

**DISPROPORTIONATE DIVISION AND SPOUSAL MAINTENANCE
FOR THE NON-MONIED SPOUSE**

Presented by:

ERIC ROBERTSON, *Austin*
Goranson Bain Ausley, PLLC

Written by:

ESTHER R. DONALD, *Dallas & Plano*
Goranson Bain Ausley, PLLC

State Bar of Texas
45TH ANNUAL
ADVANCED FAMILY LAW COURSE
August 12-15, 2019
San Antonio

CHAPTER 37

ERIC ALLEN ROBERTSON
GORANSONBAIN AUSLEY
Attorney at Law
3307 Northland Drive, Suite 420
Austin, Texas 78731
(512) 454-8791
(512) 454-9091 Facsimile

EDUCATION

University of Texas at Arlington, B.A. in General Studies, 1982
University of Texas at Arlington, M.S. in Psychology, 1986
South Texas College of Law, J.D., 1991
Admitted to State Bar of Texas, 1992
Admitted to the Bar of New Mexico, 2015

PROFESSIONAL ASSOCIATIONS AND HONORS

Board Certified by Texas Board of Legal Specialization, Family Law, 1997
Listed in *The Best Lawyers in America*, Family Law Section, 2005-2018
2018 *Best Family Lawyer* – Austin
Listed in *SuperLawyers*, 2009 – 2018.
Fellow, American Academy of Matrimonial Lawyers
Delegate, Board of Governors of the American Academy of Matrimonial Lawyers 2018-2021
President, Texas Chapter of the American Academy of Matrimonial Lawyers 2016 - 2017
Texas Academy of Family Law Specialists
Member, State Bar of Texas
Member, State Bar of New Mexico
American Bar Association, Family Law Section
Past Chair- State Bar of Texas Grievance Committee, Districts 9A and 8
Texas Board of Legal Specialization, (Family Law, Legal Assistants) 2004-2007
Austin Bar Association (President, Family Law Section 2002-2003)

LEGAL SEMINARS & WRITINGS

Course Director, 2019 Annual Meeting of State Bar of Texas: Family Law Section CLE Course.

Speaker, 2018 Advanced Family Law Course. "*Tough Characterization Issues: Employment and Retirement Benefits.*"

Speaker, 2017 Advanced Family Law Drafting Course, "*Securing the Deal.*"

Speaker, 2017 Advanced Family Law Course, "*Daubert and Other Pre-Trial Matters.*"

Speaker, 2017 Innovations: Breaking Boundaries in Custody Litigation "*Children of Divorce-What You Need to Know.*"

Speaker, 2016 Advanced Family Law Course, "*Rights & Duties and the Legal Meaning of the Phrase 'Exclusive Right to Designate the Primary Residence'.*"

Chair of Drafting Committee and Contributor: State Bar Family Law Section's & Texas Family Law Foundation's *Annotated Texas Family Code.*

Speaker, 2015 Innovations: Breaking Boundaries in Custody Litigation "*Do You Have a Prescription for That?*"

Speaker, 2013 Advanced Family Law Course "*Declaratory and Summary Judgments.*"

Speaker, TAFLS 2012 Trial Institute, Las Vegas, Nevada.

Author and Speaker, 2012 Marriage Dissolution Institute 101, “*Client Management*”.

Author and Speaker, 2012, Marriage Dissolution Institute, “*Transitioning from the Collaborative Case-What you Really Need to Know*”.

Course Director, 2011 Advanced Family Law 101 (Boot Camp).

Speaker, 2008 Austin Bar Association Divorce Basics Seminar, “*Child Support.*”

Speaker, 2006 State Bar of Texas Annual Meeting, Family Law Section CLE Event, “*Property Division.*”

Author and Speaker, 2005 University of Texas School of Law 5th Annual Family Law on the Front Lines, “*Collecting Judgments.*”

Author and Speaker, 2005 State Bar of Texas Poverty Law Conference “*Child Support and Visitation Enforcement.*”

Speaker, 2004 Williamson County Bar Association Annual Family Law Seminar “*Preparing for the Temporary Orders Hearing.*”

