

GUIDEBOOK ON CONSUMER & ECONOMIC CIVIL LEGAL ADVOCACY FOR SURVIVORS

A COMPREHENSIVE AND SURVIVOR-CENTERED GUIDE FOR
DOMESTIC VIOLENCE ATTORNEYS AND LEGAL ADVOCATES



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DOMESTIC VIOLENCE ATTORNEYS & LEGAL ADVOCATES

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The Center for Survivor Agency and Justice is a national organization dedicated to enhancing advocacy for survivors of intimate partner violence. CSAJ envisions a world where all people have equal access to physical safety, economic security, and human dignity. CSAJ develops and promotes advocacy approaches that remove systemic barriers, enhance organizational responses, and improve professional practices to meet the self-defined needs of domestic and sexual violence survivors.

The Consumer Rights for Domestic and Sexual Violence Survivors Initiative (Consumer Rights Initiative) is a national project of CSAJ that seeks to enhance consumer rights for domestic and sexual violence survivors by enhancing the capacity of and partnerships between domestic/sexual violence and consumer law and advocacy. Consumer and other economic civil legal remedies have the potential to provide survivors with the legal tools to address issues such as debt collection, credit discrimination, bankruptcy, damaged credit, tax liability, and foreclosure. To achieve survivors' joint goals of physical and economic safety also requires purposeful cross-training, networking, and sustained partnership building on the local and national levels. Therefore, CSAJ's Consumer Rights Initiative offers technical assistance to lawyers, advocates, programs, and communities across the nation through: advocacy tools and resources, webinar trainings, national conferences, individual technical assistance, and Building Partnerships Demonstration Sites.

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Financial Issues in Family Law:

PROTECTION ORDERS, CHILD & SPOUSAL SUPPORT,
AND DISTRIBUTION OF ASSETS & DEBTS

By **Laura A. Russell**¹

Introduction

Divorcing your partner is not easy. In a divorce, you have to come to terms with not only the dissolution of a marriage and relationship, but you have to divide assets, debts, and decide custody and support. Even divorces where the parties are amicable still leave them emotionally drained, and financially strapped. When children are involved, the issues of support become more complex.

Domestic violence survivors face these same issues but often they are exacerbated by abusive partners who continue to abuse during the divorce process. Partners will withhold support, refuse to pay debts that were accumulated during the marriage, fail to pay mortgages and hide assets and income. In many abusive relationships, survivors did not have any assets in their name during the marriage, only debts. This makes leaving and divorcing more difficult.

This chapter will cover the issues survivors face when seeking a divorce and offer legal strategies as applied to a case scenario, Jane. These issues include protective orders,² custody, child support, spousal support (alimony) and distribution of assets and debts in divorce.

¹ With contributions by Alameda Regional Office of Bay Area Legal Aid in Oakland, CA.

² See the chapter, **Using the Civil Protection Order as a Tool for Economic Justice**, for a detailed discussion.

Jane's Story

Jane is a thirty-six-year-old with two children and a dog. She and her husband Christian married ten years ago. Christian has a good job as a superintendent of an apartment complex. She worked before the marriage for a customer call center, but after the birth of her first child, it was impossible for her to continue at her job. Christian refused to assist with childcare, and her salary was little compared to the cost of childcare. Eventually, when her child was four months old, she quit. She has not been employed outside of the house since then, and her child is now nine years old. Her second child, a girl, was born two years later and is now seven years old. Both children are in school full-time.

During this time, Jane has endured physical abuse from Christian, and increasingly more emotional and financial abuse over the years. He has strangled her until she lost consciousness, he has punched her in the stomach while she was pregnant, he has humiliated her in front of family and friends, and, now, he is openly having an affair. Jane is afraid of Christian. She has called DV hotlines in the past but has not taken the next step. She does not know anything about the family's finances and is scared to leave. She thinks he will get custody because she has no money. She does not know where she will go and she has no skills. Also, her credit is poor, as all the family debt is in her name. They own a house, but the deed is in her husband's name only.

She comes to your office distraught. She says she wants to leave her husband. She is done, and she wants out. Last night, she called the police after they fought about his affair. By fighting, Jane describes a scene of him throwing her on the bed and placing a pillow over her nose and mouth until she almost passed out. He then punched her in the mouth and did not stop until her eldest started screaming for "Daddy to stop." She has decided she cannot take it anymore and she is done with his cheating. He was arrested, and he is out of the house, for now.

Think About It

What do you think Jane is worried about? What might be some of her concerns? What are your reactions to her situation? What do you want to do? What other information do you need from her? What do you think Jane wants to do? What might be some competing priorities?

Family Law, Debt, and Domestic Violence

How do family law issues manifest or complicate for survivors?

When seeking help or leaving an abusive partner when they are married, divorce may seem the logical choice but divorces are complicated and final. In fact, divorce is one of the most traumatic events in one's life, whether there is DV or not. And, it is one of the most financially devastating events in one's life. You cannot go back after a divorce and seek more money. Clients must realize that they will not get all they seek and that their lives will change. They have to be ready for that.

A survivor must be able to assist the attorney in finding assets and income. However, many times survivors do not know the answers to these questions. As in Jane's situation,

survivors may have unknown debt in their name, not know much about the household finances, not be able to afford costs of living on their own (particularly if they have children), may not be able to afford the divorce process, or may be fearful of engaging with an abusive partner through the process.³

Furthermore, research shows that most survivors do not receive sufficient spousal or child support needed to offset financial losses,⁴ the process and court system may be complex and time-consuming to navigate (see **Court Barriers** chapter in this Guidebook), and many survivors report poor treatment by judges. Taken together, there are real barriers to access and secure family law remedies to address both safety and economic security concerns of survivors. These barriers and the experiences and priorities of survivors are therefore critical to establishing a trusting relationship and securing the outcomes survivors' desire for themselves and their children.

