Panel, 2006 State Bar of Texas' Marriage Dissolution Institute  
Course Director, 2006 - Family Law, State Bar of Texas Annual Meeting (Austin)  
Course Director, 2006 - *Ultimate Trial Notebook* (New Orleans, Louisiana)  
Speaker/Panelist, 2007 State Bar of Texas' Family Law on the Front Lines - *Representing the Difficult Client* (Galveston)  
Workshop Moderator, 2007 State Bar of Texas' Advanced Family Law Course, *Advanced Collaborative Law* (San Antonio)  
Speaker, 2007 State Bar of Texas' Advanced Family Law Course - *The Not So Easy To Identify Executive Employment Benefits* (San Antonio)  
Author and speaker, 2008 State Bar of Texas' Advanced Family Law Course - *The Professional Practice: Yourself, Your Office, and Your Relationships with Others*  
Author and speaker, 2008 State Bar of Texas' Advanced Family Law Course - *Getting to Closure and Managing Client Relations, Collaborative Family Law Track*  
Speaker, 2009 Collaborative Law Institute of Texas Boot Camp - *Ethics in Collaborative Law*  
Speaker, 2009 International Academy of Matrimonial Lawyers Annual Meeting, USA and Canadian Chapters, *The Path to Yearning for Zion/FLDS* (San Antonio)  
Speaker/Panel, 2009 University of Texas School of Law and Texas Family Law Foundation's 10<sup>th</sup> Biennial *Family Law Legislative Update*  
Speaker, 2009 Austin Bar Association - *Family Law Practice in Difficult Economic Times*  
Various seminars for the Paralegal Division of the State Bar of Texas, State Bar of Texas, Travis County Bar Association, and Volunteer Legal Services of Central Texas

## **ALTERNATIVE DISPUTE RESOLUTION & COLLABORATIVE TRAINING & EXPERIENCE**

LBJ School of Public Affairs Advanced Mediation Training (1997)  
Advanced Family Law Mediation Training (1997)  
Dispute Resolution Center of Austin Mediation Training:  
    Basic 40-hour course, 2004  
    Family Law course, 2004  
Travis County Bar Association Settlement Week Mediator Training  
Appointed by Travis County District Judges as court-appointed mediator  
Volunteer mediator, Travis County Settlement Weeks (1989-1997)  
Volunteer mediator, Williamson County Settlement Week (1999 - present)  
Collaborative Divorce Training:  
    Basic: 2000, 2002, 2003  
    Intermediate: 2000  
    Interdisciplinary: 2006  
American Academy of Matrimony Lawyers Arbitration Training (2000)



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**HARAN D. LEVY**  
**hlevy@uhy-us.com**

Haran is a Managing Director of UHY Advisors FLVS, Inc. based in Houston. He is also a Partner with UHY LLP, a licensed CPA firm, and is a licensed Certified Public Accountant (CPA) in the state of Texas. He is Accredited in Business Valuation (ABV), is a Certified Valuation Analyst (CVA), and is Certified in Financial Forensics (CFF).

**Professional Experience:**

Haran has over 17 years of experience in the forensic accounting industry serving a variety of clients. He is responsible for providing Litigation Support services involving:

- Business Valuations
- Investigative Accounting
- Personal Injury, Wrongful Death, Wrongful Termination and Discrimination Calculations
- Family Law Matters
- Financial Analysis
- Lost Profits Analysis
- Damages Calculations (relating to breach of contract, securities fraud, usury, fraud, and others)
- Assistance to legal counsel in:
  - Discovery, planning and strategies before trial and during trial with examination of witnesses
  - Rebuttal of opposing experts
  - Assisting with trial exhibits and other matters

**Relevant Employment History:**

- Joined the firm in 1992
- Joined Deloitte & Touche, Houston, Texas (1991)
  - Performed auditing and consulting functions for healthcare, banking and various other industries
  - Aided in the development of financial statements
  - Set up internal controls and provided numerous cost-cutting recommendations and constructive service comments

**Educational Background:**

- M.B.A, in Accounting, Rice University - Texas (1991)
- B.S. in Biology, Tulane University - Louisiana (1981)
  - Graduated Summa Cum Laude
  - Phi Beta Kappa

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## HARAN D. LEVY

Page 2

### Active and Prior Professional Memberships:

- American Institute of Certified Public Accountants
- Texas Society of Certified Public Accountants
- Houston Chapter of TSCPA
- National Litigation Support Services Association
- National Association of Certified Valuation Analysts
- Diplomate of the American Board of Forensic Examiners

### Selected Speaking Engagements:

- *Finding Solutions for Dividing Property in a Troubled Economy*, presented for New Frontiers in Marital Property Law, New Orleans, Louisiana (October 2009)
- *Current Valuation Challenges*, Advanced Family Law Course, Dallas, Texas (August 2009)
- *Houston Family Law Trial Institute At South Texas College of Law* (May 2009)
- *How to Present a Valuation Case*, Advanced Family Law Course, San Antonio, Texas (August 2008)
- *Clash of Tax and Divorce Planning*, presented at AAML/AICPA National Conference on Divorce, Las Vegas, Nevada (May 2008)
- *Divorce – Determining the Community Estate*, 2008 CPE Tax Expo, Houston, Texas (January 2008)
- *Things Worse than Paying the IRS*, CLE Options, Family Law Practice: Federal, Multi-State, and Advocacy Update (September 2007)
- *Business Valuation*, Advanced Family Law Course, San Antonio, Texas (August 2007)
- *Divorce Calculations and How to Present Them to the Trier of Fact*, presented for the Family Law on the Front Lines Conference (June 2007)
- *Qualified Business Appraisers – Different Conclusions*, presented for the Houston Bar Association, Family Law Section (March 2007)
- *Stock Option Statute: Summary and Application to Creative Forms of Compensation*, presented for New Frontiers in Marital Property Law, San Francisco, California (October 2006)
- *Characterization of Assets and Calculating Economic Contribution Claims*, presented to Family Law Attorneys (September 2006)
- *Ways Attorneys & CPAs Can Work Together More Effectively*, presented at AAML/AICPA National Conference on Divorce, Las Vegas, Nevada (May 2006)
- *Compromise Vital to Successful Financial Life*, quoted in USA Today (April 28, 2006)
- *Top Ten Reasons to use Forensic Accountants and Outside Professionals*, presented for Marriage Dissolution Institute 2006 (April 2006)
- *Direct and Cross of a Financial Expert*, presented at 2005 Experts Institute sponsored by the Houston Bar Association (October 2005)
- *Qualification of the Expert*, presented at 2005 Experts Institute sponsored by the Houston Bar Association (October 2005)
- *Business Valuation in Small Estates*, presented for Family Law on the Front Lines Conference – Sponsored by The University of Texas School of Law (July 2005)
- *Hot Topics in Business Valuation*, presented to the Gulf Coast Family Law Specialists (October 2004)
- *Building and Maintaining a Successful Wrongful Termination/Personal Injury Practice*, presented at the AICPA National Conference on Fraud and Litigation Services, Phoenix, AZ (September 2004)
- *Damages in Employment Law Litigation*, presented to the Labor and Employment Section of The Houston Bar Association (January 2004)

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## HARAN D. LEVY

Page 3

### Selected Speaking Engagements: *(continued)*

- *Hiring Experts*, guest panelist at Family Law on the Front Lines Conference, sponsored by the University of Texas School of Law (March 2003)
- *Calculating Economic Losses in Labor and Employment Matters*, presented to the National Employment Lawyers Association (February 2003)
- *Direct and Cross Examination of a Valuation Expert*, presented to the Texas Academy of Family Law Specialists (January 2003)
- *Calculating Economic Losses in Medical Malpractice Matters*, presented to the University of Houston Law School (October 2002)
- *How to Analyze, Calculate and Prepare an Economic Contribution Claim for Trial*, presented to the Legal Assistants Division of the State Bar of Texas (September 2002)
- *Calculating Economic Losses in Medical Malpractice Matters*, presented to the University of Houston Law School (October 2001)
- American Bar Association Family Law Trial Advocacy Institute (May 2001)
- *Calculating Economic Damages*, presented to the Houston Northwest Bar Association (June 2000)
- *The Lowdown on Stock Options in Family Law Matters*, presented to Inns of Court (May 2000)
- *Calculating Economic Losses in Labor and Employment Matters*, presented to the National Employment Lawyers Association (November 1999)
- *Economic Loss Calculations in Employment Matters*, presented to The Houston Bar Association Labor & Employment Law Section, Houston, Texas (August 1999)
- *Litigation Services for Labor and Employment Matters and Compensation Issues in Business Valuations*, presented to Vinson & Elkins, L.L.P. (February 1999)
- *Business Valuations - Pulling Back the Curtain for Attorneys*, presented to Andrews & Kurth, L.L.P. (October 1998)
- *Economic Loss Calculations in Employment Matters*, presented to the National Litigation Support Services Association - Orlando, Florida (January 1998)
- Characterization and Valuation Issues Seminar, presented for Short & Jenkins, P.C. (February 1997)
- National Litigation Support Services Association – case presentation involving lost profit analysis (January 1996)
- Texas Family Law Practice for Paralegals – Working with CPAs on Financial Issues (March 1995)
- University of Houston Law School – Participated in law school training program as an expert witness in a mock trial presentation (October 1994, March 1996, July 1996, October 1996)
- *You Call Yourself an Expert, But You Don't Make Any Sense to Me: How to Understand and Attack Expert's Reports in Wrongful Termination Cases*, Neel Hooper & Kalmans, P.C. (April 1994)
- Litigation Services for Personal Injury and Wrongful Death Cases, Fort Lauderdale, Florida (September 1993)

### Professional Publications:

- *Clash of Tax and Divorce Planning*, (co-author) – Pennsylvania Family Lawyer, Volume 30 Issue 2 (July 2008)
- *Principles of Tracing and the Expert Witness* (contributing author) Expert Witness Manual, State Bar of Texas Family Law Section (August 2002)
- *The Impact of Economic Testimony*, (co-author) The Expert newsletter of the National Litigation Support Services Association (Summer 1996)
- *Accountancy and Law – The CPA's Role in Personal Injury, Wrongful Death and Wrongful Termination Cases*, (co-author) The Texas Law Reporter (August 1995)



## **CHRIS H. NEGEM**

Attorney at Law

8620 North New Braunfels, Suite 105

San Antonio, Texas 78217

(210) 226-1200 FAX: (210) 798-2654

Email: Chris@Negemlawfirm.com

### **EDUCATION**

- B.A. Texas A&M University, 1980;
- J.D. Mississippi College, School of Law, 1990;
- Managing Editor, Mississippi College Law Review - 1989-1990; and
- International Legal Fraternity-Phi Delta Phi.

### **MILITARY SERVICE**

- United States Army (Active Duty, January 1974-December 1976) - Honorable Discharge.

### **PROFESSIONAL ACTIVITIES**

- Director, San Antonio Family Lawyers Association, 2009;
- Board Certified in Family Law, 1997 to date;
- Past Member, Family Law Council, State Bar of Texas;
- Past Chair, Legal Assistants Committee, Family Law Section, State Bar of Texas;
- Member, Texas Academy of Family Law Specialists;
- Past Panel Chair, District 10C Grievance Committee;
- Member, San Antonio Bar Association;
- Member, Family Law Section, State Bar of Texas; and
- Fee Dispute Committee for the San Antonio Bar Association, 1995-1996 and 1996-1997.

### **TECHNICAL AND PROFESSIONAL LICENSES**

- Admitted to the Bar in Texas in 1990; and
- United States Federal District Court, Western and Northern Districts of Texas, 1990.