Speaker, 2003 Williamson County Bar Association Annual Family Law Seminar “*Economic Contribution, Reimbursement, and Tracing.*”

Author and Speaker, 2003 University of Texas Continuing Legal Education Series Family Law on the Front Lines, “*How to Look Prepared, Even if You Just Met Your Client Yesterday.*”

Author and Speaker, 2000 State Bar of Texas Legal Assistant’s University “*Discovery for Family Law - One Year Later: How the New Rules Apply to Family Law*”

Author and Speaker, 1999 State Bar of Texas Legal Assistant’s University “*Modification in Family Law Cases.*”

Speaker, 1999 Advanced Family Law Course “*Securing and Collecting What Your Client Got.*”

Author, 1998, Winning Techniques in Family Law Litigation “*In the Trenches.*”

CAREER PROFILE

Juvenile probation officer in Travis County, Texas from 1985 - 1988

Partner, Robertson and Robertson, 1993 - 1998

Associated with Ausley & Algert, L.L.P., August, 1998

Partner, Ausley, Algert, Robertson & Flores, L.L.P., 2000 – 2017

Partner, GoransonBain Ausley, 2017 - Present

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. DISPORPORTIONATE DIVISION..... 1

 A. Just and Right Division 1

 B. Murff v. Murff..... 2

 C. Cases following Murff..... 2

 1. Education/Earning Power/Age/Benefits Derived from Continuation of the Marriage..... 2

 2. Length of Marriage 3

 3. Health of the Spouses 3

 4. Debts and Liabilities 3

 5. Tax consequences of division..... 3

 6. Size of Separate Estates 3

 7. Adultery 3

 8. Cruelty 3

 9. Physical Abuse/Injuries Caused by Spouse 3

 10 Criminal Behavior 3

 D. Pleading for a Disproportionate Division..... 4

III. SPOUSAL MAINTENANCE..... 4

 A. Statutory Framework..... 4

 B. Eligibility for Maintenance..... 4

 C. Duration of Maintenance..... 4

 D. Amount of Maintenance 5

 E. Termination of Maintenance 5

IV. CONCLUSION 5

EXHIBIT A..... 7

EXHIBIT B 9

DISPROPORTIONATE DIVISION AND SPOUSAL MAINTENANCE FOR THE NON-MONIED SPOUSE

I. INTRODUCTION

What does property division look like in the popular mythology? Picture a *New Yorker* cartoon with a sad looking panhandler. He is barefoot and dressed in rags. The caption: “Lost it all in the divorce.”

In Texas, however, this outcome is far from likely. The higher wage-earning spouse enjoys a presumptive right to 50% of the community estate, along with an expectation of 100% of his own comfortable salary and income after the divorce is final. The outlook for the non-monied spouse is not nearly as bright. She may be a “SAHM” (stay-at-home-mom) who has been out of the workforce for years or decades. She may have invested considerable time and effort throughout the marriage supporting and elevating her husband’s career. And she comes into your office with little to no income, and without much future earning potential.

This paper will discuss statutes and case law that can be used to level the playing field for the non-monied spouse. We hope you will utilize it as a reference and reminder of tools available to secure an award of spousal maintenance and/or a disproportionate division of assets in your non-monied client’s favor.

The authors have attempted to avoid gender stereotypes whenever possible, but it is no secret that the lower wage earner in most marriages has traditionally been the wife. While still true in most cases, the paper will refer to “your client” whenever possible, without using gender-specific pronouns.

Thanks and acknowledgements to Cindi Barela Graham of Amarillo and Heather Ronconi of El Paso. Inspiration and information for this paper came from Graham’s 2016 paper entitled “Pleading for and Getting a Disproportionate Division” and Ronconi’s 2018 paper entitled “For Richer or Poorer: Temporary Spousal Support, Spousal Maintenance and Alimony.” Thanks also to our partner Kathryn Murphy and our associate Lindsey Obenhaus, both of whom supplied research and information for this article. Practitioners should consult Murphy’s Marriage Dissolution Institute paper entitled “Reimbursement, Fraud, Waste and the Reconstituted Estate” for a detailed analysis of fraud claims that goes beyond the scope of this paper.