Contested divorces (divorces where parties are not in agreement on all the issues) are also one of the hardest legal matters to obtain free representation. Clients can be on waiting lists, or not be able to obtain free attorneys. Legal fees in a divorce can skyrocket quickly. This does not include the lost wages, court time, and other fees (such as experts) that can be part of a divorce. Divorce attorneys charge hourly, and divorces can take hundreds of hours to complete.

Think About It

Divorce is a complex issue. In some cultures, religions, and area barriers are in place that make divorce looked upon as a failure, usually of the woman, and divorce is not appropriate under any circumstance, making it even more complex. When discussing options with a client, strive to understand what cultural and religious barriers they will face. Ask them what is best for them when attempting to overcome these barriers and seek a divorce. If appropriate, find culturally or religious groups like the client to assist in this process.

Furthermore, immigration status plays an important role in divorce. Many survivors of domestic violence may have options to assist them to become lawful permanent residents (green card holders). Some of these options may be unfamiliar for the client, so they may be wary of filing divorce. Plus, just entering a courthouse for a person without immigration status may be traumatizing.

It is best to discuss all these issues with your client before making the next choice. And remember, sometimes the best course of action may be inaction.

Assessing Family Law Needs

As you talk and begin to understand Jane's situation, you realize that though his cheating is of paramount importance to her, there are bigger legal issues. Because of the complicated experiences and feelings surrounding relationships, economics, and taking legal action for many survivors, advocacy requires an open, honest, and sensitive assessment. The screening and assessment questions presented here are for issue spotting (often called, intake questions), are not meant to be prescriptive, and

³ Some survivors know a lot about the household finances. This chapter was *not* written with them in mind, but rather for survivors who know little or have not had access to their finances. Refer to the screening questions on the following page for assistance determining this.

⁴ Ver Steegh, N. (2003). Yes, no, and maybe: Informed decision-making about divorce mediation in the presence of domestic violence. *William & Mary Journal of Women and the Law*, 9, 145–206. Retrieved from: [source](#)

conversations around family law options, including child support and divorce, should not be limited to these questions. For a fuller description of a survivor-centered *approach* to economic assessment, see the **Introductory** chapter in this Guidebook (pg. 11).

Some screening questions to help get a fuller sense of survivors' safety and financial needs include, but are not limited to:

- What do you want for right now? For the future?
- Describe the first incident of abuse, the last and the worst. Does your spouse still pose a risk to your safety? In what ways?
- When you think about divorce, how do you feel? What are your reactions?
- What is your spouse's income?
- What do the two of you own, either separately or together (including car, home, property, bank accounts, retirement accounts, anything else)?
- What do the two of you owe either separately or together (including credit cards, personal loans, mortgages, car loans, retirement loans, medical debt, student loans)?
- What do you need right now to survive financially? What are your other financial priorities (e.g. job, housing, childcare, other)?

This is the conundrum that every family law attorney faces. Survivors often come fearful of their partner and wanting to leave, but the choice is not easy and the process exhaustive. Their safety is paramount, and while divorce often appears like the best solution, they are often not ready for a divorce, have many other competing priorities, and may not have access to the information required to ease the process.

Case Scenario: *Jane has trouble answering your questions and does not know much about how the business of her marriage is conducted. She is not sure what she wants, and she cannot give you enough information for her to know if she can support herself and the kids alone. She agrees to go home, think about it and look through some financial stuff. He is out of the house, so she can do this safely. When you see Jane next, it's after a criminal court appearance, and the prosecutor is considering dropping the case. Jane is distraught. She does not want him back in the house and is scared of what he might do, but she just got a notice that the mortgage has not been paid. She cannot be homeless with her children. She needs money. She asks you how she can get it?*

Assessment questions

Addressing survivors' needs and options in family law requires open and full assessment. In addition to the questions above, it's important to discuss with the survivor: their readiness for the realities of the divorce process, their goals and how they prioritize them, as well as preparing them for the process (See the **Introductory** chapter of this guidebook for a fuller approach to assessment). Some questions to guide this discussion, include:

- Are you ready to see your abusive partner in court?
- Are you ready for the worst that your abusive partner will say about you (alcoholism, drugs, child abuse, lazy, etc.)?

- Are you employed full-time or able to seek full-time employment? Will your job be flexible with you through this process (i.e. attending court dates)? Is your salary enough to support you and any children?
- Court processes can take a year or more. Once you start, it will not be to your advantage to stop. Are you ready?
- Your attorney may never find all the hidden income or assets of your marriage, and compromises often need to be made. What's your reaction to that? What, if anything, do you need to feel prepared for the divorce process?
- What do you want now? In five years?
- Discovering property in other states (or other countries) can be impossible. Do you know of any property/assets not in the state you are in right now?
- How might your partner react to court or divorce proceedings? Are you concerned for your safety?

You must consider the survivor's safety paramount. Continuing to check in on these questions and others as the process develops is critical.

Practice Tip

In Jane's case, though looking through financial records at home (like getting her tax returns) would really help you build her divorce case, asking her to obtain information she has not previously been privy to, may 1) come as a shock to her if there are substantial financial concerns, and, importantly, 2) could jeopardize her safety if Christian finds out she has been going through financial documents.

To the first point, the role of the advocate is crucial. Someone who can assist the client through this process, discuss what is being told to them and explain the process from a non-legal perspective is important. Someone for the client to talk to, not his or her attorney, will help the client fully understand what is happening. What else could you do to help prepare Jane for the shock and manage any trauma?

To help with the second concern, help Jane think of ways to safely view or access financial documents. For example, Jane may be able to take pictures of documents, get names of banks and account holders, without taking a document that will be missed. Don't open an envelope that will be noticed, but take a picture of the front. As long as the name of the financial institution is known, an attorney can search for the asset.

Family Law Options

Restraining order (order of protection)

In Jane's case, the last incident of domestic violence should, in most states, give her the ability to go to court and obtain a restraining order. With this order, Christian will not be able to come near her, and this could extend to the children and family pet.