### **LAW RELATED PUBLICATIONS, ACADEMIC APPOINTMENTS AND HONORS**

- 2005, 2006, 2007, 2008, 2009 and 2010 *Texas Monthly* Super Lawyer;
- 2004 Who's Who in Law & Accounting as featured in the *San Antonio Business Journal*;
- "San Antonio's Best Lawyers," as featured in *Scene in S.A.* magazine, August 2004, 2005, 2006, 2007, 2008, 2009 and 2010;
- "San Antonio's Top Divorce Lawyers" as featured in *Scene in S.A.* magazine, 2003;
- 1996 Outstanding Young Family Lawyer, San Antonio, Texas;
- 1990 Outstanding Young Men in America;
- Author, Speaker, **Closing the File**, May 5, 2010 – Marriage Dissolution Institute, San Antonio, Texas
- Speaker, **Buying a Business: Capital Intensive v. Asset Based**, March 26, 2009 – Representing Small Business Course, Dallas, Texas;
- Author, Speaker, **Valuation**, April 17, 2008 – Marriage Dissolution Seminar, Galveston, Texas;
- Author, Speaker, **How to Help the Judge Rule in Your Favor: Preparing for Temporary Orders Hearing** - May 9, 2007 - Marriage Dissolution Seminar, El Paso, Texas, Enhancing your Legal Practice with the Attorney/Paralegal Team;

## CHRIS H. NEGEM

### Page 2

- Speaker, **Maximizing the Take at a Final Property Hearing** - Family Law Essentials for \$2000 or Free-April 20, 2007, Mineral Wells, Texas - The Pro Bono Committee of the Family Law Section of the State Bar of Texas;
- Moderator/Coordinator, **Family Law Essentials for \$2000 or Free** - September 30, 2005, Eagle Pass, Texas - The Pro Bono Committee of the Family Law Section of the State Bar of Texas;
- Moderator, Speaker, **Effective Mediation at the Next Level**, April 1, 2004, San Antonio, Texas - San Antonio Family Lawyers Association;
- Author, Speaker, **Identifying, Characterizing and Valuing the Marital Estate: An Overview** - October 1, 2003, San Antonio, Texas - Legal Assistants University;
- Moderator/Coordinator, **Family Law Essentials for \$2000 or Free**, September 11, 2003, Lubbock, Texas - The Pro Bono Committee of the Family Law Section of the State Bar of Texas;
- Author, Speaker, **The Trial of a Family Law Case and Ethical Conduct**, January 31, 2001-Texas General Practice and Ethics Institute - Stromar Educational Services, Inc.;
- Author, Speaker, **The Trial of a Family Law Case and Ethical Conduct**, September 26, 2000 - Stromar Educational Services, Inc.;
- Author, Speaker, **Working with Divorce Clients and Opposing Counsel, Sweet, Nice and Polite**, January 28, 2000 - Texas Family Law Practice for Paralegals;
- Co-Author, Speaker, **The Trial of a Family Law Case and Ethical Conduct**, January 26, 2000 - Stromar Educational Services, Inc.;
- Co-Author, Speaker, **Evidence**, October 27, 1999 - Stromar Educational Services, Inc.
- Co-Author, **What they don't teach you in Law School about setting and Collecting Attorney's Fees**, 1997 Advanced Family Law Course;
- Co-Author, **Practical Tips from the Top**, 1996 Marriage Dissolution Institute; and
- Co-Author, **Express Trusts in Divorce**, 1995 Advanced Family Law Course.





JOHN E. NEILL

DISTRICT JUDGE

18<sup>TH</sup> JUDICIAL DISTRICT OF TEXAS

LOCAL ADMINISTRATIVE JUDGE

Judge John Neill was appointed to the bench of the 18<sup>th</sup> District Court in 1998 by then Governor George W. Bush. He was elected to that position in 2000, 2004 and 2008. The 18<sup>th</sup> District includes Johnson and Somervell Counties.

Prior to taking the bench, Judge Neill was in the private practice of law for 12 years. He has been board certified by the Texas Board of Legal Specialization in Family Law since 1994. In 2003, Judge Neill brought Court Appointed Special Advocates ("CASA") to Johnson County. CASA is a wonderful organization that helps neglected and abused children in Johnson County.

Judge Neill received his Bachelor's degree from Baylor University in 1982 and his Juris Doctor degree from St. Mary's University School of Law in 1986, where he was a member of the Law Journal and Phi Delta Phi Legal honor fraternity.

Judge Neill has been married for 26 years. He is extremely proud of his 3 sons: Matthew, a second year law student at the University of Georgia; Cooper, just a semester away from graduating from Belmont University; and Brady, a two time state finalist swimmer who will be a senior in high school.



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**STEPHEN ORSINGER**  
**CURRICULUM VITAE**  
**stephen@momnd.com**

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**Born:** San Antonio, Texas, May 2, 1981

**Education:** St. John's College, Santa Fe, New Mexico B.A., 2003  
University of Texas School of Law, Austin, Texas J.D., 2007

**Licenses:** State Bar of Texas (2007)

**Articles & Presentations**

*The Ethics of ADR Negotiation and Settlement*  
Marriage Dissolution Institute, Galveston, 2008

*Effect of Choice of Entities: How Organizational Law, Accounting, and Tax Law for Entities Affect Marital Property Law*  
Co-authored with Richard R. Orsinger & Patrice L. Ferguson  
Advanced Family Law Course, San Antonio, 2008

*Trusts, Family Law, & the Contract-Property Dichotomy*  
Co-presented with Harold C. Zuflacht  
Marriage Dissolution Institute, Fort Worth, 2009

*Property Puzzles: 30 Characterization Rules, Explanations & Examples*  
Co-authored with Richard R. Orsinger & R. Scott Downing  
Family Law on the Front Lines, 2009  
Advanced Family Law Course, Dallas, 2009

Family Law Legislative Update  
Co-presented with Katherine Kinser, JoAl Cannon Sheridan, & Charlie Hodges  
Dallas, 2009

*Practicing Family Law in a Depressed Economy - Part I: Your Law Practice and Your Clients*  
Co-authored with Richard R. Orsinger  
Co-presented with Richard R. Orsinger  
Advanced Family Law Course, Dallas, 2009

*Valuation: Approaches Assets, and Authority*  
Co-authored with R. Scott Downing, Lindsey D. Barbee, and Ryan S. Kirkham  
Advanced Family Law Course, San Antonio, 2010



## TABLE OF CONTENTS

I.	SCOPE OF ARTICLE .....	1
II.	STANDARDS OF VALUE .....	1
	A. Fair Market Value .....	1
	B. Fair Market Value of Interests in Corporations .....	3
	C. Intrinsic or Actual Value .....	3
	D. Book Value .....	4
	E. Special or Pecuniary Value .....	5
	F. Investment Value .....	5
	G. Replacement Value .....	6
	H. Fair Value .....	6
III.	APPROACHES TO VALUE .....	7
	A. Market Data Approach .....	7
	B. Asset Approach .....	8
	C. Income Approach .....	9
IV.	PREMISES OF VALUE .....	10
	A. Going Concern .....	10
	B. Assemblage of Assets .....	10
	C. Orderly Disposition .....	10
	D. Forced Liquidation .....	10
V.	OWNER'S TESTIMONY OF VALUE .....	11
VI.	DISCOUNTS AND PREMIUMS .....	11
	A. Discount for Lack of Marketability .....	11
	B. Discount for Lack of Control .....	12
	C. Discount for Lack of Liquidity .....	12
VII.	COST OF SALE .....	12
VIII.	TAX CONSIDERATIONS .....	12
IX.	GOODWILL .....	13
X.	REAL ESTATE VALUATION IN MARITAL CONTEXT: LOCATION AND TYPE .....	15
	A. Introduction .....	15
	B. Overview of the Appraisal Process .....	15
	C. Appraising a Single-Family Property .....	16
	D. Appraising Income Property .....	16
XI.	AUTOMOBILE VALUATION: A NUTS & BOLTS APPROACH .....	17
	A. Introduction .....	17
	B. Market Value vs. Personal Value .....	17
	C. Vanilla Market Values: Quick, Easy and the "Other" Blue Book .....	17
	D. The Exotic and the Professional .....	18
XII.	CONCLUSION .....	18



## VALUATION: APPROACHES, ASSETS AND AUTHORITY

### I. SCOPE OF ARTICLE

Valuation of assets in the context of a divorce, range from the simple to those involving complex algebraic calculations. This article is intended to provide an overview of both valuation concepts/approaches, as well as resources for valuing specific assets. It is also intended to provide authority for the methodologies discussed.

### II. STANDARDS OF VALUE

#### A. Fair Market Value

“Fair market value” means:

the price the property will bring when offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy, but is under no necessity of buying.<sup>1</sup>

The person who is not obliged to sell is commonly referred to as the “willing seller,” and the person under no necessity of buying the “willing buyer.”<sup>2</sup>

This definition is specifically endorsed by the Texas Pattern Jury Charge.<sup>3</sup> The Internal Revenue Service’s definition adds the factor that both buyer and seller have “reasonable knowledge of relevant facts.”<sup>4</sup> The *International Glossary of Business Valuation Terms* also incorporates this “reasonable knowledge” standard, and adds the qualification that the buyer is *able* to buy, and the seller is *able* to sell.<sup>5</sup> At least two intermediate appellate courts have added the factor that the market

value is “the *highest* price” the property would sell for.<sup>6</sup>

Fair market value is also sometimes referred to as “market value,” “cash market value,” and “fair cash market value.”<sup>7</sup> Some of these synonyms are used only in older opinions, often interchangeably.<sup>8</sup> Fair market value is now the most commonly used and widely accepted term.

An asset’s fair market value is usually the best evidence of its value.<sup>9</sup> Thus, “the value to be accorded community property in a divorce proceeding is ‘market value.’”<sup>10</sup> However, in the absence of a market value, the actual value of the property to the owner may be shown.<sup>11</sup>

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<sup>6</sup> *Star Houston, Inc. v. Kundak*, 843 S.W.2d 294, 298 (Tex. App.–Houston [14th Dist.] 1992, no writ) (citing Black’s Law Dictionary 876 (5th ed. 1979) and Webster’s Third New International Dictionary 1383 (1967)); *Bueckner v. Hamel*, 886 S.W.2d 368, 373 (Tex. App.–Houston [1 Dist.] 1994, writ denied) (Andell, J., concurring).

<sup>7</sup> *Fort Worth & D.N. Ry. Co. v. Sugg*, 68 S.W.2d 570, 572 (Tex. Civ. App.–Amarillo 1934, no writ). “Market value” has also been equated with “actual value” and “saleable value,” but the former term has evolved to mean “intrinsic value,” a distinct form of value addressed *infra*. *Bryant v. Stohn*, 260 S.W.2d 77, 83 (Tex. Civ. App.–Dallas 1953, writ ref’d n.r.e.)

<sup>8</sup> See *City of Houston v. Charpiot*, 292 S.W.2d 677, 684-85 (Tex. Civ. App.–Galveston 1956, writ ref’d n.r.e.).

<sup>9</sup> *Zeptner v. Zeptner*, 111 S.W.3d 727, 741 (Tex. App.–Fort Worth 2003, no pet.); *R.V.K. v. L.L.K.*, 103 S.W.3d 612, 618 (Tex. App.–San Antonio 2003, no pet.); *Beavers v. Beavers*, 675 S.W.2d 296, 299 (Tex. App.–Dallas 1984, no writ) (citing *Bryant*, 260 S.W.2d at 83).

<sup>10</sup> *Ricks v. Ricks*, 169 S.W.3d 523, 527 (Tex. App.–Dallas 2005, no pet.); Texas Pattern Jury Charges: Family § 203.1 (“The value of an asset is its fair market value unless it has no fair market value.”).

<sup>11</sup> *Mandell v. Mandell*, No. 2-08-290-CV, 2010 WL 1006406, \*4 (Tex. App.–Fort Worth April 15, 2010, no pet. h.) (“When the sale of stock is restricted by a requirement that the shares be offered first to the corporation or to other shareholders, then essentially the fair market value of the stock is zero....In this situation, the parties may show the actual value of the property interest to the owner.”); *R.V.K.*, 103 S.W.3d at 618 (shares of stock with “significant restriction on the marketability” might not have had market value); *Beavers*, 675 S.W.2d at 299 (shares of stock with restriction requiring first offer of sale to other shareholders at book value had no market value); Texas Pattern Jury Charges: Family § 203.1 (“If an asset has no fair market value, its value is *the value of its current ownership as determined from the evidence.*” (emphasis added)). Such evidence may consist of the “original cost and cost of replacement, the opinions upon value given by qualified

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<sup>1</sup> *City of Pearland v. Alexander*, 483 S.W.2d 244, 247 (Tex. 1972); *Polk County v. Tenneco, Inc.*, 554 S.W.2d 918, 921 (Tex. 1977). *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 182 (Tex. 2001).