II. DISPORPORTIONATE DIVISION

A. Just and Right Division

The Texas Family Code (TFC) allows our judges a great deal of leeway in dividing the community estate. In providing the general rule for property division, TFC §7.001 states: “In a decree of divorce or annulment, the court shall order a division of the estate of the parties in a manner that the court deems *just and right*, having due

regard for the rights of each party and any children of the marriage.” *TFC §7.001(emphasis added)*.

This just and right division can be a 50/50 split of the marital estate, but that is far from required. Instead, a just and right division can often be disproportionate, as long as the circumstances justify awarding more than half of the estate to one spouse. *Logsdon v. Logsdon*, 2015 WL 7690034 (Tex. App. – Fort Worth 2015, no pet.) (when wife committed fraud on the community, a disproportionate division of the estate was upheld, in the ratio of 57.6% to husband versus 42.4% to wife); *Garcia v. Garcia*, No. 02-11-00276-CV 2012 WL 3115763 (Tex. App. – Fort Worth 2012, no pet.) (mem. op.) (wife was awarded 68% of the community estate due to husband’s fraud on the community, among other factors); *Neyland v. Raymond*, 324 S.W.3d 646 (Tex. App. – Fort Worth 2010, no pet.).

This latitude extends to TFC §7.007, which dictates the application of “equitable principles” in the consideration of reimbursement claims and applies the same parameters as TFC §7.001 when making orders regarding the reimbursement claim: “... just and right, having due regard for the rights of each party and any children of the marriage.” *TFC §7.007*.

With such broad discretion and such an expansive standard, Courts have weighed many different factors when considering how to divide community property. Some of those factors are based on equitable principles, while others are fault-based. Although certain fact patterns come up more frequently, there is no limit to the kinds of arguments a savvy practitioner can assert on behalf of a non-monied client. If the opposing party has committed bad acts that contributed to the demise of the marriage or to the reduction of the community estate, by all means include those in your pleadings and argument to the court. And do not shy away from “need based” arguments. A Judge might be persuaded that your facts not only justify but actually require a disproportionate division of the estate in order to achieve a result that is just and right.

There is an old saying that “a good lawyer knows the law; a great lawyer knows the Judge.” Sarcasm aside, it is important to know the court and the jurisdiction when you are assessing the likely success of a request for disproportionate division. For example, it would stand to reason that an affluent suburban county might see more frequent and higher disproportionate awards in favor of SAHMs and homemakers who have been out of the workforce throughout most of the marriage. Those Judges are used to seeing divorcing families in which the mother stayed home to drive carpool and raise the kids while the father used those same years to build his career and his earning power. When representing the wife in one of these divorces, your hope is that you will have a Judge who realizes it is just and necessary for Mom to receive a greater share of the estate in the divorce. This avoids post-divorce

inequities that would negatively impact Mom and her ability to care for her children and is consistent with the purposeful vagueness of TFC §7.001.

This paper will provide you a sampling of cases that have applied the just and right standard in awarding a disproportionate division. But no list would be complete, or even possible, without an initial examination of the Texas Supreme Court's 1981 decision in *Murff v. Murff*.

B. *Murff v. Murff*

Murff v. Murff, 615 S.W.2d. 696 (Tex. 1981) is the ultimate Texas authority on disproportionate property division. The Court cites a long list of cases establishing a variety of factors that can support a disproportionate division. The *Murff* opinion acknowledges the importance of those cases, which are included in a lengthy footnote, proclaiming:

Numerous courts of civil appeals decisions have recognized that a trial court may consider the disparity of incomes or of earning capacities of the parties in dividing the estate of the parties.¹ The cases cited in the margin recognize that community property need not be equally divided.... These cases further indicate that the trial court may consider such factors as the spouses' capacities and abilities, benefits which the party not a fault would have derived from continuation of the marriage, business opportunities, education, relative physical conditions, relative financial condition and obligations, disparity of ages, size of separate estates, and the nature of the property. We believe that the consideration of such factors by the trial court is proper in making a "just and right" division of the property. Likewise, the consideration of a disparity in earning capacities or of incomes is proper and need not be limited by "necessitous" circumstances. *Id.* at 699.