Consider with survivors how a restraining order might help. Weigh their perceptions of safety, future risk of violence, options for economic relief, and available resources for the process.

Case Scenario: You discuss and weigh the options in a protective order with Jane.

- Jane may feel safer knowing that her husband cannot just enter the home.
- Also, she can ask that certain bills be paid in the restraining order. Some orders allow for the payment of the mortgage, spousal support, and/or child support. Also, in one state, a restraining order will allow Jane to get any financial or legal documents taken from her returned.
- Unfortunately, restraining orders are usually only based on physical abuse. Therefore, if Jane has only encountered emotional or financial abuse, it is rare that a state will issue a restraining order.
- If your client has not suffered physical abuse, you should consult a family law practitioner before filing for a restraining order. If your client files and then loses the case, this could enrage the abusive partner and place the survivor in more danger.

For more here, see the **Using Civil Protection Orders as a Tool for Economic Justice** chapter in this Guidebook.

Key Terms

Restraining order: A restraining order (also known as a protective order or order of protection) is a court order that requires the abusive partner to stay away from the survivor. The protection can include staying away from one's home, work and school. It can include children, and in some states, pets.

Public assistance: Public assistance is a general term for all benefits offered by the government. These benefits vary from state to state but may include cash assistance, housing subsidies (rental payments), food stamps or other food assistance (such as WIC and AFDC), and other help for utilities. Also, though not public assistance, Medicaid can assist when there is no other health insurance option.

Spousal support: Also called alimony, and maintenance. It is support given to an ex-spouse (or a spouse during the divorce or separation) to assist the lower income spouse with expenses and is usually based on the needs of the parties. Some areas use a formula to determine this support.

Child support: Child support is financial support, based on a formula, which uses incomes of the parties, paid by the non-custodial parent to the custodial parent until the child is either 18 or 21, depending on the state.

Uncontested divorce: A divorce is the process of legally dissolving a marriage. An uncontested divorce means that all the issues between the parties have been resolved before going to court, and there will be few, if any, court appearances.

Contested divorce: A contested divorce is where any issues between the parties cannot be resolved, including: restraining order, the grounds of the divorce, custody, child support, other child-related expenses, medical insurance for the other party and/or the children, spousal support, and distribution of assets and debts.

Equitable distribution: The legal term for how property and debts of the parties are divided in a divorce when you are not in a community property state. The term "equitable" does not mean equal and is usually a term that is defined by the state where the divorce occurs. What is considered property and debts of the parties vary from state to state.

Community property state: These states (described below) are states where any property and debts acquired during the marriage are distributed equally. As with equitable distribution, what is considered property and debts acquired during the marriage vary within community property states.

Jurisdiction: This is the state that has the right to determine the divorce. It is usually the state where the parties live or have lived recently. The laws on where a divorce can be started vary from state to state

Public assistance

Determining whether to seek public assistance when also considering divorce can be complicated. Consider the following questions as you work with survivors in this decision:

Question	Application to Jane
Does the survivor have too many assets or even too much income to go on public assistance?	In Jane's case, this may be risky. If she had a full-time job or other assets she may not qualify. Plus, some states will place a lien on your property so they can recoup the money paid to someone on public assistance. That lien will be a debt in the divorce that will have to be dealt with.
Is public assistance or child or spousal support through divorce the better option?	Jane also must choose. She cannot be on public assistance and obtain child or spousal support. And if Jane is on public assistance, she will lose her right to seek alimony. A careful analysis is needed to determine which is the better financial option. For most clients whose abusive partner earns a median income, public assistance is not the answer. Also, once a divorce ends, you usually cannot go back and ask for alimony (or spousal support).
What property or assets could the survivor be awarded in divorce?	Property distributed during a divorce will also affect this. Is it possible or likely that Jane will be awarded the house in the divorce? If she or other survivors obtain too much property in a divorce, public assistance will deny her further benefits.

Practice Tip

Review the amounts Jane might obtain during a divorce. If they are higher than public assistance, then, financially, divorce may be the better option. Also, one must consider how likely the abusive partner is to pay any awards that are ordered. If Christian was self-employed, getting court ordered support may be difficult, and the money may come in haphazard. These are all issues that a client must consider when deciding next steps.

Spousal support

Spousal support is also called alimony, and maintenance. It is support given to an ex-spouse (or a spouse during the divorce). It is given to assist the lower income spouse with expenses or to (in theory) maintain a similar standard of living as during the marriage and is usually based on the needs of the parties, determined (generally) by: need, ability to pay, whether domestic violence exists. Spousal support can end after a set period of time (usually based on the length of the marriage), or upon the remarriage of the payee. The parties must have differing incomes or usually no support is awarded. In most cases, spousal support is taxable to the payee as income and the payor may deduct it from their taxable income (See the **Tax Advocacy** chapter in this Guidebook). Spousal support may continue until the death of the payee in rare circumstances. Something to discuss with survivors is that taking one income and dividing between two households will usually mean that the standard of living will go down. In the vast majority of cases, the standard of living of the lower earning spouse is usually the standard of living that decreases after a divorce.

Filing for spousal support usually triggers the abusive partner to file for divorce. It's important to make survivors aware that this may force them into a divorce that they

cannot control the timing of. Spousal support is not consistent state by state. In many places, it is not consistent among counties. Survivors will have to file in the county she

resides in, but depending on many factors, they may not get enough money to pay their bills.

Practice Tip

If Jane wants to file for spousal support, she should know what her husband earns, and bring proof. She should have copies of all the household bills and know exactly how much she needs to pay them. Most states do not have a formula for what she will get, the amount she will get is based on what she needs, what he earns, and what she can prove. Some states use a formula for spousal support, which is based on the incomes of the parties.