<sup>2</sup> *Id.* at 246; see also *Wendlandt v. Wendlandt*, 596 S.W.2d 323, 325 (Tex. Civ. App.–Houston [1st Dist.] 1980, no writ).

<sup>3</sup> Comm. on Pattern Jury Charges–Family, State Bar of Tex., Texas Pattern Jury Charges: Family § 203.1 (2008 ed.).

<sup>4</sup> Rev. Rul. 59-60 § 2.02, 1959-1 C.B. 237

<sup>5</sup> American Institute of Certified Public Accountants, et al., *International Glossary of Business Valuation Terms*, <http://www.bvresources.com/FreeDownloads/IntGlossaryBVTerms2001.pdf> (accessed June 3, 2010).

The Texas Supreme Court has recognized that, if the evidence establishes the absence of a market for the kind of property involved, evidence of intrinsic value is admissible.<sup>12</sup>

Some courts have concluded that the presence of an *actual* market for the property or the prospect of an *actual* sale are irrelevant.<sup>13</sup> However, as explained *supra*, in Texas, evidence of intrinsic value is usually only admissible if there is no market for a particular piece of property.<sup>14</sup> Consequently, the admission of intrinsic value evidence is an explicit recognition that there is no *actual* market for that property, and an implicit recognition that fair market value evidence is incompetent because of that lack of an *actual* market.

The conflict between these two perspectives can be readily seen from the two following expressions of fair market value:

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witnesses, the gainful uses to which the property has been put as well as any other facts reasonably tending to shed light upon the subject.” *Crisp v. Security National Insurance Co.*, 369 S.W.2d 326, 320 (Tex. 1963).

<sup>12</sup> *City of Austin v. Cannizzo*, 153 Tex. 324, 330, 267 S.W.2d 808, 812 (1954); *accord Beavers v. Beavers*, 675 S.W.2d 296, 297 (Tex. App.—Dallas 1984, no writ) (“[I]n the absence of a market value, the actual value of the property to the owner may be shown.”). However, in a strict sense, *all* property might have a fair market value:

There is nothing actually that does not have a market value, for the fact remains, that if by reason of its location, existence or surroundings, it had no marketability, it would by the same token have no intrinsic worth, except as some sentimental bauble of its owner.

M. Rayburn, *Rayburn on Condemnation*, § 19.01 (1987 & Supp. 1991).

<sup>13</sup> See, e.g., *Shackleford v. United States*, 262 F.3d 1028, 1033 (9th Cir. 2001) (Value of lottery payment with anti-assignment restriction: “Where a willing seller and willing buyer do not exist, we will presume both their presence and a hypothetical sale.”), and *Trigon Ins. Co. v. United States*, 215 F. Supp. 2d 687, 709 (E.D. Va. 2002) (Value of cancelled contracts for federal tax purposes: “The case law establishes that the willing buyer/willing seller standard governs the determination of the fair market value of an asset even if there is no established market for the asset and even if the particular asset cannot in fact be sold....for federal tax purposes.”); *contra Wendlandt v. Wendlandt*, 596 S.W.2d 323, 324 (Tex. App.—Houston [1st Dist.] 1980, no writ) (citing (“This standard or test presupposes an existing, established market.”))

<sup>14</sup> *Cannizzo*, 153 Tex. at 330, 267 S.W.2d at 812.

*Compare:*

The willing buyer-willing seller formulation of fair market value is, by its own language, a hypothetical value: an imaginary price to be paid by an imaginary buyer to an imaginary seller in an imaginary sale.<sup>15</sup>

*with:*

“[M]arket value” or “market price” presuppose the existence of “real and willing buyers buying a real product from real and willing sellers in a real market.”<sup>16</sup>

These two perspectives are difficult to reconcile. The existence of an *actual* established trading market does not have a conceptual bearing on the value of a transaction in a *hypothetical* market.<sup>17</sup> Instead, property has no market value only when there is no “reasonable factual basis from which to determine the probable sum that fair negotiations between a hypothetical buyer and seller would produce.”<sup>18</sup> However, some Texas courts have held that actual real world market is required before a fair market value standard can be used.<sup>19</sup> In the real world, obtaining reliable data to value a closely held company can be difficult. There may not be an actual market for

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<sup>15</sup> *Cannizzo*, 153 Tex. at 337, 267 S.W.2d at 817 (Garwood, J., dissenting) (emphasis added); see also *Spindor v. LoVaca Gathering Co.*, 529 S.W.2d 63, 65 (Tex. 1975).

<sup>16</sup> Byron C. Keeling & Karolyn King Gillespie, *The First Marketable Product Doctrine: Just What is the “Product”?*, 37 St. Mary’s L.J. 1, 90, n. 339 (2005) (citing Owen L. Anderson, *Royalty Valuation: Should Royalty Obligations Be Determined Intrinsically, Theoretically, or Realistically? Part 2*, 37 Nat. Resources J. 611, 683 (1997), and Owen L. Anderson, Rogers, Wellman, *The New Implied Marketplace Covenant, Special Inst. on Private Oil & Gas Royalties pt. 13A*, at 13A-9 (Rocky Mtn. Min. L. Found. 2003) (emphasis added); *Wendlandt*, 596 S.W.2d at 324 (“This standard or test presupposes an existing, established market.”)).

<sup>17</sup> *Campbell v. United States*, 228 Ct. Cl. 661, 661 F.2d 209, 215 (1981) (“The decisive consideration is not the lack of an established trading market but the lack of any reasonable factual basis from which to determine the probable sum that fair negotiations between a hypothetical buyer and seller would produce.”).

<sup>18</sup> *Id.*

<sup>19</sup> *Wendlandt*, 596 S.W.2d at 324 (“This standard or test presupposes an existing, established market.”)



that specific entity and the value to its owner may be indicative of its real value rather a hypothetical sale.

### B. Fair Market Value of Interests in Corporations

Usually, the fair market value of an interest in a publicly-traded corporation can be determined by the price of a particular class of stock on the stock market. However, when the interest is in a closely-held corporation, or “market quotations are either lacking or [stock sales] are too scarce to be recognized,”<sup>20</sup> the following factors may be considered to determine fair market value:

- (1) the nature of the business and the history of the enterprise from its inception;
- (2) the economic outlook in general and the condition and outlook of the specific industry in particular;
- (3) the book value of the stock and the financial condition of the business;
- (4) the earning capacity of the company;
- (5) the dividend-paying capacity;
- (6) whether or not the enterprise has goodwill or other intangible value;
- (7) sales of the stock and the size of the block of stock to be valued; and
- (8) the market price of stocks of corporations engaged in the same or a similar line of business having their stocks actively traded in a free and open market, either on an exchange or over-the-counter.<sup>21</sup>

Note that these factors are alternatives to using stock price to determine fair market value. When these factors are used to determine the value of an interest in a

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<sup>20</sup> Rev. Rul. 59-60, 1951-1 C.B. 237, § 4.01; *Willis v. Donnelly*, 118 S.W.3d 10, 41 (Tex. App.–Houston [14th Dist.] 2003), *aff’d in part and rev’d in part on other grounds*, 199 S.W.3d 262 (Tex. 2006) (“When too few stock sales exist to establish a market price, other factors to assess fair market value include...”).

<sup>21</sup> Rev. Rul. 59-60, 1951-1 C.B. 237, § 4.01; *Willis*, 118 S.W.3d at 41; *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 892 (Tex. App.–Texarkana 1987), *disapproved on other grounds by Tex. Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240 (Tex. 2002).

corporation, the value derived is a *fair market value*.<sup>22</sup> However, when an interest in a closely-held corporation has no fair market value, either the *liquidation value*<sup>23</sup> or the *actual value*<sup>24</sup> of the corporation should be considered; the Revenue Ruling factors have no bearing on these types of value.

### C. Intrinsic or Actual Value

“Intrinsic value” means:

an inherent value not established by market forces;<sup>25</sup> a personal or sentimental value;<sup>26</sup> the true, inherent, or essential value of the thing itself;<sup>27</sup> the value of the property’s use to its owner;<sup>28</sup> a concept of value based on the

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<sup>22</sup> *See, e.g., Risser*, 739 S.W.2d at 891-92 (financial expert witnesses believed that these factors could be used to determine the “fair market value” of the shares of a corporation). However, some of these factors incorporate standards of value that might be incommensurate with fair market value. For example, the “book value” prescribed in factor (3) is *not* fair market value, and is, in at least some cases, more akin to “actual value.” *See* subsection D, and footnote 24, *infra*.

<sup>23</sup> *Williams v. Gaines*, 943 S.W.2d 185, 193 (Tex. App.–Amarillo 1997, writ denied) (“Ordinarily, in the absence of sales showing a market value, the value of the stock is predicated upon the market value of the assets of the company after deducting its liabilities.”).

<sup>24</sup> *R.V.K. v. L.L.K.*, 103 S.W.3d 612, 618 (Tex. App.–San Antonio 2003, no pet.). While considering the proper standard of value to be used for stock with a significant restriction on the marketability, the court wrote “[i]f the property does not have a market value, the parties may show the actual value of the property to the owner.” *Id.* The court cited *Beavers v. Beavers*, 675 S.W.2d 296, 299 (Tex. App.–Dallas 1984, no writ), which demonstrates one of the rare instances where actual value is equivalent to book value. *Id.*

<sup>25</sup> *Star Houston, Inc. v. Kundak*, 843 S.W.2d 294, 298 (Tex. App.–Houston [14th Dist.] 1992, no writ).

<sup>26</sup> *Id.*; *Bueckner v. Hamel*, 886 S.W.2d 368, 373 (Tex. App.–Houston [1st Dist.] 1994, writ denied) (Andell, J., concurring) (citing *Kundak*, 843 S.W.2d at 298, and Black’s Law Dictionary 739 (6th ed. 1990)).

<sup>27</sup> *Bueckner*, 886 S.W.2d at 373 (Andell, J., concurring).

<sup>28</sup> *Crisp v. Security National Insurance Co.*, 369 S.W.2d 326, 328-29 (Tex. 1963).

fundamental, or real value of the asset.<sup>29</sup>

The value to owner standard contemplates that the owner is not selling the property, but rather maintaining it in its present form.<sup>30</sup> Intrinsic value is sometimes referred to as “personal value,”<sup>31</sup> “real value,”<sup>32</sup> “actual value”<sup>33</sup> or “holder value.”<sup>34</sup> The two most commonly used terms are “actual” and “intrinsic” value; once they were distinct, but have been conflated somewhat.<sup>35</sup>

Intrinsic value also means “the intrinsic worth based upon such factors as cost, depreciation, present usefulness, [and] past return on investment.”<sup>36</sup>

The *International Glossary of Business Valuation*

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<sup>29</sup> Shannon P. Pratt, *Valuing a Business: The Analysis and Appraisal of Closely Held Companies* 946 (5th ed., McGraw-Hill 2008)

<sup>30</sup> Jay E. Fishman, Shannon P. Pratt & William J. Morrison, *Standards of Value*, 20-21 (2007).

<sup>31</sup> *Porras v. Craig*, 675 S.W.2d 503, 505 (Tex. 1984). In times past, intrinsic value meant the “reasonable value” to the owner themselves, “not a fanciful, capricious, or sentimental value.” *Dallas Hotel Co. v. Blanchette*, 246 S.W. 1065, 1066-67 (Tex. Civ. App.—Dallas 1922, no writ).

<sup>32</sup> M. Rayburn, *Rayburn on Condemnation*, § 16.00 (1987) (cited by *Religious of Sacred Heart of Texas v. City of Houston*, 836 S.W.2d 606, 616 (Tex. 1992)).

<sup>33</sup> *Id.*

<sup>34</sup> James C. Penn, *Evaluating Property Issues Amid Fairness Issues* 2, *New Frontiers in Marital Property* 2009 (State Bar of Texas).

