



PREPARING FOR THE DIVORCE TRIAL

BY PATRICIA M. OUELLETTE

Dear Client:

It has now been about eighteen months since we first met. Your expectations and decisions regarding settlement have changed substantially since that time. Initially you just wanted me to draft a Judgment of Divorce consistent with what you and your husband had discussed. The marital estate consisted of retirement plans, investment accounts, a marital home and two businesses your husband had established during the marriage: a printing company a mobile home park. At that time you were not employed and had been out of the work force for about 10 years raising your children. You had enrolled at a local college in preparation of reentering the work force.

When your husband announced he wanted a divorce, you were devastated. At that time, you were convinced that your husband's businesses had no value and that you both had reached a tentative agreement wherein you would receive the marital home, worth approximately \$400,000 with a \$200,000 mortgage and 50% of your \$350,000 investment account. You would keep your teachers retirement plan. Your husband would retain the two businesses and his retirement plan. He would pay for one year of college.

You asked me to draft the Judgment of Divorce pursuant to the tentative settlement with your husband, but as an after thought, requested my opinion on the settlement. We discussed at length, the potential value of your husband's businesses, the potential claim for alimony, and the division of assets.



At that time, you decided not to accept the settlement until we could determine the value of the businesses. Unfortunately, this was not viewed kindly by your husband. We then proceeded with formal discovery.

Discovery

During the discovery process, we sent interrogatories and requests for the production of documents to your husband. We asked him several questions regarding the inception of his businesses, the cause of the breakdown of the marriage, any property he deemed was his separate property and/or inherited as well as requesting him to produce income tax returns, balance sheets and financial statements, for his businesses and other business and personal records.

ABC Printing Company

Through this process, we were able to obtain the business records as well as the Buy Sell Agreement for ABC Printing Company. Your husband owns 60% of the company and his partner owns 40%. The Buy Sell Agreement was signed only by your husband and provided that in the event of divorce he was required to sell his share to his partner for \$50,000. The agreement also provided that the majority shareholder (your husband) had discretion to adjust the selling price.

You had expressed frustration during the discovery process because of the difficulty we had obtaining the requested records and the necessity of the court procedures required to get your husband to comply. You were concerned about the cost of attorney fees and could not understand the reason why we needed so much documentation. At that time, I told you that it would be impossible for our expert, to value the business without the requested documentation and that the businesses could be worth substantially more than you initially thought. Our expert valued the printing company at \$900,000 resulting in a value of \$540,000 for your husband's 60% share. Thus, I believe that the time and effort in obtaining the requested documentation was well spent.

Further, if we did not settle, then at trial we would be required to prove the value of the business. In order to accomplish this, we had to retain an expert and allow that expert the tools she needed to testify about the valuation.



Country Home Estates Mobile Home Park

The mobile home park was valued at \$6 million. Your husband maintains that the mobile home park is not a marital asset, since he inherited the property on which the park was built from his father. However, you informed me that you helped contact and monitor contractors who built the park, did the books for the park, and collected the rents. When your husband inherited the property it was only worth about \$100,000. We discussed the inclusion of this asset and the hurdles that we had to overcome. Although I cannot guarantee that the Judge will see things our way, with the value of this asset and the contributions you made to its appreciation during the marriage, I believe that at least some portion will be included.

Depositions

In addition to the documents we received, we also took your husband's deposition, his partner's deposition and the deposition of your husband's expert. Your husband's attorney took your deposition, our expert's deposition and your husband's CPA.

You were very nervous about your deposition, and at times, became a bit confused. However, I think that you did a fine job and we were able to correct the misstatements. When we prepared you for your deposition, I told you that it was very important for you to answer honestly and that if you

did not understand a question, to ask the person to repeat the question.

Mediation

After discovery was completed, we attended a mediation session in an attempt to settle the case. The mediation session was conducted by Jane Smith, who was chosen by me and your husband's attorney. We chose Jane because she practices extensively in the family law area and is able to settle some very complex and difficult cases. During mediation, we were successful in resolving the following issues:

- Division of the personal property;
- Division of the retirement plans; and
- Value of the marital home and the investment accounts.

Unfortunately, even after spending two mediation sessions, we were not able to settle the following issues:

- Length and amount of monthly spousal support;
- Value of the mobile home park;
- Determination of whether or not the mobile home park was a marital asset;
- Value of the printing company;
- Whether or not the Buy Sell Agreement is a valid agreement.

The following is a chart of the marital assets that we intend to present at trial. This chart compares our marital estate with your husband's.