By stating that trial courts may consider "such factors," it is clear that SCOTX did not intend the factors actually enumerated in *Murff* ("spouses' capacities and abilities, benefits which the party not at fault would have derived from continuation of the marriage, business opportunities, education, relative physical conditions, relative financial conditions and obligations, disparity of ages, size of separate estates, and the nature of the property") to be exclusive. *Murff* sends an invitation to the creative family lawyer to look closely at the facts of your case and argue the equities that favor your client's receipt of over 50% of the estate. Particularly when you represent the non-monied spouse, you should take this invitation, and opportunity, seriously.

The *Murff* Court concluded its opinion as follows:

The trial court in a divorce case has the opportunity to observe the parties on the witness stand, determine their credibility, evaluate their needs and potentials, both social and economic. As the trier of fact, the court is empowered to use its legal knowledge and its human understanding and experience. Although many divorce cases have similarities, no two of them are exactly alike. Mathematical precision in dividing property in a divorce is usually not possible. Wide latitude and discretion rests in these trial courts and that discretion should only be disturbed in the case of clear abuse. *Id.* at 700.

The following cases have built upon the platform of the *Murff* decision. We have divided them into categories for ease of reference. But these categories are not exhaustive, and our hope is that they will inspire you to come up with creative categories of your own to trigger the Court's "human understanding and experience" in service of the needs and rights of the non-monied spouses you represent.

C. Cases following *Murff*

While we again want to emphasize that factors to support disproportionate division are limited only by your imagination (and the facts of your case), most factors do break down into one of two categories: need-based and fault-based. The cases below provide some useful examples of each of these types of decisions, with the need-based factors listed first. Of course, fraud is a significant fault-based factor that is used to justify a disproportionate division. However, it is a very detailed and complex topic and deserves analysis that is beyond the scope of this paper. Other papers have explored the topic of fraud in depth, as noted in the Introduction to this paper.

NEED-BASED FACTORS:

1. Education/Earning Power/Age/Benefits Derived from Continuation of the Marriage
 - *Lynch v. Lynch*, 540 S.W.3d 107 (Tex. App.—Houston [1st Dist.] 2017, rev. denied Dec. 14, 2018) (Disproportionate division due to inequity between younger, high wage-earning husband as compared with an older wife with lack of a college education, a 28-year gap in employment, and unsuccessful attempts to find a job).
 - *Halleman v. Halleman*, 379 S.W.3d 443 (Tex. App.—Fort Worth 2012, no pet.) (Husband awarded 76% and Wife awarded 24%).
 - *Loaiza v. Loaiza*, 130 S.W.3d 894 (Tex. App. —Fort Worth 2004, no writ) (Wife awarded 77% and Husband awarded 23%).
 - *Garcia v. Garcia*, 170 S.W.3d 644 (Tex. App. —El Paso 2005, no pet.) (Wife awarded 62% and

Husband awarded 38%).

2. Length of Marriage

- *Cappellen v. Cappellen*, 888 S.W.2d 539 (Tex.App.—El Paso 1994, writ denied).
- *Vannerson v. Vannerson*, 857 S.W.2d 659 (Tex.App.—Houston [1st Dist.] 1993, writ denied).
- *Massey v. Massey*, 807 S.W.2d 391 (Tex.App.—Houston [1st Dist.] 1991, writ denied).

3. Health of the Spouses

- *Garcia v. Garcia*, 170 S.W.3d 644 (Tex. App. —El Paso 2005, no pet.) (Wife awarded 62% and Husband awarded 38%).

4. Debts and Liabilities

- *Walston v. Walston*, 971 S.W.2d 687 (Tex. App. – Waco 1998, pet. denied) (community liabilities must be considered in division of estate).
- *In re Marriage of Jeffries*, 144 S.W.3d 636 (Tex. App. – Texarkana 2004, no pet.) (court erred by failing to consider liabilities in determining a just and right division).
- *Monroe v. Monroe*, 358 S.W.3d 711 (Tex. App. – San Antonio 2011) (husband awarded a disproportionate share of assets to offset debts and to account for husband’s contributions of separate property to community estate throughout marriage).