<sup>35</sup> *Compare City of Austin v. Cannizzo*, 153 Tex. 324, 330, 267 S.W.2d 808, 812 (1954) (“[W]here the evidence establishes the absence of a market for the kind of property involved evidence of *intrinsic* value is admissible”) (emphasis added) *with Beavers v. Beavers*, 675 S.W.2d 296, 297 (Tex. App.—Dallas 1984, no writ) (“[I]n the absence of a market value, the *actual* value of the property to the owner may be shown.”) (emphasis added). The authorities cited by both *Cannizzo* and *Beavers* can be traced back to a common source, *Ft. Worth and D.C. Railway v. Hapgood*, 210 S.W. 969, 970 (Tex. Civ. App.—Amarillo 1919, no writ) (“We might be able to say from this record that no market value was shown if the restricted meaning of market value is adopted, which appellant apparently insists upon. If so, the witnesses’ opinion as practical men and men experienced as to its *actual* value would be admissible.”) (emphasis added).

<sup>36</sup> *City of Austin v. Cannizzo*, 153 Tex. 324, 330, 267 S.W.2d 808, 812 (1954)

*Terms* endorses a definition of intrinsic value in business valuations that emphasizes the information known to the buyer or investor but not to the market in general.<sup>37</sup> Note that this conception of intrinsic value would always be equal to fair market value if the information known to the buyer or investor were merely “reasonable knowledge of relevant facts.” Therefore, the amount of knowledge upon which a calculation of intrinsic value must be based exceeds any knowledge that would be reasonably available to potential buyers or investors in the market.<sup>38</sup>

As explained *supra*, in the absence of market value, the actual value of the property to the owner may be shown.<sup>39</sup> Evidence of actual value to the owner is relevant and admissible when the court is making its division of the community property.<sup>40</sup>

Household goods, clothing and personal effects have no market value in the ordinary meaning of that term.<sup>41</sup> When valuing this kind of personal property, “the trier of facts may consider original cost, cost of replacement, the opinions upon value given by qualified witnesses, the gainful uses to which the property has been put, as well as any other facts reasonably tending to shed light upon the subject.”<sup>42</sup>

#### D. Book Value

In the context of a business as a whole, “book value” means:

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<sup>37</sup> American Institute of Certified Public Accountants, et al., *International Glossary of Business Valuation Terms*, <http://www.bvresources.com/FreeDownloads/IntGlossaryBVTerms2001.pdf> (accessed June 3, 2010) (Intrinsic value is “the value that an investor considers, on the basis of an evaluation or available facts, to be the ‘true’ or ‘real’ value that will become the market value when other investors reach the same conclusion.”); *see also*

<sup>38</sup> *See, e.g.*, Pratt 2008, 946 (“Intrinsic value assumes a higher level of insight and knowledge about the asset that a typical investor might possess.”).

<sup>39</sup> *See* notes 11 & 12 *supra*.

<sup>40</sup> *Wendlandt v. Wendlandt*, 596 S.W.2d 323, 325 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

<sup>41</sup> *See Crisp v. Security National Insurance Co.*, 369 S.W.2d 326, 328 (Tex. 1963) (cited by Texas Pattern Jury Charges: Family § 203.1 cmt.) (measure of value of this property is “the actual worth or value of the articles to the owner for use in the condition in which they were at the time of the fire excluding any fanciful or sentimental considerations.”).

<sup>42</sup> *Wendlandt*, 596 S.W.2d at 325 (citing *Crisp*, 369 S.W.2d 326).

the value shown by the books of the business, which are kept in accordance with generally accepted accounting principles, that is arrived at by taking the total value of the assets as shown by its books and deducting therefrom the total liabilities.<sup>43</sup>

In the context of the specific assets of a business, “book value” means:

the capitalized cost less accumulated amortization or depreciation as it appears on the books of account of the business enterprise.<sup>44</sup>

Book value is also sometimes referred to as “net book value.”<sup>45</sup> This type of value presupposes the existence of a correct, complete and proper set of books that shows all of the company’s assets and liabilities.<sup>46</sup>

Book value may be used when a business has no market value, but it is entitled to little, if any, weight in determining the value of corporate stock in a closely-held corporation, and many other factors must be taken into consideration.<sup>47</sup> Book value may not always be an accurate method for assessing value due to certain facets of standard accounting practices, such as leaving contingent liabilities out of the calculation of actual liabilities and not frequently reassessing the value of corporate assets which may change value frequently or have uncertain value, such as intellectual property, derivatives and real estate.

Other factors that may be considered in addition to book value when valuing an interest in a closely-held corporation are outlined in detail in Revenue Ruling 59-60, discussed in subsection B, *supra*.

### E. Special or Pecuniary Value

In some situations, an asset will have no fair market value, but intrinsic value is also an inappropriate

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<sup>43</sup> *Chaffe v. Murray*, 492 S.W.2d 680, 684 (Tex. Civ. App.—Corpus Christi 1973, writ ref’d n.r.e.); *Mandell v. Mandell*, No. 2-08-290-CV, 2010 WL 1006406, \*4 (Tex. App.—Fort Worth March 18, 2010, pet. filed).

<sup>44</sup> American Institute of Certified Public Accountants, et al., *International Glossary of Business Valuation Terms*, <http://www.bvresources.com/FreeDownloads/IntGlossaryBV Terms2001.pdf> (accessed June 3, 2010).

<sup>45</sup> *See, e.g., id.*

<sup>46</sup> *Chaffe*, 492 S.W.2d at 684.

<sup>47</sup> *Bendalin v. Delgado*, 406 S.W.2d 897, 900-01 (Tex. 1966).

standard of value. For example, a pet dog may have no fair market value, and a very high intrinsic value to its owner as a beloved companion that greatly exceeds its replacement value.<sup>48</sup> However, unlike other property that may be primarily composed of sentimental value, a dog (moreso in the past) also has a value that “that may be ascertained by reference to the usefulness and services of the dog.”<sup>49</sup> In such a situation, the special or pecuniary value takes precedence over the intrinsic value.

This special or pecuniary value derived from the usefulness of the property is similar to intrinsic value, but specifically does not take into account the “sentimental value” component of intrinsic value.<sup>50</sup> While the *Heiligmann* rule excluding sentimental value from the calculation of special or pecuniary value has not been applied outside the context of animals, it might be able to be analogized to any other type of property that has no market value and an exceedingly high personal or sentimental value that might tend to skew an intrinsic value calculation.

The essential difference, then, between intrinsic value and special or pecuniary value is that the latter is a special application of the former; it disregards the component of the personal or sentimental value to the owner, and instead focuses entirely on the component of the value of the property’s use to the owner.

### F. Investment Value

In the context of a business valuation, “investment value” has several different meanings:

the amount a willing buyer realistically would pay for the enterprise as a whole on the valuation date;<sup>51</sup> the value to a particular

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<sup>48</sup> *See Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554 (Tex. App.—Austin 2004, no writ).

<sup>49</sup> *Heiligmann v. Rose*, 81 Tex. 222, 16 S.W. 931, 932 (1891) (cited by *Schuster*, 144 S.W.3d at 564). Note that *Heiligmann* was decided at a time when

<sup>50</sup> *Compare Star Houston, Inc. v. Kundak*, 843 S.W.2d 294, 298 (Tex. App.—Houston [14th Dist.] 1992, no writ) (“[I]ntrinsic value is an inherent value not established by market forces; it is a personal or sentimental value.”) *with Schuster*, 144 S.W.3d at 564 (“[P]ecuniary or sentimental value placed upon the dog by [the owner], or what he considered the dog worth to him,” is irrelevant and inadmissible (citing *Young’s Bus Lines v. Redmon*, 43 S.W.2d 266, 267-68 (Tex. Civ. App.—Beaumont 1931, no writ)).

<sup>51</sup> *R.V.K. v. L.L.K.*, 103 S.W.3d 612, 618 (Tex. App.—San Antonio 2003, no pet.) (citing *Swope v. Siegel-Robert, Inc.*, 74 F.Supp.2d 876, 911 (E.D. Mo. 1999), *affirmed in part and*

investor based on individual investment requirements and expectations;<sup>52</sup> the value of a business (or business interest) to a specific owner.<sup>53</sup>

Investment value is also referred to as “enterprise value” or “earnings value.”<sup>54</sup>

These various definitions of investment value reflect its close relationship to fair market value (“the amount a *willing buyer* would pay...”) and actual or intrinsic value (“the value to a *specific owner*...”).<sup>55</sup> However, Pratt identifies four factors of investment value that distinguish it from other standards of value:

- (1) the specific owner [or investor]’s expectation of risks;
- (2) the potential synergy associated with ownership of the subject business;
- (3) the specific earnings expectations resulting from the subject ownership; and, in some cases,
- (4) the relationship of the spouse/owner to the other owners of the business.<sup>56</sup>

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*reversed in part on other grounds*, 243 F.3d 486 (8th Cir.), *cert denied*, 534 U.S. 887, 122 S.Ct. 198, 151 L.Ed.2d 139 (2001), and *Jeffries v. Mills*, 165 Or. App. 103, 995 P.2d 1180, 1190 (2000)).

<sup>52</sup> American Institute of Certified Public Accountants, et al., *International Glossary of Business Valuation Terms*, [http://www.bvresources.com/FreeDownloads/IntGlossaryBV Terms2001.pdf](http://www.bvresources.com/FreeDownloads/IntGlossaryBVTerms2001.pdf) (accessed June 3, 2010).

<sup>53</sup> Shannon P. Pratt, *Valuing a Business: The Analysis and Appraisal of Closely Held Companies* 945 (5th ed., McGraw-Hill 2008).

<sup>54</sup> *R.V.K. v. L.L.K.*, 103 S.W.3d 612, 618 (Tex. App.—San Antonio 2003, no pet.).

<sup>55</sup> See Sharyn Maggio & Thomas F. Burrage, Jr., *A CPA’s Guide to Family Law Services* 28 (American Institute of Certified Public Accountants, Inc. 2005) (“This standard eliminates the hypothetical buyer and seller, using specific individuals instead. The concepts of investment value and intrinsic value overlap in the divorce proceedings in many jurisdictions.”)

<sup>56</sup> Pratt, 945.

## G. Replacement Value

“Replacement value” is the cost of replacing a piece of property within a reasonable time, and is also used as an alternative to fair market value, albeit most commonly in cases of theft or conversion.<sup>57</sup>

While replacement value is rarely used in divorce valuations, a situation analogous to its application in theft and conversion cases might be where both spouses jointly use one piece of property with no fair market value that will most likely be awarded to one or the other in the divorce. Some commentators have suggested the family car as an example,<sup>58</sup> but it is difficult to imagine a situation where a car had no market value, a prerequisite for the use of replacement value. Perhaps a better example would be truly obsolete electronics, such as a Betamax video player, but even this class of property may find a (sometimes robust) market on internet auction sites, for example. Thus, property that is useful enough to invoke the underlying principles behind replacement value is also usually useful enough to have a market value.

## H. Fair Value

“Fair value” does not have a formal definition like the other standards of value do. In some situations, fair value is the value of a business interest owned by a dissenting shareholder, or the value of a court-ordered sale of a business interest by an oppressed shareholder.<sup>59</sup> In other situations, fair value can mean simply “present value.”<sup>60</sup>

Ultimately, though, fair value just means a value that is *fair*, one that can be calculated without stringent

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<sup>57</sup> Tex. Pen. Code § 31.08(a); *see, e.g., Drost v. State*, 47 S.W.3d 41, 44 (Tex. App.—El Paso 2001, pet. ref’d) and *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 557-58, 565 (Tex. App.—Austin 2004, no pet.).

<sup>58</sup> See Richard R. Orsinger & Randall B. Wilhite, *Valuation and Division*, 3 Speer’s Texas Family Law Service § 20:31 (6th ed. 1988).

<sup>59</sup> Tex. Bus. Orgs. Code § 10.356; *see Brown v. Brown*, 348 N.J. Super. 466, 483, 792 A.2d 463, 474, (N.J. App. Div. 2002).