Child support

The non-custodial parent pays child support to the

custodial parent. In most states determining custody does not rely on which parent earns more, as the money is for the children. Child support is based on a formula, which is usually a percentage of the non-custodial parent's income. Child support continues until the child is either 18 or 21, depending on what state you are in. Child support is not taxable to the payee and not deductible to the payor. Child support is paid the custodial parent almost always.

Similarly to spousal support, child support is very structured and filing for this usually triggers the abusive partner to file for custody. It is a percentage of income of the non-custodial parent and also varies depending on the number of children. Some states also vary the amount on the time the non-custodial parent is ordered to spend with the child, whether they actually do or not. Child support is regulated. There are enforcement mechanisms, such as the ability to intercept tax returns and gambling winnings to pay back support. Support can come directly out of one's paycheck.

Case Scenario: *If Jane's husband does not have a job where taxes come out of his salary (such as a job based on commission or "off the books" or he is self-employed), then child support (and spousal support) will be difficult to get, as there is no mechanism for interception. Furthermore, proving one's income will be problematic. Be sure to discuss the implications of filing for child support as well as Christian's likelihood of complying with court orders.*

*Also, if Jane's husband is self-employed and did not accurately report his income, there will be other concerns. If Jane signed those tax returns, she could be liable for underreporting; the Court may report the tax fraud to the IRS (rare); and the Court may decide that if she signed them, they are valid and she will be held to this income, no matter how low it is. See **the Tax Advocacy** chapter in this Guidebook for more on filing concerns and the potential to claim Innocent Spouse Relief.*

Practice Tip

The largest issue in a divorce is always proof. The attorney/client team must prove to the Court (Judge) that the income/assets/debts exist and what they are. Having the client say the other party makes X salary is rarely enough. The client must show documentation (tax returns, paid bills, 1099s, W-2s, bank accounts, etc.) to prove that what they are saying is true. It's important to discuss with survivors the difference between the proof (evidence) courts will require versus our general sense of proof (honesty, descriptions, etc.). We all feel that if what we say is true, it should be believed by the Court. This is not the case. From the outset of your interactions with survivors, discuss the meaning of proof and help set and reflect on the survivors' expectations of the Court (they be too high or too low based on the evidence you are able to gather together).

Jane should be aware of these issues when she is deciding her next steps. If she needs money for food and shelter immediately and her abusive partner is self-employed, she will have problems collecting and may need to consider public assistance until she is more financially stable.

Child custody

For survivors with children, custody is generally the most important issue. Many clients have been told that they will lose custody because they do not have any money, or are here without immigration status. Neither argument is completely true. Custody determinations are made using a variety of factors, many of which fall into a category called “best interests of the child”. In this, the courts look at all factors that involve the child, such as who has been the primary caretaker, who will make sure the child will have a good relationship with the other parent, who can emotionally support the child and care for the child, and many other factors that vary from state to state.

As with other issues, child custody also has financial implications. It goes without saying that raising a child is very expensive, but the parent who does not obtain custody will usually have to pay child support, a portion of child related expenses (such as medical, sports and other extra-curricular activities). Some parents will express an interest in custody so they can either use it for leverage in a divorce, or to continue to control the other parent after the divorce is over.

Many survivors are confused when a parent who has expressed very little interest in child rearing suddenly seeks custody. Though there are many times when the motive is good, there are other times when they seek custody because of financial, or control reasons. As an advocate, one should prepare their client for this.

Case Scenario: *In Jane’s case, after Christian was excluded from the house, he did not attempt to see the children, and just filed for divorce. During the divorce, he barely saw the children and Jane is devastated because he is an absent father. Jane begs you to “get him to see the children” but he is not interested.*

Divorce

A divorce is the final step. A divorce can be either contested or uncontested. An uncontested divorce means that all the issues between the parties have been resolved, and there will be few, if any, court appearances. The process will be quicker than a contested divorce. A contested divorce is where any issues between the parties cannot be resolved.

These issues can include:
restraining order, the grounds of the divorce, custody, child support, other child-related expenses, medical insurance for the other party and/or the children, spousal support, distribution of assets and debts.

Think About It

Divorces can take a long time. In one state, a divorce may take up to six years. In other states, divorces can take anywhere from months to years. How can you prepare Jane for this? In what ways can you meet her changing needs throughout the process? What barriers and challenges can you anticipate together?

If Jane opts to begin a divorce, all the above issues (restraining order, custody, and support) can be dealt with. Assets and the debts of the marriage will all be divided. Finally, they will have to decide on the grounds of the divorce. The divorce is the longest process and the most intensive. Once a divorce is done, it is considered final (you can only get remarried). It is difficult to undo a divorce, or even modify some of its terms. Divorce is also the most costly option, as items may have to be appraised, documents produced and attorneys paid. There are few legal services options for clients who want divorces and have assets. States allow for the “wealthier” spouse to pay legal fees for the “poorer” spouse, but those fees are never enough to cover the entire matter. Divorces can take years to litigate, and parties can be emotionally as well as financially drained by the end. The client has to be ready for a divorce if they want to start one. Once started, it is near impossible to stop.

Think About It

Given these four options (restraining order, custody, support, and divorce), what should Jane do? What might she feel as you review the pros and cons of each option? What other information do you need to help her make the best decision? What can you offer to help her make a decision?

Practice Tip

Help survivors document what they do know about their finances, assets, and debt. Suggest that Jane writes a list of every asset, and debt they, Christian or the both of them have. Write a list of all the bills the survivor about and try to figure out how much money they typically spent in a month.

You can also pull a survivor’s credit report to get a sense of debt. Get an authorization to pull the survivor’s three credit reports. (Note: never give your client’s current address to a CRA if she is at a confidential location. Even giving your address may tip the abusive partner off, as he can Google your address and see it is a legal service. Use their old address when asked.) See the **Credit Reporting & Repair** as well as **Debt** chapters in this Guidebook for strategies regarding safety and pulling credit reports or managing debts.