5. Tax consequences of division

- *Loaiza v. Loaiza*, 130 S.W.3d 894 (Tex. App. Ft. Worth 2004, no writ) (Wife awarded 77% and Husband awarded 23%).

6. Size of Separate Estates

- *Garcia v. Garcia*, 170 S.W.3d 644 (Tex. App. —El Paso 2005, no pet.) (Wife awarded 62% and Husband awarded 38%).
- *Lucy v. Lucy*, 162 S.W.3d 770 (Tex. App. – El Paso 2005, no pet.) (Wife awarded 73% and Husband awarded 27%).

FAULT-BASED FACTORS:

7. Adultery

- *Abernathy v. Fehlis*, 911 S.W.2d 845 (Tex. App.—Austin 1995, no writ) (Disproportionate division justified by Husband’s adultery, which caused the

breakup of the marriage).

- *In re Marriage of C.A.S.*, 405 S.W.3d 373 (Tex. App. – Dallas 2013, no pet.) (Adultery can support a disproportionate division even if it began after the parties separated and did not cause the breakup of the marriage).
- *Loaiza v. Loaiza*, 130 S.W.3d 894 (Tex. App. — Ft. Worth 2004, no writ) (Because of Husband’s adultery and wasting of community assets, Wife awarded 77% and Husband awarded 23%).
- *Chafino v. Chafino*, 228 S.W.3d 467 (Tex. App. – El Paso 2007, no pet.) (Disproportionate division in Wife’s favor justified by Husband’s adultery, which caused the breakup of the marriage).
- *Halleman v. Halleman*, 379 S.W.3d 443 (Tex. App. – Fort Worth 2012, no pet.) (Wife’s adultery, which caused the breakup of the marriage, justified disproportionate division in favor of Husband. Husband awarded 76% and Wife awarded 24%).

8. Cruelty

- *Kaley v. Kaley*, No. 14-17-00768-CV, 2019 WL 2097490 (Tex. App. – Houston [14th Dist.] May 14, 2019) (Disproportionate division justified by the fact that wife had obtained a stalking protective order against husband and by husband’s extreme cruelty, including placing tracking devices on wife’s car, trespassing into wife’s residence, and sending hundreds of hateful emails and texts to wife daily).
- *Villalpando v. Villalpando*, 480 S.W.3d 801 (Tex. App.—Houston [14th Dist.] 2015, no writ).
- *Wells v. Wells*, 251 S.W.3d 834 (Tex. App. – Eastland 2008, no pet.).
- *In the Matter of the Marriage of Bacerra*, 100 S.W.3d 637 (Tex. App.—Texarkana 2003, no writ) (Gifts to other women considered cruelty).

9. Physical Abuse/Injuries Caused by Spouse

- *Faram v. Gervitz-Faram*, 895 S.W.2d 839 (Tex.App.—Fort Worth 1995, no writ).
- *Finch v. Finch*, 825 S.W.2d 218 (Tex.App.—Houston [1st Dist.] 1992, no writ).
- *Garcia v. Garcia*, 170 S.W.3d 644 (Tex. App. – El Paso 2005, no pet.) (Wife awarded 62% and Husband awarded 38%).

10. Criminal Behavior

- *Bradshaw v. Bradshaw*, 555 S.W.3d 539 (Tex. 2018) (Wife awarded a disproportionate interest in marital residence because husband had been convicted of using home to sexually abuse wife’s

daughters).

D. Pleading for a Disproportionate Division

In order to argue for a disproportionate division for your client, you must plead for it. We have provided an “Easy Reference Guide” of need-based and fault-based factors in Exhibit A attached hereto. Take these as inspiration, use your experience and creativity to add to the list, but obviously only plead the factors that work with your specific facts.

As you set forth these factors and/or any others that benefit your case, be careful not to plead the evidentiary basis of the factors in great detail. Grounds for disproportionate division often creep dangerously close to “inflammatory allegations of marital misbehavior” that is discouraged by TFC §6.402(a). *TFC§6.402 comment (Vernon 2015)*. When pleading for a disproportionate division, stick to the factors and save your facts for the courtroom.