<sup>60</sup> *Railroad Commission v. Houston Natural Gas Corporation*, 289 S.W.2d 559, 573 (Tex. 1956) (“The word ‘fair’ is vague and ambiguous and in itself affords no satisfactory test by which to choose between the complex accounting methods urged here by the parties. The cases do establish that the words ‘fair value’ mean ‘present value.’”)

adherence to rigidly defined criteria.<sup>61</sup> As such, fair value becomes a global term for any assessment of value that cannot be categorized under one of the other widely-recognized, clearly-delineated standards, incorporating primarily discretionary fairness.

### III. APPROACHES TO VALUE

An approach to value is a particular method for calculating the value of property. The various approaches to value are not subordinate to the standards of value.

For example, if the asset approach, described *infra*, is used to determine the fair market value standard but yields no value (or a negative value), that calculated value might indicate that no actual market exists for that property.<sup>62</sup> In other words, there are some types of property which a hypothetical or actual seller would not be willing to “give away” or pay the buyer to purchase. Likewise, there are some types of property which no hypothetical or actual buyer would be willing to take responsibility for, even if they were paid by the seller to do so.

In such a situation, the application of a certain approach to calculate a certain standard of value might demonstrate that this standard of value does not exist or is not appropriate for that particular property.

The three usual approaches to determining market value are the market data, asset, and income approaches.<sup>63</sup> Although these are the three usual approaches to determining value, they are not necessarily the exclusive methods by which market value may be determined.<sup>64</sup> Regardless of which method is used, however, they are all merely factors to be considered in arriving at the value of the property.<sup>65</sup>

#### A. Market Data Approach

The market data approach is a method for determining market value, and is sometimes confused

with market value.<sup>66</sup> This approach is also referred to as the “market approach,”<sup>67</sup> the “comparable sales approach,”<sup>68</sup> and the “market data comparison method.”<sup>69</sup>

The market approach is predicated on comparing the subject property to similar property that has been sold.<sup>70</sup> The similarity between the subject property and the property it is compared to—the “test of similarity”—is of central importance to the market approach; this similarity serves as a predicate for admissibility.<sup>71</sup> Valuers will apply certain adjustments to the data of comparable sales in order to make that transaction more similar to a transaction involving a similar property.<sup>72</sup>

For businesses, this approach may be applied by comparing the subject business to either private or public transactions involving similar businesses. The assessment of private transactions uses what is variously called the “comparative transaction method” or the “direct market data method.” The method derives a “market multiple” or “value multiple”—a ratio of sales prices of comparable

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<sup>66</sup> *Religious of the Sacred Heart of Texas v. City of Houston*, 836 S.W.2d 606, 617 n. 17 (Tex. 1992). The Court explained that some confuse “the thing” (the determination of a property’s market value) with “the symbol for that thing” (the term “market value”) by means of an analogy:

One of the inadequacies of language is that sooner or later, the thing is confused with the symbol for that thing. When the mind is centered on the verbal description of something instead of the thing itself, we conclude that ‘Pigs are rightly named, since they are such dirty animals.’

*Id.* (citing J. Rollins, *What Is Intrinsic Value?*, 29 Tex. B.J. 95, 95 (1966)).

<sup>67</sup> American Institute of Certified Public Accountants, et al., *International Glossary of Business Valuation Terms*, <http://www.bvresources.com/FreeDownloads/IntGlossaryBV Terms2001.pdf> (accessed June 3, 2010).

<sup>68</sup> *Religious of the Sacred Heart of Texas v. City of Houston*, 836 S.W.2d 606, 615 (Tex. 1992).

<sup>69</sup> Tex. Tax Code § 23.013.

<sup>70</sup> American Institute of Certified Public Accountants, et al., *International Glossary of Business Valuation Terms*, <http://www.bvresources.com/FreeDownloads/IntGlossaryBV Terms2001.pdf> (accessed June 3, 2010).

<sup>71</sup> *Bridges v. Trinity River Authority*, 570 S.W.2d 50, 55-56 (Tex. Civ. App.—Tyler 1978, writ ref’d n.r.e.).

<sup>72</sup> *Id.* at 55.

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<sup>61</sup> See (very) generally James C. Penn, *Evaluating Property Issues Amid Fairness Issues* 1-2, New Frontiers in Marital Property 2009 (State Bar of Texas).

<sup>62</sup> But see Notes 13-17 *supra* for a discussion on whether the existence of actual value is a necessary condition for the calculation of fair market value.

<sup>63</sup> *Houston R.E. Income Properties XV, Ltd. v. Waller County Appraisal District*, 123 S.W.3d 859, 861 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

<sup>64</sup> *Id.*

<sup>65</sup> *Religious of the Sacred Heart of Texas v. City of Houston*, 836 S.W.2d 606, 615 (Tex. 1992).

closely-held private businesses to accounting data like income and assets.

The assessment of public transactions examines the stock price of guideline publicly traded companies and guideline merged and acquired companies.<sup>73</sup> This analysis is sometimes called the “guideline public company method” or “guideline publicly-traded company method.” The method also derives a “market multiple” or “value multiple,” but uses stock prices of comparable companies instead of sales prices.

One widely-used source of data for private businesses is *Pratt’s Stats*. Sources of information for public businesses include EDGAR,<sup>74</sup> Disclosure Incorporated,<sup>75</sup> Standard & Poor’s Industry Surveys, and many others. Sources both private and public will frequently be specially-tailored to a particular industry and entity size.

The market approach can also entail analysis of previous transactions involving the subject property; for example, if a similar ownership interest in the business has recently been sold, this data may be used to calculate the value of the subject ownership interest.

In the context of condemnations, the market approach is favored over the other approaches:

Actual market sales, as bearing upon ultimate value issues, have been many times characterized as the best and soundest of the various methods of valuation, for they immediately add strength, reason and weight to an expert opinion witness’s testimony, if his opinion is in line with the price range that is disclosed by a study of the market sales.<sup>76</sup>

In that context, the trial court has great discretion in determining whether the comparable sales are sufficiently similar, and is reviewed on an abuse of discretion standard.<sup>77</sup>

Examples of adjustments that may be applied under

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<sup>73</sup> Shannon P. Pratt, *Valuing a Business: The Analysis and Appraisal of Closely Held Companies* 950-51 (5th ed., McGraw-Hill 2008).

<sup>74</sup> Electronic Data Gathering and Retrieval database, the S.E.C.’s search engine, accessible here: <http://www.sec.gov/edgar.shtml>

<sup>75</sup> A contractor for the S.E.C. that provides indexes of public company disclosures.

<sup>76</sup> Rayburn, *Texas Law of Condemnation*, § 117, p. 382 (cited by *Bridges*, 570 S.W.2d at 55-56).

<sup>77</sup> *Bridges*, 570 S.W.2d at 56.

the market approach include those made to account for physical, functional, or economic obsolescence,<sup>78</sup> and differences in size, location, and rent.<sup>79</sup>

## B. Asset Approach

The asset approach is another means of determining market value. Under this approach, a business, business ownership interest, or security is valued by subtracting liabilities from assets.<sup>80</sup>

The procedure used to determine the standard of book value is *not* the same as the asset approach.<sup>81</sup> In other words, the assets and liabilities listed on the books of the business should not be used under the asset approach because, as explained *supra*,<sup>82</sup> standard accounting practices do not require that *all* assets and liabilities be included on the balance sheets of the business. The asset approach, on the other hand, considers all these off-balance sheet assets and liabilities when calculating the market value of the business.<sup>83</sup>

There are two basic methods used in the asset approach, one which considers the net value of tangible assets, the other which considers both tangible and intangible assets. The first, referred to as the “net asset value method,” focuses on the business’ tangible assets, generating a value for the business by subtracting liabilities from tangible assets.<sup>84</sup> Because this method does not incorporate the value of intangible assets, it is commonly used to value minority interests or businesses with a significant amount of personal goodwill.

The second method used in the asset approach is the “excess earnings method,” also referred to as the “capitalized excess earnings method.” This method combines the value of both the tangible *and* intangible

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<sup>78</sup> Tex. Tax Code § 23.011.

<sup>79</sup> *Houston R.E. Income Properties XV, Ltd. v. Waller County Appraisal Dist.*, 123 S.W.3d 859, 863 (Tex. App.–Houston [1st Dist.] 2003, no pet.).

<sup>80</sup> American Institute of Certified Public Accountants, et al., *International Glossary of Business Valuation Terms*, <http://www.bvresources.com/FreeDownloads/IntGlossaryBVTerms2001.pdf> (accessed June 3, 2010).

<sup>81</sup> Shannon P. Pratt, *Valuing a Business: The Analysis and Appraisal of Closely Held Companies* 951 (5th ed., McGraw-Hill 2008).

<sup>82</sup> See subsection D.

<sup>83</sup> Pratt, 951.

<sup>84</sup> See *International Glossary of Business Valuation Terms*, “Net Tangible Asset Value.”

assets of the business, and deducts its liabilities from this sum.<sup>85</sup> The value of the intangible assets is determined by assessing the rate of return on the tangible assets, then calculating the expected amount earned by means of those tangible assets in excess of the return on those assets.<sup>86</sup> The expected excess earnings are extrapolated from excess earnings in the past, whence “capitalized.”

When valuing an ownership in a closely held corporation, if there is no evidence of market value of corporate stock, the asset approach can be used as a *de facto* standard of value: the difference between the value of the assets and amount of liabilities of the corporation.<sup>87</sup> More generally, the value of corporate stock is predicated on the market value of the assets of the company after deducting its liabilities.

In condemnation cases and real estate appraisals for tax purposes, the market approach and the income approach are both recognized, but the asset approach is replaced with a loosely-analogous method referred to as the “cost approach.”<sup>88</sup> The cost approach determines market value by subtracting depreciation from the reproduction or replacement cost of the property.<sup>89</sup> This approach may be used when there is not sufficient data of comparable sales.<sup>90</sup>

### C. Income Approach

The underlying assumption of the income approach is that a buyer is primarily interested in the income the property will generate, and thus its value will be the

present value of *anticipated* future returns.<sup>91</sup> The income approach consists of estimating the net operating income stream of a property and applying a capitalization rate to determine the property’s present value.<sup>92</sup>

The underlying assumption of the income approach is that a buyer is primarily interested in the income the property will generate, and thus its value will be the present value of *anticipated* future returns.<sup>93</sup>

For real estate, fair market value under the income approach is commonly determined by the rental income generated by the property.<sup>94</sup>

For closely-held businesses, an adjustment is made to the compensation received by the owner; the owner’s actual compensation is replaced with the reasonable compensation that would be paid to a third party holding the same position in the business.<sup>95</sup>

As with the asset approach, there are two basic methods used in the income approach. Both methods divide an estimate of future returns by a capitalization rate, but differ in important ways.

The “capitalization of earnings method”—distinct from the “capitalized excess earnings method” used under the asset approach—is calculated by applying the capitalization rate to the normalized earnings of the business.<sup>96</sup> This method is used when a company’s future operations are not expected to change significantly from its current normalized operations, or where future operations are expected to grow at a somewhat

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<sup>85</sup> Pratt, 951.

<sup>86</sup> *International Glossary of Business Valuation Terms*; see also *Helper v. Helper*, 224 W.Va. 413, 686 S.E.2d 64, 68 n. 3 (W. Va. 2009).

<sup>87</sup> *Southwestern Bell Telephone Co. v. Wilson*, 768 S.W.2d 755, 762 (Tex. App.—Corpus Christi 1988, writ denied) (citing *Roberts v. Harvey*, 663 S.W.2d 525, 528 (Tex. App.—El Paso 1983, no writ); *Citizens National Bank of Lubbock v. Maxey*, 461 S.W.2d 138 (Tex. Civ. App.—Amarillo 1970, writ ref’d n.r.e.)).

<sup>88</sup> See generally *Religious of the Sacred Heart of Texas v. City of Houston*, 836 S.W.2d 606 (Tex. 1992); Tex. Tax Code § 23.011.

<sup>89</sup> *Religious*, 836 S.W.2d at 315 (citing 4 Nichols, *Nichols on Eminent Domain*, § 12C.01[3][b] (3d ed. 1978)).

<sup>90</sup> *Id.* (citing 2 Orgel, *Valuation Under the Law of Eminent Domain*, § 246 (2d ed. 1953)).