Divorce Law and Legal Strategies

Case Scenario: *Jane comes back to your office in a few weeks with a piece of paper. She is not sure what it is, but someone handed it to her a week ago. You look at it. It is the beginning of a divorce, started by her husband. It is the summons, and you know you have a limited time to answer it. You have a long conversation with Jane. She was not ready for this. She thought he would go to counseling and they could make it work. She is devastated, and not prepared. You discuss with her the procedures and tell her if she does not answer, she may lose everything.*

She agrees she needs to fight the divorce. You sign a retainer with her, and you are now her divorce attorney. She is still upset, so you gather as little information from her as you need to file a response to the divorce and set a meeting in a week. At the next meeting, she has done some homework obtaining financial documents and statements (but not all) and you have credit reports.

Mapping the relationship

As you begin talking with survivors about the divorce and painting a picture of their joint financial lives, assets, and debts, you must question everything. Survivors are kept in the dark about finances on purpose. If Jane shows you a mortgage statement in her name, she must own property. If she says no, it is not because she is lying. It is because she does not know. She has been systemically kept out of all financial decisions in the marriage. She has been conditioned not to ask, or there will be consequences. She has signed documents without reading them or seeing them. She may even know that the abusive partner signed her name, but was not able to do anything about it.

The most important document, which is a blueprint of the business of the marriage, is the **asset, debt and income statement**,

which is usually filed early in the case. This document is a snapshot of all the assets, expenses, and the parties' income. The higher earner spouse will often use this document to claim they lived above their means, and the entire marriage is just debt. The lower earner will try to show that both parties can live separate on this income and survive.

Think About It

Keep in mind that survivors may only know bits and pieces. They might say: "I once saw \$5000 in a box. Can I have half?" "My house must be worth \$400,000 because my sister's house sold for that in another city." "I keep getting these letters and calls saying I owe money. I just hang up, but could I?" "I want \$500 a month in alimony because my friend got that." They will likely have no idea what they need to live on or could get from the soon to be ex. You will have to guide survivors through the process.

Case Scenario: *Once you meet with Jane again, you are able to begin to review this document with her. During the review, you go over the issues in her case that relate to finances and start to give her a picture of what she might get. You begin to go over the items that will be at issue in Jane's divorce: house, car, retirement assets, debts, alimony and child support. Though grounds are still open, they will not be at issue. The restraining order and custody were finalized before she was served, so they are not at issue either.*

There are several basic concepts in divorce law, and they vary from state to state. Here, we discuss the characterization and division of property and grounds for divorce.

Property

Most states adhere to the idea of marital property and separate property. Property acquired during the marriage, regardless of whose name it is in is marital and subject to distribution in a divorce. Property acquired before the marriage, or with funds that were created before the marriage is separate. There are many states where this rule creates a blurry line and proving what is marital or separate can take time. There are other states (few states) that believe that once you are married all property is community. These are community property states. Though this concept varies on the length of marriage, the idea is that everything owned is community property and able to be distributed.

Considerations for Community Property States

The characterization of property (whether it is community or separate) is essential in these states. It determines everything. Equitable distribution is pivotal. Separate property can be confirmed in a dissolution, but the court has no authority or jurisdiction over a person's separate property except in limited circumstances. Community property assets and debts are divided equally at dissolution (divorce).

For example, in California, a community property state, any assets acquired or debts incurred before marriage or after separation are generally considered separate property/debts. There are exceptions to this general rule, for example: inheritances or gifts received during marriage are separate. Also, these are presumptions that can be rebutted. For example, if a gift was received during the marriage it is presumed separate. However, if one party can prove that the gift was meant for the benefit of the community, it might be held to be community property. Things get very complicated when other factors come into play. For example, a house is purchased prior to marriage by one spouse, but improvements are made, or mortgage is paid down by community funds (income earned by either party during the marriage). Or a car is bought before marriage, but title is transferred to the other spouse during the marriage. Or, where one spouse continues to occupy the other spouse's separate property or the parties' community property after separation and during the divorce proceedings, then there are reimbursements and charges owed to the community. The rules and exceptions go on, so it's important to work with a family law attorney in your state.⁵

Nine states have a community property system: Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington and Wisconsin. Puerto Rico is also a community property jurisdiction, and Alaska has an optional system.⁶

Divorce grounds

Every state has a no-fault ground, which means that no party was at fault for the divorce. In some states, grounds do not have any input in deciding distribution of property. In others, some grounds can be part of the distribution process.

Practice Tip

When determining grounds, as well as other matters of the divorce, it is important to discuss with Jane how Christian might react. Does he still pose a safety risk to her? Does he have access to the children? If she were to use other grounds for the divorce, how might Christian react? After talking with Jane, she feels that the best ground to use is a no-fault ground. She wants to keep things calm and not risk angering Christian, and the grounds do not have any influence on any other issues in her divorce, so the no-fault ground is best for her. Plus, she does not want to testify again about the violence, which could be required if using a fault ground (such as the abuse or adultery).

Discussing the assets

The house

Case Scenario: *Jane and Christian own a house. It was purchased during the marriage, about five years ago. The house means everything to her. It is this address that allows her children to go to school in district that both she and the children like. It means that she no longer has to move when a lease expires, and it means that she has "made it." She wants to keep the house.*

⁵ Thanks to Brenda Star Adams and colleagues at the Alameda County Regional Office of the Bay Area Legal Aid in Oakland, CA.

⁶ IRS, https://www.irs.gov/irm/part25/irm_25-018-001.html

Keeping the house requires much analysis on your part. First, who actually owns the house? This means whose name is on the deed (Houses and condominiums have deeds. Other items that people may consider homes or real property may not be considered as such by that law. For example, co-operative apartments and mobile homes may not be considered real property in your state. This term is important, as real property has more protections against loss than other forms of property). The owner of the property is usually recorded in a registry. Some registries are in the town that is the seat of the county, some are at the courthouse, and others can be on-line.