Doe v Doe Asset Summary			
	Wife	Husband	Difference
Marital Residence	400,000	400,000	
Mortgage	<u>(200,000)</u>	<u>(200,000)</u>	
Net Equity	200,000	200,000	0
Investments	350,000	350,000	0
Country Estates Mobile Home Park	6,000,000	Not Marital	6,000,000
ABC Printing Company – 60% of total value of \$900,000	540,000	50,000	490,000
Personal Property	Divided at Mediation		
Automobiles	Divided at Mediation		
Retirement Plans	Divided at Mediation		
Total	7,090,000	600,000	6,490,000



Spousal Support

One of the issues in question for trial is whether or not you should receive spousal support. The Court will consider the following factors in deciding to award spousal support.

- Past relations and conduct of the parties;
- Length of the marriage;
- Abilities of the parties to work;
- Source and amount of property awarded to the parties;
- Ages of the parties;
- Ability to pay spousal support;
- Present situation of the parties;
- Needs of the parties;
- Parties health;
- Prior standard of living of the parties; and whether either party is responsible for the support of others;
- Contributions to the parties joint estate; and
- General principals of equity.

When you testify at trial, I will be asking you questions regarding the above factors to establish our position that spousal support is warranted. Certain factors mentioned above can be easily established and I doubt that your husband will disagree, such as the length of the marriage, the party's ages and health, since you are both in good health at this time.

The other factors will be established by either testimony from you, your husband or the experts. Therefore, I will ask you questions regarding your ability to work, your job searches, your health and what types of jobs you are qualified for. In addition, I will ask you questions regarding your standard of living during your marriage, what you were able to afford, the vacations you took, etc.

You were formerly employed as a teacher approximately 10 years ago. During the pendency of the divorce, you chose to return to school and take additional classes in an effort to update your resume and apply for teaching jobs. You have sent over 100 resumes to various school systems and have only had two interviews thus far, with not one job offer. I will ask you to explain this to the Court.

I will also focus on the years of the marriage and the contributions that you made. For example, we discussed during the early stages of your marriage before your husband's businesses got off the ground, that you worked as a teacher to help support the family and then came home and helped your husband manage the books and records for his companies as well as take care of the children. You were also primarily responsible for all of the household tasks so that your husband could spend the hours necessary to build his businesses. I will ask you about those early years and the times where your husband would not get home until 1:00 a.m. During that period, you informed me that you had attended all parent-teacher conferences, made sure the

children were healthy and would take them to the doctor if necessary, did all of the grocery shopping, performed your husband's clothes shopping, helped your husband with the business books, made sure the oil in the vehicles was always changed, handled all necessary maintenance and repairs on the house, mowed the lawn, etc.

Although I may ask you some questions regarding your needs, your income and your husband's income, I will also ask your CPA the same questions. Therefore, there is no reason for you to memorize your income tax returns for the past 10 years. If I ask you a question about your income answer honestly but if you don't know, don't try to guess.

I computed alimony guidelines, which give us a range based upon certain factors of what your spousal support may be. The judge is not required to follow these guidelines and will listen to all of the evidence and testimony before a decision is made.

Asset Values & Division

The major discrepancies involve your husband's two businesses – Country Estates Mobile Home Park and ABC Printing Company. Thus we will spend the most time preparing for trial on the businesses.

Country Estates Mobile Home Park

Your husband maintains that because he was gifted the land on which the mobile home park was built, that this is not a marital asset. Consequently, I will be asking your husband questions regarding when the land was gifted, the value of the land, whether gift tax returns were filed for this gift, etc. I will also ask you those same questions as well as give you the opportunity to comment on the late nights your husband spent at Country Estates Mobile Home Park and your contributions with the building of the mobile home park and the numerous duties you performed so that he could be away from home working.

Since Country Estates Mobile Home Park has already been built and is relatively easy to manage, this may be an asset that the Judge would divide. I have cautioned you regarding owning an asset jointly with an ex-spouse, especially in a situation where the divorce has been acrimonious.

ABC Printing Company

Our expert has appraised ABC Printing Company at \$900,000 and your husband owns 60% of this company. However, he submitted a Buy Sell Agreement that was only signed by him, dated after the Complaint for the Divorce was filed, substantiating that he was required to sell his share of the business to his partner who has a 40% interest for not more than \$50,000, if he ever was involved in a divorce. Further, the agreement provided that the majority



shareholder would have discretion over the purchase price, which would be your husband. My concern is that this contract is a direct result of the divorce. Consequently, I will ask you questions, your husband questions and his partner questions regarding the circumstances surrounding the Buy Sell Agreement.

It would not be practical for you to be awarded the 60% ownership in ABC Printing. You are not familiar with the company, you do not understand how the company operates and your husband's partner has clearly indicated that if you were to be awarded the company, then he would no longer work there. Thus this assets will probably be awarded to your husband with some offset for its value.

Marital Residence

I understand that you would like to retain the marital residence. Since you and your husband agree on the value this may be something that could be used to offset ABC Printing. In our Trial Brief, we have requested that you retain the marital residence and that your husband retain ABC Printing and that he pay you the difference in value 10-year period with an interest rate of 5%.