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<sup>91</sup> See generally American Institute of Certified Public Accountants, et al., *International Glossary of Business Valuation Terms*, “Income (Income-Based) Approach,” <http://www.bvresources.com/FreeDownloads/IntGlossaryBVTerms2001.pdf> (accessed June 3, 2010).

<sup>92</sup> *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 183 (Tex. 2001).

<sup>93</sup> See generally *International Glossary of Business Valuation Terms*; see also *City of San Antonio v. El Dorado Amusement Co., Inc.*, 195 S.W.3d 238, 248 (Tex. App.—San Antonio 2006, pet. denied); *Polk County v. Tenneco, Inc.*, 554 S.W.2d 918, 921 (Tex. 1977).

<sup>94</sup> See *State v. Central Expressway Sign Associates*, 302 S.W.3d 866, 871 (Tex. 2009).

<sup>95</sup> See Richard R. Orsinger & Randall B. Wilhite, *Valuation and Division*, 3 Speer’s Texas Family Law Service § 20:25 (6th ed. 1988)

<sup>96</sup> *Business Dictionary*, <http://www.businessdictionary.com/definition/capitalization-of-earnings-method.html> (accessed June 24, 2010).

predictable rate.<sup>97</sup> Adjustments are made to the historical net income to account for and eliminate nonrecurring or extraordinary expenditures that a prospective buyer would not be expected to incur.<sup>98</sup> The capitalization rate applied to this income stream is usually the expected rate of return on the interest in the business.<sup>99</sup>

The “discounted cash flow method” first calculates the expected earnings over a particular future period, incorporating projections of growth, changes in the price of the goods or services sold, and fluctuations in the number of buyers purchasing those goods or services.<sup>100</sup> These projected earnings differ in scope from the normalized projected earning used in the capitalization of earnings method in that they do not assume stability in the future income stream as compared to the historical income stream. The capitalization rate applied in this method is also different; instead of a “direct” capitalization rate, the discounted cash flow method uses a “yield capitalization rate,” which is actually a discount rate that adjusts the expected rate of return to its present value.<sup>101</sup>

#### IV. PREMISES OF VALUE

A “premise of value” is an assumption regarding the most likely set of transactional circumstances that may be applicable to the property being valued.<sup>102</sup> These premises are not subordinate to the standards of or

approaches to value; each premise may be used with any standard or approach.<sup>103</sup>

The premise used will nonetheless influence the manner in which certain questions inherent in the standards and approaches are resolved, and thus will have an impact on the final value calculated. For example, the amount a willing buyer would be inclined to pay for a business interest from a willing seller may depend on whether the business is a viable going concern, or will likely need to be liquidated.<sup>104</sup>

##### A. Going Concern

Value as a going concern is the property’s value as an ongoing operating business enterprise, its value in continued use, as a mass assemblage of income-producing assets.<sup>105</sup>

##### B. Assemblage of Assets

Value as an assemblage of assets is the value of the property’s assets liquidated *as a whole*.<sup>106</sup> This premise does *not* consider the assets in their current use in the production of income or as part of an ongoing operating business enterprise.<sup>107</sup>

##### C. Orderly Disposition

Value as an orderly disposition is a liquidation value that assumes that the property’s assets are sold individually—and *not* as a whole—over a reasonable period of time to maximize the proceeds received.<sup>108</sup>

##### D. Forced Liquidation

Value as a forced liquidation is a liquidation value that assumes that the property’s assets are sold individually and quickly, with less-than-normal exposure to the secondary market.<sup>109</sup>

<sup>97</sup> *Helper v. Helper*, 224 W.Va. 413, 686 S.E.2d 64, 67 n. 29 (W. Va. 2009).

<sup>98</sup> *Id.*

<sup>99</sup> *Business Dictionary*, <http://www.businessdictionary.com/definition/capitalization-of-earnings-method.html> (accessed June 24, 2010). This “direct” capitalization rate has been more specifically defined as “the rate of interest investors would require as a return on their money before they would invest in the income-producing property, taking into account all the risks involved in that particular enterprise.” *Polk County v. Tenneco, Inc.*, 554 S.W.2d 918, 921 (Tex. 1977).

<sup>100</sup> See generally *M & A Technology, Inc. v. iValue Group, Inc.*, 295 S.W.3d 356, 365 (Tex. App.—El Paso 2009, pet. denied).

<sup>101</sup> Pratt, 950.

<sup>102</sup> Shannon P. Pratt, *Valuing a Business: The Analysis and Appraisal of Closely Held Companies* 47-48 (5th ed., McGraw-Hill 2008); *International Glossary of Business Valuation Terms*, <http://www.bvresources.com/FreeDownloads/IntGlossaryBVTerms2001.pdf> (accessed June 3, 2010)

<sup>103</sup> *See id.*

<sup>104</sup> *See id.* at 48.

<sup>105</sup> Pratt, 47; *International Glossary of Business Valuation Terms*

<sup>106</sup> Pratt, 47.

<sup>107</sup> *Id.*

<sup>108</sup> Pratt, 47-48; *International Glossary of Business Valuation Terms*.

<sup>109</sup> Pratt, 48; *International Glossary of Business Valuation Terms*.



## V. OWNER'S TESTIMONY OF VALUE

A property owner is qualified to testify to the market value of his property.<sup>110</sup> The owner may testify to this value even if they would not be qualified to testify to the market value of similar property owned by someone else.<sup>111</sup> It is ownership itself that qualifies the owner to testify to market value, since an owner ordinarily knows the value of their own property.<sup>112</sup> The owner is *prima facie* qualified if they declare that they know the market value of the property.<sup>113</sup>

However, the owner's "testimony must show that it refers to market, rather than intrinsic or some other value of the property."<sup>114</sup> The owner's testimony "is probative if it is based on the owner's estimate of market value and *not* some intrinsic or other value such as replacement cost."<sup>115</sup> However, an owner's testimony of the value of

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<sup>110</sup> *Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664, 669 (Tex. 1996) (market value of personal property for purposes of damages in breach of warranty and violation of DTPA suit); *Porras v. Craig*, 675 S.W.2d 503, 504 (Tex. 1984) (market value of real property for purposes of damages in suit for damage to land); *Bower v. Processor and Chemical Service, Inc.*, 672 S.W.2d 30, 32 (Tex. App.–Houston [14th Dist.] 1984, no writ) (sole shareholder and president qualified to testify to value of personal property owned by closely-held corporation); *Putman v. Sanders*, 537 S.W.2d 308, 312 (Tex. Civ. App.–Amarillo 1976, no writ) (value of personal property for purposes of damages in negligence suit); *State v. Berger*, 430 S.W.2d 557, 559 (Tex. Civ. App.–Waco 1968, writ ref'd n.r.e.) (market value of real property for purposes of condemnation value in eminent domain suit). Most intermediate courts now cite *Redman* for this proposition.

<sup>111</sup> *Porras*, 675 S.W.2d at 504; *Hillin v. Hagler*, 286 S.W.2d 661, 662 (Tex. Civ. App.–Fort Worth 1956, no writ).

<sup>112</sup> *Berger*, 430 S.W.2d at 559 (citing *Pecos & N.T. Ry. Co. v. Grundy*, 171 S.W. 318, 319 (Tex. Civ. App.–Amarillo 1914, no writ)). Note that *Grundy* involved the owner testifying to the *actual* or *intrinsic* value of the property and *not* its *market* value.

<sup>113</sup> *Bavarian Autohaus, Inc. v. Holland*, 570 S.W.2d 110, 115 (Tex. Civ. App.–Houston [1st Dist] 1978, no writ).

<sup>114</sup> *Porras*, 675 S.W.2d at 504 (Tex. 1984); *see also* *Pontiac v. Elliott*, 775 S.W.2d 395, 399 (Tex. App.–Houston [1st Dist.] 1989, writ denied); *contra* *Wright Titus, Inc. v. Swafford*, 133 S.W.2d 287, 295-96 (Tex. Civ. App.–Austin 1939, writ dismissed cor.) (owner's testimony of intrinsic value of property that had no market value admissible and probative).

<sup>115</sup> *Redman Homes*, 920 S.W.2d at 669 (Tex. 1996) (emphasis added); *contra* *Ft. Worth and D.C. Railway v. Hapgood*, 210 S.W. 969, 970 (Tex. Civ. App.–Amarillo 1919, no writ) ("We might be able to say from this record that no market value was

the property "to me" does *not* necessarily express intrinsic, rather than market, value.<sup>116</sup> Instead, the testimony must only show that the opinion is "based on market forces" to indicate market value.<sup>117</sup>

A spouse may provide *lay* witness testimony of the market value of a community property business,<sup>118</sup> but must usually be designated as a witness.<sup>119</sup> Alternatively, a spouse might be qualified to provide *expert* witness testimony to market value, but their identity as an expert and the substance of their testimony must be disclosed to the other spouse.<sup>120</sup>

## VI. DISCOUNTS AND PREMIUMS

In the valuation context, a "discount" is a reduction in value taken when certain circumstances render the property less valuable than the valuation method applied would indicate. A "premium" is the inverse, an increase in value added when the circumstances would make the property more valuable. [If a particular valuation method assumes neither of these circumstances in making a valuation calculation then, if appropriate, either a discount or a premium may be applied to properly adjust the valuation. However, if a method assumes one or the other, then the existence of the contrary circumstance may require either a discount or premium to be taken to properly adjust the valuation.]

### A. Discount for Lack of Marketability

The discount for lack of marketability reflects the difficulty associated with selling an asset of a particular kind. Enterprise value by its nature does not include a discount based on shares' minority status or lack of

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shown if the restricted meaning of market value is adopted, which appellant apparently insists upon. If so, the witnesses' opinion as practical men and men experienced as to its *actual* value would be admissible.") (emphasis added).

<sup>116</sup> *Ford Motor Co. v. Cooper*, 125 S.W.3d 794, 802-03 (Tex. App.–Texarkana 2004, no pet.).

<sup>117</sup> *Id.*

<sup>118</sup> *Bufkin v. Bufkin*, 259 S.W.3d 343, 355 (Tex. App.–Dallas 2008, pet. denied); *Barton v. Barton*, No. 09-06-349 CV, 2007 WL 1219425, \*1 (Tex. App.–Beaumont Apr. 26, 2007, no pet.) (mem. op.).

<sup>119</sup> *See* *Collins v. Collins*, 904 S.W.2d 792, 800-02 (Tex. App.–Houston [1st Dist.] 1995, writ denied); *but see* *Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 162 (Tex. 1992) (good cause exception to automatic exclusion of witness for failure to designate).

<sup>120</sup> *See* *Collins*, 904 S.W.2d at 800-02.

marketability.<sup>121</sup> This discount attempts to calculate an adjustment in value because the asset cannot be immediately converted to cash. Market ability discounts are often subjective and experts frequently differ on the appropriate rate.

### B. Discount for Lack of Control

The discount for lack of control reflects the absences of some or all of the powers of control over a business.<sup>122</sup> A discount taken on shares of minority status is a species of a discount for lack of control. This discount attempts to quantify the fact that purchase of a controlling interest in a business is more valuable to an investor, rather than one where their investment is controlled by someone else.

### C. Discount for Lack of Liquidity

The discount for lack of liquidity reflects the difficulty associated with selling different types of business interests.

## VII. COST OF SALE

The issue of whether to factor in the cost of sale comes up most frequently in the context of real estate valuation, but can affect other assets as well.

One situation is when a court orders the parties to sell the marital residence and divide the net proceeds from the sale. Net sale proceeds are usually defined in a final decree as “gross sales price less cost of sale and full payment of any mortgage indebtedness or liens in property”).<sup>123</sup> In this situation, the cost of sale is already figured into the property division so that both parties receive the actual percentage property division due to them in the final decree.

Another situation is when the court divides real estate to one party or the other. If, for instance, a person is awarded a \$250,000 home with a \$100,000 mortgage, it appears on the surface that they have been awarded \$150,000 in equity. However, once that person puts the house on the market and pays cost of sale—which usually include realtor’s commission and closing costs—the actual amount awarded to them will be less: \$141,000 if the seller pays a six percent commission to the realtor. If \$150,000 was the amount used to effectuate a 50/50 property division, the person paying the cost of sale

<sup>121</sup> *R.V.K. v. L.L.K.*, 103 S.W.3d 612, 618 (Tex. App.—San Antonio 2003, no pet.).