Case Scenario: *If Jane went on public assistance, some states might place a lien on the house in the amount of the award. These liens should be dealt with in the divorce, as it is a marital debt.*

Second, who is liable under the mortgage? That means who signed the Note (the legal document binding someone to pay back the mortgage). The mortgage itself comes with many other questions.

Case Scenario: When Jane brings you the house documents, there is a letter from a lender stating that the mortgage has not been paid in several months. Apparently, when Christian was excluded from the house, he failed to pay the mortgage, insurance, and property taxes (this may be one bill, or many). As you begin to explain this to Jane, she gets distressed. She needs to stay in the house. How could he do this? Does he not care about the children, she asks.

Finally, the largest question is, can the survivor afford the house? In Jane's case, this is an analysis of what her income will look like post-divorce. So, what can she expect to earn? What will she be getting in support? What are the actual expenses of the house (factoring in utilities and repairs)? This discussion is often the hardest. As an advocate, you want Jane to have what she desires and feels she needs. But, as an advocate, you know that getting her the house in the divorce may require sacrifices, and worse, sacrifices she may make to keep a house she cannot afford and will lose soon anyway. Also, Jane needs to consider

Practice Tip

In some states the foreclosure process (the legal process by which a lender can take your real property from you), is nonjudicial. This means that the lender does not have to go to court. This process is faster for the lender and leaves the homeowner with limited recourse. If the mortgage is 60 days behind or more, you should consult with a foreclosure defense attorney immediately or risk Jane losing her home. See the **Foreclosure** chapter in this Guidebook for more.

whether it is more expensive or cheaper to rent a comparable home in this area.

The house is usually the largest asset the couple has. In most states, it is awarded to the custodial parent. How the award is structured can vary. For example:

- The custodial parent and children may live in the house until the youngest child reaches a certain age and then the house is sold. How the proceeds are divided (equally, some reimbursement to the one side for expenses, some percentage is given to one side only) vary from state to state.
- The house may be sold, but the proceeds used to buy another house, which will then be divided when the youngest child reaches a certain age.
- The house may be sold upon the divorce, and the proceeds divided equitably.
- One party may pay the other party for their share of the house at the time of the divorce.

- The custodial parent may live in the house until the youngest turns a certain age, and then must leave without any compensation.

When deciding how the house will be settled in the divorce, there are certain issues to take into consideration:

- Who is liable for the mortgage? Can one party be certain that it will be paid timely (or this will affect their credit score)?
- If the owner of the property is not the same as the person liable for the mortgage, will this affect the mortgage? Most mortgages have clauses that if the property ownership is transferred, the lender can start a foreclosure process. Clients should be aware of these pitfalls.
- How will major repairs be paid? Will there be reimbursement?
- How much is the house actually worth? (Equity in a home should take into account the amount of debt (mortgage) to be paid and the cost to sell the house (transfer taxes, realtor commissions).

Case Scenario: *In the end, Jane feels with a full-time job, and child and spousal support, she can afford to live in the house until her youngest finishes college. This is important to her, as she does not want to uproot the children. You decided to file for immediate relief in the divorce and ask that the entire past due amount on the mortgage be paid immediately. You have spoken to a foreclosure defense attorney, and in your state, the process is judicial, and this lender has not started anything. So, Jane has time. She is relieved. But, you worry that the Court will not order Christian to pay the mortgage. Jane, on your advice, starts searching for all past mortgage payments. From the documents, you find that prior to the filing of the restraining order, Christian not only paid all the bills timely, but they had additional monies to travel to the country of Jane's birth with the children at least annually. This will help the Court understand that Christian is failing to pay the mortgage out of spite, you hope.*

When the home is not owned, but rented, the division of the rental apartment may also come with pitfalls. Attorneys should determine who is on the lease, and what requirements, if any; the landlord (or the rental program, or both) may have to assign the lease to another party. Also, if the apartment rent is below market due to a program, rule or statute, some states may consider this an asset and require it be distributed, meaning a party may have to pay the other spouse for the right to keep the apartment. In general, though, many states prefer to have the custodial parent stay in the marital home until the youngest child reaches maturity.

Bank accounts

Case Scenario: *Jane has seen Christian write checks, and received one for support. It is from Chase bank. During the marriage, she had no idea what accounts they had, but she knows he paid many items by check or debit card. You ask Jane what banks are near her residence, and Christian's job. Recognizing that many people bank at a place of convenience, you feel Chase and any bank around these areas might be a good place to start looking for accounts.*

Bank accounts, whether checking, savings, money markets or any other form of liquid cash, are divided during a divorce. Many states (including community property states) will divide them equally, taking into accounts any money that was in the account before the marriage, or placed into the account after the start of the divorce. The key factor is to find out what accounts exist, and how much was in them at the time of the divorce. Also, if a significant amount of money was drained just prior to the divorce, this could be important.

In many states, when a party fails to provide necessary evidence, the attorney can subpoena certain information.

Case Scenario: In Jane’s case, Christian refuses to give any information about his bank accounts. You have the one check from Chase, but nothing else. Jane says that there is a Bank of America across from Christian’s job, so you serve them a subpoena for information. You find a Christian had checking and a saving account with Bank of America. These accounts also show Christian’s income, and his side income from tips and extra work around the building he works for. With this information, you can consider asking for more support, as the income he stated is not accurate. You also now know that the income he reported (and Jane signed) on the tax returns is not accurate.

Think About It

If you discover hidden accounts or assets, how should you use the funds? For example, they could be used to meet immediate needs, like the unpaid mortgage payments in Jane’s case, or the survivor may be entitled to half the assets in the divorce. Consider with the survivor, which might be more beneficial now and in the long term. In Jane’s case, you decide to ask for a restraint on these accounts, as Jane will be entitled to half of these accounts, and do not want them to be diminished during this process. Many states will not allow the assets (in this case bank accounts) to be distributed until the divorce is over. So, this money will just sit in the account and cannot be used.