III. SPOUSAL MAINTENANCE

A. Statutory Framework

When you represent the non-monied spouse in a divorce, assessing eligibility for spousal maintenance should also be on your checklist. While Texas is not generous with spousal maintenance, there can be facts and circumstances that warrant a maintenance award under TFC §8.001. Spousal maintenance is defined as periodic post-dissolution payments from the future income of one spouse for the support of the other spouse. *TFC §8.8001(1)*. It is not intended as a punishment for the higher wage-earning spouse, but instead is conceived as a method for providing limited support for a non-monied spouse during the transition period after divorce. Under limited circumstances, spousal support can be ordered to provide for SAHMs or long-term homemakers, disabled spouses, spouses who care for disabled children of the marriage, or spouses affected by family violence. If your client falls into any of these categories, a pleading for spousal maintenance may be worth pursuing.

A handy one-page Quick Summary of Spousal Maintenance is attached as Exhibit B to this paper, copied with permission from *Family Law at your Fingertips* by Kathryn Murphy (published by the Family Law Section of the State Bar of Texas, 2017). The remaining sections of this paper explore the topic in more detail.

B. Eligibility for Maintenance

In order to be eligible for spousal maintenance, your client must lack sufficient property (from the community or separate) to meet her minimum reasonable needs. In addition, one of the following must be true:

1. Family violence (conviction or deferred adjudication for a criminal offense) occurred during the pendency of the divorce or within the two years before filing; OR
2. Your client has an incapacitating mental or physical disability; OR
3. The marriage lasted at least ten years from date of marriage to date of divorce, AND your client lacks ability to earn enough income to meet her minimum reasonable needs; OR
4. Your client is custodian of a child of the marriage (regardless of the child’s age) who has a mental or physical disability that requires substantial care and personal supervision, preventing the parent from earning enough to meet her minimum reasonable needs.

TFC §8.051.

As with a just and right division analysis, the court assesses the facts of each particular case to define “minimum reasonable needs.” *Howe v. Howe*, 551 S.W.3d 236 (Tex. App. – El Paso 2018, no pet.) Minimum wage is not the standard, but instead courts typically look at the party’s ability to pay for living expenses including utilities, car, insurance, gas, groceries, uncovered medical expenses, drugs and medicine, clothing, credit cards, and credit union dues, among other basics. *In re Marriage of Hale*, 975 S.W.2d 694 (Tex. App. – Texarkana 1998, no pet.). Whether or not the party lacks sufficient property or income to meet these needs is also a question for the court, and evidence must be presented as to the nature and value of property to be received in the divorce, the nature and value of separate property (if any), the amount of monthly income available, and the amount of monthly expenses. Be prepared to present evidence on these points to justify a spousal maintenance award. If the spousal maintenance claim is based on a lack of ability to earn sufficient income, it will also be necessary to present evidence that a diligent effort has been made to earn sufficient income or develop marketable skills. *TFC §8.053(a)*.

C. Duration of Maintenance

Except in situations involving an incapacitating physical or mental disability, the duration of the marriage dictates the limits on the duration of a spousal maintenance award. Unless there is a finding of family violence under TFC 8.051(1), spousal maintenance cannot be ordered for marriages of less than 10 years. With a family violence finding (in a marriage of less than 10 years), or if the marriage lasted between 10 and 20 years, there is a 5-year limit on any maintenance award. If the marriage lasted between 20 and 30 years, then the maintenance award cannot exceed 7 years. And for marriages of 30 years or longer, the maximum

duration of a maintenance award is 10 years. This said, the Family Code explicitly prescribes that spousal maintenance orders should be limited to the shortest reasonable duration that allows the recipient to begin earning sufficient income to provide for her minimum reasonable needs, except when there is a physical or mental disability, duties of caring for an infant or young child of the marriage, or other compelling impediments. *TFC* §8.054(a).

D. Amount of Maintenance

Monthly payments of court-ordered spousal maintenance are capped at the lesser of \$5,000 or 20% of the paying spouse's average monthly gross income. *TFC* §8.055(a). Section 8.055 goes on to itemize what can be included in the computation of gross income (wages, salary, commissions, overtime pay, tips, bonuses, interest, dividends, royalty income, self-employment income, net rental income, severance pay, retirement benefits, pensions, trust income, annuities, capital gains, unemployment benefits, interest income from notes, gifts, prizes, maintenance, and alimony). This Code section also outlines a specific list of items which are not to be included in gross income (return of principal or capital, accounts receivable, public assistance, payments for foster care, veteran's disability, SSI, social security benefits, disability benefits, and workers' compensation).

