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Evaluating a Divorce Settlement

by Alan C. Eidsness and Jaime Driggs

Sizing up a potential settlement in a divorce case typically involves studying a balance sheet and cash flow schedules or reviewing language on custody or for a parenting plan. With so many moving pieces, it is easy to get bogged down in the details especially in the midst of a settlement negotiation. But if we set the paperwork aside and take a step back to evaluate the deal as a whole, there are often a number of important considerations at play, many of which only become apparent when we move beyond the details and examine the big picture. And we see even more when we think through the deal not just from our client's standpoint but also from the other side.

Liquidity—Not all dollars on a balance sheet are created equal. Cash may be especially valuable to a client who wants to start a business, a client who has poor credit, a client who wants to delay drawing on a pension, or a client who needs cash to have peace of mind. A settlement that provides such clients less assets but more cash may be a price they are willing to pay.

Attorneys' Fees—Sometimes victory comes with a price. Aside from the fees that your client will incur in obtaining relief in court on a given issue,



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remember that the relief itself may end up meaning further litigation in the future and, therefore, more attorneys' fees. For example, in a case where spousal maintenance is a close question, prevailing on a claim means financial support, but it also means that the recipient is going to need to continue to deal with the payor in the future on modifications, COLA requests and upon retirement. A proposal to buy-out maintenance that seems inadequate at first glance is perhaps a good deal when those future litigation costs are considered. The payor will have the same litigation costs and may be inclined to pay more for a buy-out if he takes those costs into account.

Is there really a disagreement?—Sometimes what appear to be sharp disagreements on the surface are not quite as divergent and perhaps disappear after probing further. Take, for example, the dad who tells his attorney that he wants joint custody of the parties' three-year-old son. Mom tells her attorney that she wants sole custody. But in questioning each party further, dad's attorney learns that dad thinks it is best for the child to continue living primarily with mom until he starts school and mom's attorney discovers that mom plans on resuming her demanding management position when that happens and plans to rely heavily on dad who is self-employed and has a flexible schedule.

Is it something your client was going to do anyway?—Sometimes what seems like a one-sided obligation turns out to not be a concession at all since your

client was planning on doing it anyway. For example, contributing to a college savings plan or paying for the cost of a special activity may be easy things to agree to do if your client was already planning on them. On the other hand, if the obligation is one that a court could not impose such as paying for college, that is something that is worthy of compensating in some way.

Does your client actually want what they think they want?—A client tells you that she insists on keeping the marital homestead to provide a stable home for the children. But does she really want to deal with the upkeep and the expense, especially now that she is going to be a single parent? Are the children especially sensitive or attached to the home or is she projecting her own attitudes onto them? Will she get stuck with the commission on the home when it sells by hanging on to it now? Even things that may look good on paper can end up not being such a good idea. The neutral appraisal comes back for your client's home and he is angry because it is too high. After plugging the value into the balance sheet and seeing the impact on the division of assets, he tells you it makes more sense for him to just sell the house. But does he really want to search for a new house and move?

Is your client really willing to do what it takes to prove their claim?—The guiding principle against which we often measure a settlement proposal is what a court would decide. But going to court to obtain that decision comes with a price above and beyond your attorney's fees. Litigation is stressful. Is your client

willing to subject themselves to testifying in court? Even if the facts are on your side, is your client willing to subject the witnesses they need to call to prove those facts to testifying in court? Litigation is divisive and can transform a failed relationship into a toxic relationship. Has your client thought through the fall-out from litigating custody, even if they obtain the decision they want? Litigation is time-consuming and distracting. The finality of a settlement might allow a self-employed client to devote more attention to their business and earn more than the amount in dispute.

How is your client going to feel about the deal they made?—Most of us groan when we hear a client tell us that their position is a matter of “principle” but in some instances doing what “feels right” may not be as crazy as it first appears. Take, for example, the client who is dead-set against paying spousal maintenance even though you think his chances of avoiding it are minimal. After an exhausting mediation session, you are on the verge of negotiating a great deal that requires your client to pay a modest amount for only a limited period of time subject to a *Karon* waiver. Your client understands how great the deal is, you’ve explained that a court could not do what is being offered, but he still cannot bring himself to agree to pay her. If a judge ordered him to pay her, he explains, that would be different because then he would be obeying the law but he cannot agree to pay her. Our clients are the ones who have to live with the agreements we help them make. A settlement that our client would end up resenting is not a good deal no matter how much we think it makes sense. Conversely, a client may want to accept a proposal that we think is too generous because they will be able to look in the mirror at the end of the day and feel like they did the right thing.

Taxes—We regularly consider taxes when calculating spousal maintenance or looking at retirement assets on a balance sheet that constitute “pretax” dollars, but taxes can also come up in less subtle ways. For example, your client was unexpectedly laid off two years after entry of the judgment and decree and cannot find a new position. After looking at the facts, you conclude he’s got a slam dunk claim to reduce his substantial spousal maintenance obligation and bring a motion right away. You then remember the alimony recapture rules and realize that if the judge grants your motion, your client will have a significant tax problem.

The balance sheets and other forms we routinely use in our practices help us cover the essential elements of an agreement but they usually do not provide everything we need to fully analyze a potential settlement. Evaluating how an agreement fulfills our client’s goals normally requires the 10,000 foot perspective that you cannot get from the paperwork alone and often involves our best effort to look into the future. Our clients are complex and unique and the considerations described above are just a few examples of what may be relevant in each case.

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