Income tax returns

Income tax returns (federal and state) can be a great source of proof and hardship in a divorce. Though this is discussed in the **Tax Advocacy** chapter of this Guidebook, there are a few items to be reminded of: alimony, inaccurate tax returns, and tax debt.

First, alimony is taxable to the person receiving it and a tax deduction to the one paying it. This is not the case in child support, which is not taxable.

Second, inaccurate tax returns, as in Jane’s case, can have consequences with the IRS as well as the survivors’ ability to dispute the tax return in court (it may be evidence against the survivor).

Finally, if the survivor earned income that went unreported – even if they thought their partner had reported it, or if they did not know they needed to file a return – they may be liable past taxes.

In a divorce, owed income taxes are a debt, and the divorce should decide who has to pay that debt. Also, the children are a deduction on one’s taxes. Once they are divorced, they must file taxes separately, and who is able to claim the children often becomes an issue (known as the “race to file first”). The IRS is very clear that the person who is the custodial parent gets to claim the children, but sometimes the parties can decide differently. The IRS accepts this, but certain paperwork has to be completed. Also, claiming the children could affect one’s Earned Income Tax Credit amount, so be certain that Jane knows what she is doing when she allows Christian to claim one child, or two, on his taxes post-divorce. See the **Tax Advocacy** chapter for more details and options with these issues.

Automobiles

Cars (boats, motor homes, and other modes of transport) are also divided in a divorce. The concern for these items includes: What lien, if any, is on the item? Who is liable for this lien? And how is it going to be paid? In handling a divorce, the attorney should tally these items up in a sort-of balance sheet, determining what each party owes the other. This allows the attorney to keep track of what each party owns and owes, and what each is entitled to.

Case Scenario: *In our case, Jane uses the family car to bring the children to after school activities. The car is registered in Christian's name, and there is a lien on the car in Jane's name. Christian has paid all the bills associated with the car. The car is expensive, as Christian felt it was a sense of status to drive a "nice" car. Jane would prefer a more reliable, inexpensive car.*

Using Kelly Blue Book (kbb.com), it is determined the car has a value of \$38,000. The lien that remains on the car is \$22,000. Therefore, if Jane keeps the car, she owes Christian half of the value or \$8,000, as the car was purchased with marital monies and during the marriage. She also has to continue paying the lien. Jane does not want the car, but the car is titled to Christian so he must sign the car over to a new owner. Christian agrees to sell it and divide the proceeds in the divorce. This will give Jane the cash to buy a more reliable, less expensive car, and Christian can buy a car of his choice.

Retirement accounts

Most states consider retirement accounts to be marital property. Therefore, they are divided in a divorce. When deciding what to do with retirement account, consider the following: Whether this is the only retirement money a spouse has; the earning potential of the spouse; the age of the spouse. Retirement accounts could include defined contribution plans (a 401(k)) and defined benefit plans. The 401(k) is similar to a bank account, as the value in it, if all earned during the marriage, is just divided equally in most states. Defined benefit plans, like pensions, are rarer. These plans are usually only found when a spouse works for the government or a union and typically detail what percentage of the employee's salary will be paid for life, or other benefits. It is important to consider the value of the retirement accounts, how the survivor could benefit (and what the tradeoffs are), and how it would be divided.

Case Scenario: *In Jane's case, Christian has both a 401(k) (which is a defined contribution plan) and a defined benefit plan. The defined benefit plan states that when Christian retires he will receive a percentage of his salary for life. Jane could use the money in the 401(k) now, but if she takes it out, she faces a severe tax penalty. The defined benefit plan is difficult to determine in value, and it must be divided by a Domestic Relations Order, which is expensive. Jane could let Christian keep his retirement accounts, in exchange for another asset (possibly the house), but then she may have nothing when she needs to retire.*

These are all important options to weigh, with good questions; the correct answer to any of them lies with Jane. Only she will know what is best for her. This is where you, as the attorney, just keep the balance sheet running, and after her decision, work for the best trade off with another asset, if that is her choice.

Case Scenario: *In the end, Jane takes her share of the defined benefit plan and lets Christian keep the 401(k) in exchange for an equal additional share of the bank accounts. This gives her the liquid cash she needs now, while she is job-hunting, and also means she does not have to have an attorney do another Domestic Relations Order, which can be expensive.*

Other assets

Though we have discussed some of the major assets of clients, there are many others. For example, dividing the household furniture, any business owned or operated during the marriage, second homes or owned rental properties and so on. The list of assets that one owns can go on. The most important rules are this:

- Someone in your state has already dealt with this issue. Ask around and find out how it is handled in your state.
- Everything can be decided and divided in a divorce, from the family pet to the wedding ring. So, whatever your client or the other side has, it is an issue in the case. So, remember, ask your client about every asset.
- Whatever your client wants in the divorce, so does their spouse. This could range from the family pet (who they never fed or walked) to the necklace that they gave the spouse and forgot existed until the spouse wore it to court. So, explain to your client that regardless if the asset was not meaningful, it is an asset and able to be divided in the divorce.

Handling Debts in the Divorce

There are a variety of debts, such as credit cards, medical debts, personal loans, and utilities. As we discussed throughout this Guidebook, debts and how they are dealt with outside of a divorce vary. In a divorce in most states, including community property states, debts are divided either equally or according to incomes (pro-rata). Debt distribution circles around the issues of:

- When was the debt created?
- Why was the debt created?
- Did the debt go to the partnership of the marriage?

Though states handle these issues differently, the key issue is whether the debt helped the family. The medical debt, of which the services were a necessary, should be discussed in light of the fact that Christian failed not only to place the youngest child on his insurance but also to follow up.