E. Termination of Maintenance

A spousal maintenance award is modifiable by the court, similar to the modification of an award of child support. *TFC* §8.057.

Absent modification, a spousal support obligation terminates:

1. Upon a finding that the obligee is cohabiting with a romantic partner in a permanent place of abode on an ongoing basis; OR
2. Upon the remarriage of the obligee; OR
3. Upon the death of either party.

TFC §8.056.

IV. CONCLUSION

When you represent the non-monied spouse, a straight 50/50 property division is rarely "just and right" for your client. Texas Family Code §7.001 provides the basis for a disproportionate division, and *Murff* and its progeny can help you plead and advocate for creative paths that will lead to a more favorable financial outcome for your client.

Alternatively or in addition, post-divorce spousal maintenance through Texas Family Code §8.001 can be available to the non-monied spouse. When circumstances warrant, utilize this option to help your client reach more stable financial ground after leaving a

lengthy marriage without adequate resources or abilities to immediately provide for herself.

Both these tools require you to employ creativity and advocacy in your pleadings and in the courtroom. Recalling *Murff*, you will need to empower the court to "use its legal knowledge and its human understanding and experience" to come to the aid of the non-monied spouse. We hope this paper helps you in that effort.

EXHIBIT A***EASY REFERENCE GUIDE:***
**SOME FACTORS SUPPORTING A DISPROPORTIONATE DIVISION
IN FAVOR OF THE NON-MONIED SPOUSE****1. Factors Based on Need**

- a. Children (especially with special medical, emotional or educational needs or disabilities)
- b. Education of the spouses
- c. Employability (consider cost of outside childcare if spouse enters workforce)
- d. Disparity of earning power
- e. Business opportunities of the spouses
- f. Size and nature of separate estates
- g. Health and physical condition of the spouses
- h. Ages of the spouses
- i. Length of the marriage
- j. Need for future support
- k. Nature of the marital property
- l. Liquidity and income production
- m. Tax consequences of the property division
- n. Debt/liabilities to be divided
- o. Expected inheritance of one spouse

2. Factors Based on Wrongdoing

- a. Fault in the breakup
- b. Benefits the innocent spouse may have derived from continuation of the marriage
- c. Adultery
- d. Cruelty/Abuse
- e. Actual fraud on the community
- f. Constructive fraud
- g. Wasting of community assets by one spouse
- h. Torts committed by one spouse against the other
- i. Excessive gifts of community property
- j. Criminal behavior (consider costs of legal defense/loss of community income)
- k. Increase in value of separate estate due to time/talent/labor/effort diverted from community pursuits

EXHIBIT B**ALIMONY/SPOUSAL MAINTENANCE****QUICK SUMMARY**

- A. **Eligibility** – Spousal maintenance can be ordered only if spouse seeking maintenance **will lack sufficient property (including separate property) to provide for his/her minimum reasonable needs AND:**
1. Family violence occurred within 2 years before suit filed or while suit is pending;
OR
 2. **one** of the following applies to spouse seeking maintenance:
 - a. Inability to earn sufficient income to provide for minimum reasonable needs because of an **incapacitating physical or mental disability**; OR
 - b. **10 year marriage** and spouse **lacks ability to earn sufficient income** to provide for minimum reasonable needs; OR
 - c. Spouse is **custodian of a child of the marriage of any age who requires substantial care and personal supervision** because of a physical or mental disability that prevents spouse from earning sufficient income to provide for minimum reasonable needs.

B. **Duration of Maintenance (Except Disability Situations)**

<u>Duration of Marriage</u>	<u>Maximum Duration</u>
Under 10 yrs (fam. violence)	5 years
10 - 20 years	5 years
20 - 30 years	7 years
30+ years	10 years

- C. **Amount of Maintenance** – Cannot exceed lesser of \$5,000 or 20% of average monthly gross income.