<sup>122</sup> *International Glossary of Business Valuation Terms*, <http://www.bvresources.com/FreeDownloads/IntGlossaryBVTerms2001.pdf> (accessed June 3, 2010)

<sup>123</sup> See *In re Goodson*, 110 S.W.3d 81, 82 (Tex. App.—Houston [1st Dist.] 2003, orig. proceeding)

would end up with less than fifty percent after factoring in the cost of sale. Attorneys should keep this in mind when negotiating settlements or asking the Court to order the sale of the residence. The length of time it takes to sell and any make-ready costs should also be considered.

## VIII. TAX CONSIDERATIONS

Section 7.008 of the Texas Family Code gives the Court the ability to consider tax consequences when making a property division:

In ordering the division of the estate of the parties to a suit for dissolution of a marriage, the court may consider:

- (1) whether a specific asset will be subject to taxation; and
- (2) if the asset will be subject to taxation, when the tax will be required to be paid.

Sampson and Tindall’s comment on this statute states:

Calculation of taxes to be paid in the future and the discount to be used requires some thought and calculation, but this is preferable to the complete prohibition of such consideration. In reality, recognition of taxes as an important factor in reaching an agreement has been the rule of practice for able lawyers.

This statute was enacted in response to a prior case which held that affecting assets was too speculative. Care needs to be taken to mark the distinction between tax affecting an asset which is permissible and assigning existing tax liability which is mandatory. The Beaumont Court of Appeals has held that it is reversible error for the Court to refuse to consider tax liabilities when they substantially affect a spouse unable to pay them:

Repeatedly, appellate courts have held that tax consequences stemming from the division of property as well as any unpaid tax liabilities are proper factors to be considered by the trial court in deriving a fair and just division of the community properties. *McCartney v. McCartney*, 548 S.W.2d 435 (Tex. Civ. App.-Houston [1st Dist.] 1976, no writ). Furthermore, it is reversible error for a court to refuse to consider tax liability, particularly when it is substantial and one of the spouses is without means to pay the obligation. See *McCartney, supra*; *Cole v. Cole*, 532 S.W.2d 102 (Tex.Civ.App.-Dallas 1975) aff’d 568 S.W.2d 152 (1978).

*Baccus v. Baccus*, 808 S.W.2d 694, 700 (Tex. App.–Beaumont 1991, no pet.); see *In re Marriage of Born*, 2009 WL 1010876 at \*7 (Tex. App.–Texarkana 2009, no pet.) (mem. op., not designated for publication).

In *Wright v. Wright*, 280 S.W.3d 901, 911-12 (Tex. App.–Eastland 2009, no pet.), the Eastland Court of Appeals held that evidence in divorce action was legally and factually sufficient to support finding that husband had committed fraud on the community by transferring 49% of husband's and wife's jointly-owned company stock to company employee without knowledge or consent of wife because had there been no transfer of stock the community would have had another \$627,000 to divide, and the transfer of stock without consideration would have resulted in a large gift tax obligation to the community estate:

Had there been no transfer of stock, the community would have had another \$637,000 to divide. Glenn's transfer of the stock to Gryder for no consideration was unfair to Jodie and the community being divided. Moreover, tax consequences of the transaction were not considered by Gryder or Glenn. The trial court did not err in finding that Glenn's intent was to deprive Jodie of a significant portion of the community assets and that the transfer was unfair to her.

Suffice to say, attorneys should always advise their clients to seek the opinion of a CPA or tax attorney before making any agreements regarding complex property divisions. Depending on the nature of community assets being divided, there can be numerous tax implications and consequences to consider.

## IX. GOODWILL

Black's Law Dictionary gives the following definition for Goodwill:

A business's reputation, patronage, and other intangible assets that are considered when appraising the business, esp. for purchase; the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets. Because an established business's trademark or servicemark is a symbol of goodwill, trademark infringement is a form of theft of goodwill. By the same token, when a trademark is assigned, the goodwill that it carries is also assigned. — Also written good will. Cf. going-concern value under value (2). [Cases: Good Will 1–2.]

“[Goodwill] is only another name for reputation, credit, honesty, fair name, reliability.” Harry D. Nims, *The Law of Unfair Competition and Trade-Marks* 36 (1929).

“Good will is to be distinguished from that element of value referred to variously as going-concern value, going value, or going business. Although some courts have stated that the difference is merely technical and that it is unimportant to attempt to separate these intangibles, it is generally held that going-concern value is that which inheres in a plant of an established business.” 38 Am. Jur. 2d Good Will § 2, at 913 (1968).

In the context of valuing a business during a divorce, experts must distinguish between personal goodwill and commercial goodwill of a business. “Personal” or “professional” goodwill is not marital property, and thus has no value, no character, and cannot be divided by the court. “Business” or “commercial” goodwill is marital property, and thus may be characterized using standard rules of characterization.

The Texas Supreme Court wrote of goodwill in a Texas divorce:

[I]t cannot be said that the accrued good will in the medical practice of Dr. Nail was an earned or vested property right at the time of the divorce or that it qualifies as property subject to division by decree of the court. It did not possess value or constitute an asset separate and apart from his person, or from his individual ability to practice his profession. It would be extinguished in event of his death, or retirement, or disablement, as well as in event of the sale of his practice or the loss of his patients, whatever the cause.

*Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972). This case is widely viewed as a comment on “personal goodwill,” as distinguished from entity goodwill or enterprise goodwill.

Commercial goodwill was commented on in *Geesbreght v. Geesbreght*, 570 S.W.2d 427, 435-36 (Tex. Civ. App.–Fort Worth 1978, writ dismissed):

“Good will” is sometimes difficult to define. In a personal service enterprise such as that of a professional person or firm, there is a difference in what it means as applied to “John Doe” and as applied to “The Doe Corporation” or “The Doe Company”. If “John Doe” builds up a reputation for service it is personal to him.

If “The Doe Company” builds up a reputation for service there may be a change in personnel performing the service upon a sale of its business but the sale of such business naturally involves the right to continue in business as “The Doe Company”. The “good will” built up by the company would continue for a time and would last while the new management, performing the same personal services, would at least have the opportunity to justify confidence in such management while it attempted to retain the “good will” of customer opportunity to have time to try to preserve the “good will” already existent and to use it as an entrance into the identical field of operations in a personal service type of business would be present where the name of the business is a company name as distinguished from the name of an individual. Therein does it have value, plus the value of the opportunity to justify confidence in the new management by the customer/clients of the predecessor owner(s). It is as applied to the foregoing that we consider Emergency Medicine to possess what we treat as “good will” as part of its worth and value under the circumstances of this case, and therefore an asset which would have value to some extent apart from John’s person as a professional practitioner.

In *Salinas v. Rafati*, 948 S.W.2d 286 (Tex. 1997), the Supreme Court favorably cited both *Nail* and *Geesbreght*, but wrote:

*Geesbreght* and *Nail* illustrate the considerations involved in determining whether an estate includes goodwill. Neither establishes an absolute rule.

*Salinas*, 948 S.W.2d at 291.

In *Austin v. Austin*, 619 S.W.2d 290, 291-92 (Tex. Civ. App.–Austin 1981, no writ), the court wrote the following about goodwill listed as an asset in a contract to purchase the business, which made a specific allocation of the sales price to goodwill:

The good will of an ongoing, noncorporate, professional practice is not the type of property that is divisible as community property in a divorce proceeding. [citing *Nail*]...When good will is not attached to the person of the professional man or woman, it is property that may be divided as community property. [citing *Geesbreght*.]...Once a professional practice is sold, the good will is no longer attached to the

person of the professional man or woman. The seller’s actions will no longer have significant effect on the good will. The value of the good will is fixed and it is now property that may be divided as community property.

The case of *Nowzaradan v. Nowzaradan*, 2007 WL 441709 (Tex. App.–Houston [1st Dist.] 2007, no pet.) (mem. op.), closely examined personal goodwill in the valuation of a medical clinic in a divorce. Both experts testified to a value of personal goodwill that was excluded, and the court said that “the record reflects that the BCC clinic had significant commercial goodwill, due to its name, location, extended hours, client base, and “walk-in” practice, all of which could potentially carry over to any new owner.” *Id.* at \*8.

The case of *Geaccone v. Geaccone*, 2005 WL 1774964 (Tex. App.–Houston [1st Dist.] 2005, no pet.) (mem. op.), involved the important conceptual question of whether a business can be valued for purposes of divorce on the assumption that the seller will sign a covenant not to compete in connection with the sale. Husband’s brief (available on Westlaw) stated the issue thus:

This appraisal was based in part on the assumption that GASPER would enter into a limited covenant not to compete with any new purchaser of his practice (R.R. Vol. 3, p. 52). According to this same valuation expert, if GASPER’s dental practice was appraised without assuming that GASPER would be willing to enter into a limited covenant not to compete, the practice would be “unsalable.”

Husband argued that the difference between the price with a covenant not to compete and the price without one is entirely attributable to personal goodwill. Unfortunately, the appellate court did not address the complaint, citing a failure to object when the valuation report was offered and then failing to pin the trial court down sufficiently at the findings of fact/conclusions of law stage. The question is an important one that needs to be answered definitively.

A split in the Courts of Appeal has left conflicting opinions on the effect of buy-sell agreements on commercial goodwill during a divorce. Compare *Finn v. Finn*, 658 S.W.2d 735 (Tex. App.–Dallas, 1983, writ ref’d n.r.e.) (court held that a law firm’s commercial goodwill was not divisible upon divorce because the partnership agreement does not provide any compensation for accrued goodwill to a partner who ceases to practice law with the firm, nor does it provide any mechanism to realize the value of the firm’s goodwill) with *Keith v. Keith*, 763 S.W.2d 950 (Tex.

App.–Fort Worth 1989, no writ) (court held that the formula set forth in the partnership agreement with respect to death or withdrawal of the partner is not necessarily determinative of a spouse's interest in the ongoing partnership as of the time of trial in a divorce).

The issue before the court in *R.V.K. v. L.L.K.*, 103 S.W.3d 612 (Tex. App.–San Antonio 2003, no pet.) concerned the valuation of a medical practice and whether *Finn* or *Keith* should be used to determine whether a buy-sell agreement controls the valuation of stock. *Id.* at 617. The court, in a plurality opinion, did not address the question of whether it would follow *Keith* or *Finn* because the parties' differences in valuation did not concern commercial goodwill. The plurality reversed and remanded the case, concluding that the trial court failed to consider the buy-sell agreement to be a significant restriction on the marketability of the stock. *Id.* at 619. The court expressly noted that the divorce had not triggered the buy-sell agreement. *Id.* at 618. Justice Opez wrote a concurring and dissenting opinion. Justice Opez agreed with the dissent that the court needed to address the different methods of valuation in *Finn* and *Keith* and should follow *Keith*, but agreed with the plurality that the case should be remanded. *Id.* at 619-21. The dissenting opinion authored by Justice Marion and joined by Justice Stone would have affirmed the trial court ruling. The dissenters believed that the court should follow *Keith* and "hold that the value of R.V.K.'s interest should be based on the present value of the entities as ongoing businesses, which would include such factors as limitations associated with the buy/sell agreement and consideration of commercial goodwill." *Id.*

## X. REAL ESTATE VALUATION IN MARITAL CONTEXT: LOCATION AND TYPE

### A. Introduction

The prevailing mantra for real estate is of course: Location, location, location. However, in the marital context, when evaluating parties' real estate assets in a divorce, the mantra changes to: location and type. The reason why is simple. In terms of assets people may hold, the typical category for real estate is just a single-family property, e.g. their home. However, your client may hold an income-property, that is, real estate that produces income through a cash flow stream. Both types of real estate almost always require professional help in determining accurate values. Nonetheless, it is important to understand fundamentals that an appraiser uses to understand the value assigned to your client's asset.