In the end, the debts, just as the assets, will be divided in some equitable fashion, and if settling, can be placed on the balance sheet to determine the final amounts each owes the other. Just remember, as stated in the **Debt** chapter of this Guidebook, regardless of how debts are distributed in a divorce, and who is required to pay them in a divorce, the creditor can (and will) sue the person whose name is on the debt (and therefore liable for it in consumer matters) and will ignore the distribution as decided in the divorce.

Settling the Divorce

Most divorces end by settlement. Divorce trials are rare. Settlements allow your clients to decide what is best for them, and what is most important to them. The balance sheet discussed in this chapter is critical. Divorce goes hand in hand with finances. Even the

Case Scenario: *At the beginning of this process, Jane gave you a copy of her credit report. You have gone over it with Jane, and though some of the debts she recognizes, others she does not. You have subpoenaed those debts and realize that Christian opened credit cards in Jane's name, and Jane knew nothing about them.*

The credit cards in Jane's name, that she knows about, were spent on food and clothing for the family when Christian would not give her access to any money. There is also a medical debt, as Christian failed to add the youngest child to his medical insurance and the child had to go to the hospital for a broken arm. Christian has never taken care of this bill, even though his insurance should cover it.

There are credit cards that Jane knows nothing about. Even so, looking at the statements, they seemed to be used for marital expenses (car repairs, restaurants, and trips with the family). There are some suspicious purchases, so Jane goes through every statement line by line to determine what can be arguable not marital debt.

Jane also used the credit cards for expenses after Christian was removed from the house and refused to give her money, or pay the utilities.

The credit cards that Jane was aware of are marital. The ones she was not aware of, come with many issues. You could argue they are fully marital (minus the expenses that are questionable) or argue that Jane did not consent to the purchases. Both of these arguments may be valid in your state.

Christian may also not be liable for the expenses that were placed on the credit cards after the divorce was commenced. This will depend on your state, and on issues of what other income was available, if any, to pay these bills.

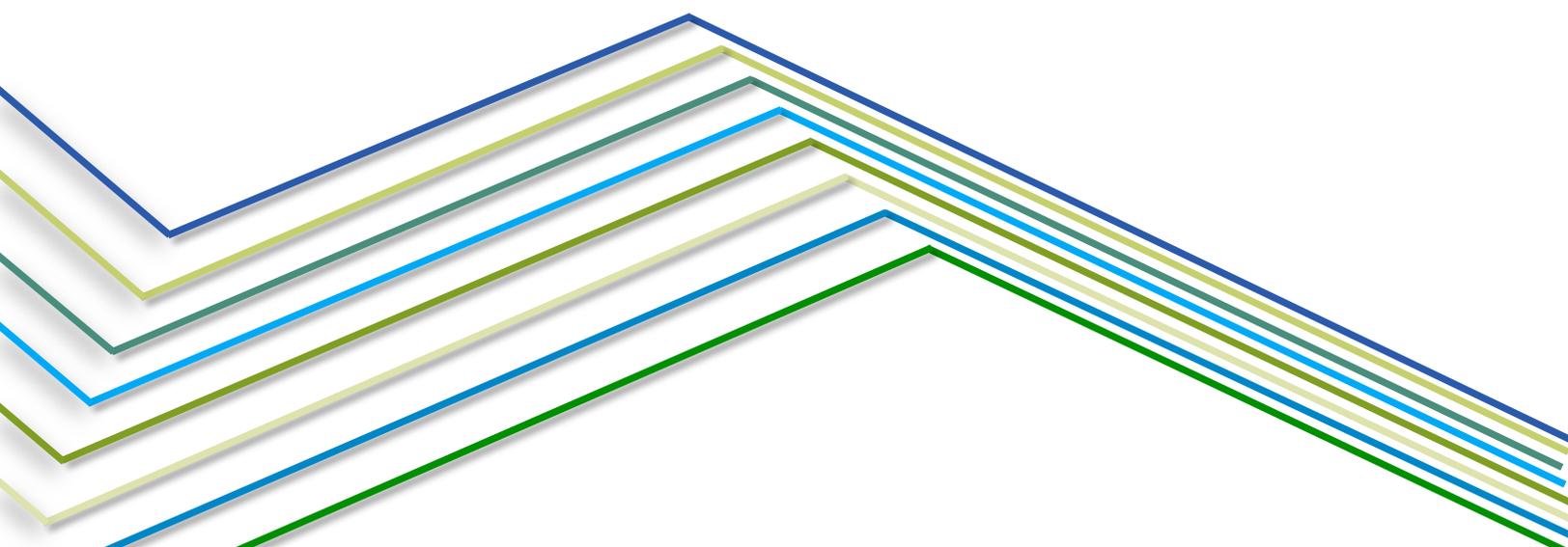
children can, at times, come down to money (child support, tax deductions). Remembering what your client wants, owes and owns is important in settling a case. Knowing that a case is about finances and not any moral judgments is also important.

Conclusion

Divorce ranks up there with death of a close family member as the most traumatic event in a person's life. Domestic violence only makes the trauma and stress worse. No matter what happens, advocates and attorneys must support their clients, allay their fears, and attempt to finalize the case in a way that supports them into the future. Clients will not see vindication in a divorce. What they will see, hopefully, is a financial way out, an ability to not only survive but also succeed financially and create a better, more peaceful way of life than they had before.

Additional Resources

- Isc.gov (list of legal services agencies)
- Womenslaw.org
- Lawhelp.org
- CSAJ training materials and resources:
 - [Accessing Economic Justice for Survivors in Family Law Cases](#)
 - [Individual Advocacy and Legal Rights in Consumer Issues](#)



GUIDEBOOK ON CONSUMER & ECONOMIC CIVIL LEGAL ADVOCACY FOR SURVIVORS

A COMPREHENSIVE AND SURVIVOR-CENTERED GUIDE FOR
DOMESTIC VIOLENCE ATTORNEYS AND LEGAL ADVOCATES



**CENTER FOR SURVIVOR
AGENCY & JUSTICE**

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