The decision of the division of the assets and the value of the assets will now be in the Judge's hands. Our job is to present the best evidence that we can to convince the Judge of the merits of our position.

Trial

The week prior to trial, we will meet however many times necessary to prepare for trial. We will review all of the questions that I will ask you, your husband, our expert and your husband's experts as well as any witnesses and our determination of their responses. I will ask you to review your notes and establish certain facts that we want to present.

Direct Examination

When I ask you questions, it is called direct examination. This is your chance to tell your story. These questions will generally be open-ended and very broad. I cannot emphasize enough the importance of telling the truth. An example of this type of question is, "Tell me what the first five years of your marriage were like." This gives you the opportunity to tell about raising the children, working, taking care of the household duties while your husband built his businesses.

You should answer all questions honestly and without showing anger or evasiveness. This will have the greatest impact on the Judge and allow the Judge to see the type of person that you are. Remember that there is no bad or wrong answer when you tell the truth.

Cross Examination

Cross-examination is when your husband's counsel will ask you questions. Generally, those questions will be very specific. In this instance, I would ask that you answer the questions honestly, but that you **do not** offer any additional information. It is important to make opposing counsel ask the right questions. You again should not be evasive or combative, even though some of the questions you are asked may be difficult to answer and even cause you to cry. It is not acceptable to show anger or to laugh at a Judge's ruling or disrupt the court room in any way. It is not acceptable to throw daggers by way of facial expressions at your husband. This type of behavior will probably cause an unfavorable impression.

Further, the best answers are answers that do not use absolutes, such as never and always. Telling the Judge that your husband never watched the children will soon be dispelled when he brings up the one time in the 20 year marriage when you went on vacation with your sister and your husband did in fact take care of the kids.

When You are Called as a Witness

When I call you as a witness, I like to give you time to get your voice. So, the first few questions that I ask will be quite simple, such as state your age, your date of birth, the names and ages of your children, date of your marriage, etc. It is very important that you answer all of your questions, calmly, truthfully and to the best of your ability. If you are confused about the question, please ask that the question be clarified. Do not anticipate any question. Wait to hear the question, take a breath and then answer honestly.

Objections

In the midst of your testimony, opposing counsel may object. In this instance, you only need to know one thing – when an objection is made, you must be quiet and let the Judge make his or her ruling. Either the Judge or I will then direct you how to proceed. You do not have to worry about whether sustained means that you can continue or not. After the ruling is made I or the Judge will instruct you to answer the question or the question will be rephrased. The objection will not be about you or how you are answering, but to the legal format of the question itself.

Courtroom Procedures

I will try to explain to you the courtroom and the courtroom procedures. Before the trial begins, the Judge may request to see both of the attorneys in chambers. Generally, the Judge will do this to see if there is any hope of settling or if he or she can assist in settlement negotiations. The Judge may suggest that the parties take some time to see if they can settle. This may cause frustration for you since you are



ready and prepared to go to trial. Many times, settlement occurs on the courthouse steps. When faced with putting life decisions in a stranger's hands, unreasonable people sometimes become reasonable. Try not to be frustrated or angry about the delay.

I will try to keep you as informed as possible as to what the Judge is discussing and how we will proceed. Sometimes, I have arrived at court only to be told that the Judge is ill that day and that the trial is adjourned or that there is another important case to be heard and our trial may not start until later. These are situations, which neither I nor your husband's counsel can control. You may even want to visit the Judge's courtroom in the weeks prior to trial just to observe. This can be invaluable. It will allow you to observe the Judge, the courtroom procedures and see how other litigants behave. In addition, being familiar with your surroundings can help alleviate some of your anxiety.

No Talking During Proceedings

Do not talk with me while the trial is proceeding. I will supply a pad of paper and a pen or pencil so that you can write down any comments, questions, or objections. If a witness or opposing counsel is speaking, I will become distracted if you speak to me and I will not hear what is being said.

Appropriate Dress

We have already discussed the manner in which you should

dress, which should show respect for the court. Therefore, you should **not** wear any of the following:

- jeans
- low-cut blouses
- short skirts
- tennis shoes
- shorts

Witness Fees

You have asked me why after paying our expert to value your husband's businesses, it is now necessary to pay a fee in order to have her attend the trial. The Judge must make a decision based on all of the facts and evidence presented by both parties. Frequently, the Judge will have to determine which side is more credible. If we only present a written report and the other side presents their expert and is available for questioning, you will be at a serious disadvantage.

Conclusion

We have spent many hours together in preparing for this trial. We have the appropriate financial information, documents, appraisals and witnesses. We have met on numerous occasions and will continue to meet before trial. You know what the marital assets are and their values. You are comfortable with what a fair settlement will be. The decision to go to trial, although not easy, is necessary since your husband is unwilling to compromise on the business values.