### B. Overview of the Appraisal Process

"An appraisal is an estimate or an opinion of the value of a property, or some interest therein, rendered by an impartial person skilled in the analysis and valuation

of real estate."<sup>124</sup> The value that an appraisal achieves is the market value and this process develops through an orderly, well-conceived procedure, called the appraisal process.<sup>125</sup>

For real estate to have value, several attributes must be present: firstly, the parcel of real estate must have utility, meaning that it has the characteristic of serving human needs by providing shelter, privacy, or income; secondly, there must be an effective demand for the services or amenities that the property produces; thirdly, there must be relative scarcity, which means that supply must have a limitation relative to demand; and fourthly, transferability, which means that the rights of ownership may be conveyed.<sup>126</sup> While this is the textbook definition one other consideration is holding it as an investment property. Property values can be fluid especially when an area becomes hot. Market value in real estate can be defined as the most probable selling price in a cash amount.<sup>127</sup>

The appraisal process is defined by a framework or a systematic analysis of facts that determine the market value of a specific parcel of real estate.<sup>128</sup> The first step an appraiser takes within the framework is to ask three basic questions: (1) define the appraisal problem; (2) make a survey and plan; and (3) collect and organize the data.<sup>129</sup> Then the appraiser must apply an approach appropriate to the type of property and the data available.<sup>130</sup> There are three different approaches: (1) the market or direct sales comparison approach, (2) the income approach, and (3) the cost approach.<sup>131</sup> Each approach is appropriate for a specific kind of real estate. The appraisal process culminates with the appraiser's report, where their findings are reconciled and an opinion as to market value is made.<sup>132</sup>

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<sup>124</sup> JEROME DASSO, ET AL., REAL ESTATE 156 (12th ed.1995).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 160.

<sup>129</sup> *Id.* at 161.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

### C. Appraising a Single-Family Property

The best approach for appraising single-family properties is the market or sales comparison approach.<sup>133</sup> This entails identifying similar properties that have recently sold, analyzing the dissimilarities between the comparable assets and the subject property, and, from this, estimating the subject properties market value.<sup>134</sup> In order to adequately assess the market, sufficient data for sales of comparable property must be present.<sup>135</sup> The direct sales comparison approach is based on a fundamental assumption of economics: A rational potential buyer will not pay more for a subject property than they would pay for another property of like or equal desirability.<sup>136</sup>

There are some limitations to consider with this approach — especially given the present economic circumstances. A lack of adequate market data is the most major limitation.<sup>137</sup> The market approach is not particularly reliable when the kind of property in question is one that is infrequently purchased or is very unique, e.g. a church.<sup>138</sup> Another limitation to consider is a lack of truly comparable properties.<sup>139</sup> A limitation that is presently quite significant is that value estimates are based on historical data.<sup>140</sup> Thus, there is an underlying assumption that sales follow their historical trends — one only needs to look to the current and significantly declined markets of Phoenix and Tucson to see this is not always the case. Following the recent banking crisis, many lenders insist on data not older than six months.

Furthermore, the direct sales comparison approach is also not always applicable. Why? Sometimes there are no comparable properties to base an evaluation on. Consider an example were someone built their property on vacant land. What approach would an appraiser utilize then? The answer is the cost approach. The cost approach provides an estimate of market value predicated by the cost of acquisition of another vacant site and the construction of a building and other improvements to

develop that property.<sup>141</sup> The cost approach is based on the assumption that a rational potential buyer would not pay more for a property than the cost of producing, without significant delay, a substitute property of equal utility.<sup>142</sup>

### D. Appraising Income Property

Income producing properties are valued in two ways: (1) direct capitalization or (2) through a gross income multiplier approach.<sup>143</sup>

Direct capitalization is the procedure whereby the market value of property producing income is calculated by capitalizing the annual net income that is generated by the property at an overall capitalization rate.<sup>144</sup> The procedure is based on a mathematical calculation that is summarized as follows:

$$MV_o = \frac{NOI}{R_o}$$

Where  $MV_o$  is the market value;  $NOI$  is the annual net operating income; and  $R_o$  is the rate of capitalization necessary to attract investors.<sup>145</sup> The capitalization rate simply represents the yield or required rate of return on real estate, less the potential for capital appreciation.<sup>146</sup>

The gross income multiplier (GIM) approach is alternative income approach.<sup>147</sup> This approach for value relates to annual total income to market value.<sup>148</sup> The basic formula for GIM is this:

Market Value = Gross Income x Market-Derived GIM.  
The derivation for the GIM comes for looking at sales prices of comparable properties divided by their respective gross annual incomes.<sup>149</sup> Both of the above approaches involve some subjective calls by the appraiser in determining the rate of return and market-derived GIM.

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<sup>133</sup> *Id.* at 183.

<sup>134</sup> *Id.* at 183.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 188.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 188-189.

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<sup>141</sup> *Id.* at 189.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 178-179.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 179.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

Unlike selecting real estate, which focus on the situs or location, valuation focuses on the type and location. It is important to note that appraising real estate is part art and part science. Hard numbers on comparable sales will be available, but choosing when numbers to apply is often subjective. In many divorce cases, who is going to receive the marital home is a foregone conclusion. Accordingly, the party keeping the home has motivation for a low value and the other party, the opposite. Investigate your appraiser carefully. Some develop a reputation for valuing either high or low. It may make sense to hire your appraiser first only as a consultant.

One final comment is that Texas has adopted the Uniform Standard for Professional Appraisal Practices (USPAP). Make sure both your appraiser and your opponents are in compliance with the act.

## XI. AUTOMOBILE VALUATION: A NUTS & BOLTS APPROACH

### A. Introduction

For many people a car is one of the first assets of significant value they ever acquire and, along with homes, is the most common asset valued in a divorce. In general—virtually a *per se* rule—cars are abysmal in retaining value. The instant title passes from the dealer to the buyer, that automobile can lose nearly a quarter of its value in an instant — after five years a vehicle is typically worth well less than 50% of what was originally paid for it.<sup>150</sup>

### B. Market Value vs. Personal Value

The starting point then in terms of legal valuation of automobiles is to qualify how courts of this state value such an asset. Is it the value it holds to that person — whose clunker is worth a million dollars to them — or is it the value that automobile actually holds on the market place. The Texas Supreme Court in *Porras* held that opinion testimony, affirmatively demonstrating that an owner is referring to personal, and not market value, is no evidence.<sup>151</sup> Market value, in Texas, is defined as the price an asset, such as an automobile, would bring when offered for sale by one who desires to sell it, but is not obligated to, and is bought by one who is under no

necessity to buy.<sup>152</sup> Whereas, personal or intrinsic value is an inherent value not established by marketplace factors and is a personal or sentimental value.<sup>153</sup> Therefore, despite sentimental attachment, the courts of this state look to market value in determining valuation of an automobile.

### C. Vanilla Market Values: Quick, Easy and the “Other” Blue Book

Cars are in general fungible assets. Blacks Law Dictionary defines fungible as: “[something] [r]egarded as commercially interchangeable with other property of the same kind.”<sup>154</sup>

By virtue of this attribute, it is easy to discern what the marketplace value of an automobile is. The question then is: How?

There are several good on-line sources available for a quick appraisal. The best known of these sources is likely the Kelly Blue Book.<sup>155</sup> There are other accurate sources easily available, such as Edmunds, so one should not feel that Kelly Blue Book is the “only” source for determining market value of a car, but it is likely the best known.

Kelly Blue Book and like sources make determining value a very quick process, if you possess all the relevant information about the vehicle in question. To this end, a hypothetical demonstration will be most effective.

Let’s say our client comes to us with material for an inventory and appraisal. Let’s also say that our particular client drives a Hummer H2. She and her husband purchased the car brand new three years ago in 2007, when their marriage was rosier and before the steep rise in gas prices and the economic meltdown. How do you value this car, today?

Well, if you use Kelly Blue Book online, one of the first questions asked is what is your location by zip code; in this example, our car and its owners live in University Park in the 75225 zip code. (Cars owned in southern states retain value more than in northern states, because roadways in states like Texas rarely are salted due to ice, and thus, provide less corrosion to the vehicle.)

The next step is to select the model and year. As stated, our vehicle is a 2007 Hummer H2. This leads you to choice of four values: “Trade in Value - the amount

<sup>150</sup> Jeannine Fallon & Chintan Talati, *Vehicle Depreciation Top Ten List*, EDMUNDS.COM, 8/8/2006, <http://www.edmunds.com/help/about/press/116431/article.html> (demonstrating some cars are expected to lose 80% of their value within five years).

<sup>151</sup> *Porras v. Craig*, 675 S.W.2d 503, 505 (Tex.1984); *see also Ford Motor Co. v. Cooper*, 125 S.W.3d 794, 799 (Tex. App.—Texarkana 2004, no pet.)

<sup>152</sup> *Waste Disposal Ctr., Inc. v. Larson*, 74 S.W.3d 578, 583 (Tex. App.—Corpus Christi 2002, pet. denied)

<sup>153</sup> *Star Houston, Inc. v. Kundak*, 843 S.W.2d 294, 298 (Tex. App.—Houston [14th Dist.] 1992, no writ)

<sup>154</sup> BLACK’S LAW DICTIONARY (8th ed. 2004)

<sup>155</sup> Kelly Blue Book, Home Page, <http://www.kbb.com>

consumers can expect to receive from a dealer on trade-in;” “Private Party Value - the value a buyer can expect to pay when buying a used car from a private party;” “Suggested Retail Value - the value that is representative of the dealer’s asking prices’ for a used car. A starting point for negotiation between a consumer and a dealer;” and “Certified Pre-Owned Value - the value that is representative of dealers’ asking prices for a used car covered by the automaker’s CPO program. A starting point for negotiation between a consumer and a dealer.” In our scenario, the best value to use is the Trade-In Value, because this most accurately provides the market value if there were a willing seller and a willing buyer.

The search requires some further specifics about the features of our car: let’s say this is an H2 Sport Utility 4D, with luxury package and a navigation system in addition to the standard features. The car only has 30,000 miles.

The online Kelly Blue Book generates then a range of possible values. Our car it seems would command on the present marketplace, a value of approximately \$32,000.00. We can add this to our inventory and appraisal and our understanding of how much our client’s assets are presently worth. This is the vanilla, quick and easy valuation approach.

#### D. The Exotic and the Professional

Some cars are known for turning heads. Some super cars are not only known for turning heads, but turning wallets. Some very exotic super cars, truly break all valuation convention and not only retain their value, they may — surprisingly — appreciate in value. This is a very rare exception.

Recently, a sale of a one of only three remaining 1936 Bugatti 57SC Atlantics was reported to have occurred — the price tag for this vehicle was an astronomic \$30 to \$40 million dollars.<sup>156</sup> The Bugatti sale was brokered by a professional automotive auction house, because with such unique sales, it is not unusual for such transactions to remain private when both buyers and sellers typically like to remain anonymous.<sup>157</sup> This is a situation where the Kelly Blue Book would be of laughable value. Clearly this unique automobile is not a fungible asset and required the attention of special professionals.

If your client has a rare or vintage car — something of extraordinary value, but not necessarily the stratosphere shattering Bugatti — then only a qualified

professional will do. The expert automobile appraiser is the person whose finger is on the pulse of what buyers are paying at auction for cars like your client’s exotic super car. Only an expert appraisal will accurately determine what the true market value for such a car is.

Unless the situation is one of the rare “exotics,” normally valuing an automobile is an easy and efficient process. Because cars are so fungible, without much effort, you can determine a reasonably reliable estimate of value almost instantaneously. However, when your client’s situation is unique — i.e. where the car is not something easily fungible — the only option for you to pursue is an expert appraisal.

## XII. CONCLUSION

Properly assessing a business valuation can be one of the most challenging areas in the property side of a divorce. Having a firm understanding of both the standards of value and the methodologies employed is essential if your cases have a remotely complex property component. This paper’s goal in part is to provide the practitioner a primer on these areas. The second goal was to provide some guidance on valuation of two of the most common assets in a divorce – real estate and cars.

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<sup>156</sup> Dan Neil, *World’s Most Expensive Car: Sold!*, WALL STREET JOURNAL, May 4, 2010, <http://blogs.wsj.com/drivers-seat/2010/05/04/the-world%E2%80%99s-most-expensive-car-sold/>

<sup>157</sup> *Id.*