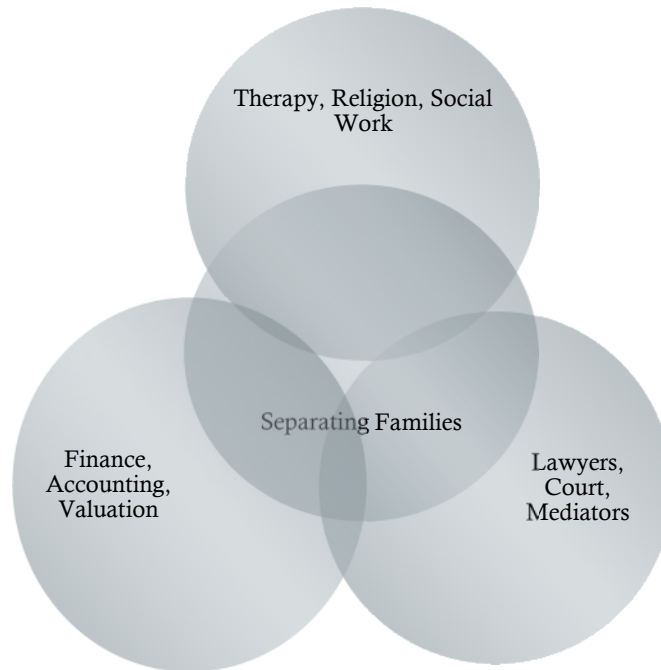


SENSIBLE SEPARATION



Sensible Separation is an interdisciplinary newsletter for professionals assisting families with divorce or separation. If you would like to contribute an article or have an announcement you would like to share, please submit to gkincaid@hrkklaw.com. For more information about divorce mediation, please visit www.sensibleseparation.com. Another opportunity to share helpful thoughts or insights about our work exists on the *Sensible Separation* FACEBOOK page, which is located at www.facebook.com/sensibleseparation. Please visit our site. We are just getting it started and would appreciate the traffic and any helpful information that you would like to share.

Honorable Keven O’Grady

**Sherri Loveland,
Attorney**

**Greg Kincaid, Attorney
and mediator.**

Recently an order for Conciliation came across my desk. Judge O’Grady kindly offers a few words on this new program.

Sherri is on the Child Support Guidelines Committee and she agreed to do a short interview on the appropriate use of the extended tables.

As a mediator, I see spreadsheets every day. It is so easy to make mistakes on them. I asked my wife, a CPA, for some tips to help us.

I hope you enjoy this issue of *Sensible Separation*. If you have news that is noteworthy or would like to contribute an article that might be helpful to divorcing professionals, please feel free to email me at gkincaid@hrkklaw.com.

I. EXTENDED CHILD SUPPORT GUIDELINES: USE THEM OR LOSE THEM?

What follows is a brief interview about the use of the extended child support tables with attorney Sherri Loveland. Sherri practices Family Law in Lawrence, Kansas and also serves on the Kansas Child Support Guidelines Committee.



1. Question: Sherri, does either parent have the burden of proof on this issue?

Answer: Yes and no, the person asking for it, which makes sense, has the burden of proving that using the extended income calculation is appropriate but I have seen judges go both ways. Some judges state that they automatically use the extended income formula because the guidelines say that "all income" means all income (a quote from the guidelines talking about what a court considers in establishing child support) and then it becomes the burden of the defending parent, if you will, to show why this shouldn't happen. This is an area of discretion for the judges where advocacy plays a strong part.

2. Question: Surely, the answer to that question has to be impacted by the amount of money being earned. Wouldn't a parent earning a million dollars a year presumptively be paying more than guidelines support?

Answer: Yes, that would seem to be how the presumption often works, if there were a presumption. However, there are some judges who adhere to the "two-pony rule" (how many ponies does one child need?) and some judges will draw the line at some amount of support recognizing the support amount calculated does not always translate to a benefit to the child but really translates to maintaining the lifestyle of the custodial parent.

3. Question: If decided on a case-by-case basis, what are the factors the court should consider?

Answer: Anything pertinent to the finances of the parties, the needs (or lack of need) of the child(ren) and anything that plays into those issues might be a factor. This is a very discretionary aspect of the guidelines

so any relevant factors concerning need of the child vs. a parent's existing obligations, his or her actual ability to pay, structure of their income and assets, lifestyle changes, etc. is fair game.

4. Questions: I find lawyers, judges and mediators doing two worksheets, adding the sums together and dividing by 2. What do you think of that method?

Answer: I had not heard of that method of calculating support beyond the guidelines but I certainly have no objection to it. With the use of the extended formula being discretionary with the court, any agreed upon method to arrive at a support amount that both parties can settle on which provides for the child(ren) and keeps the parties out of court is certainly a win in my book.

5. Question: Is there any case law out there? I'm not aware of it.

Answer: I am not aware of any case law that creates any specific perimeters for the use of the extended formula for support. Now that you ask the question, I will probably have to do a search for my own information, but at this moment I am not aware of any specific cases dealing with this.

6. Do you think the Guideline Committee would consider offering some guidance or is that a path they don't want to stray down?

Answer: We have discussed this, actually, and my recollection is that we have specifically elected NOT to give guidance as we want this to be, and remain, an area where the facts are advocated and the Judges put on their thinking caps and use their discretion. That's not to say we would never look at this but right now we have declined to not define this or set factors to be considered beyond what I have already described.

Thank you! Sherri Loveland practices with the Stevens Brand law firm in Lawrence, Kansas.

II. WHAT IS CONCILIATION AND WHY ARE WE STARTING TO USE IT, By the Honorable Keven O'Grady.



Conciliation: an Alternative to Mediation.

Most Johnson County family law attorneys know that mediation is generally required before a hearing can be held concerning legal custody or parenting time. There are exceptions to every rule of course (motions to

modify ex parte temporary orders being one), but for years the natural progression of almost every case included mediation as a first step. See Local Rule 22. It became clear to mediators, judges and many lawyers that mediation was not always the best option for every family. A slightly more intensive service was needed. "Conciliation" through Domestic Court Services is one such process. Conciliation is another alternative dispute resolution procedure, similar to mediation, which promotes a positive relationship between parents while working towards an agreed resolution of parenting plan disputes. The process can be thought of as another form of mediation but with the added twist that conciliation is non-confidential. Currently mediation in Kansas is defined and controlled by Supreme Court Rule 901, et seq. Supreme Court Rule 902 defines conciliation as "a proceeding in which a neutral person assists the parties in reconciliation efforts." This rule also allows the conciliator more leeway to express alternative options or make suggestions. The 10th Judicial District now joins several other judicial districts in Kansas in utilizing conciliation. It seems that every district implements conciliation in a slightly different manner but the goal is the same for everyone: providing families the first and best opportunities to make parenting decisions for themselves.

The conciliation process, like mediation, begins as an opportunity for parents to make their own decisions in the best interest of their children. The conciliator might be a more active participant in the discussion by suggesting possible solutions and different ways to resolve conflicts. If parenting issues remain unresolved, the conciliator will offer information to the judge identifying the remaining issues and suggesting additional resources might help the parents move beyond their impasse. The conciliator does not recommend a parenting plan to the court or suggest that one parent's particular schedule is better or worse than the other parent. The conciliator might typically identify the special issues vexing the family, list options for additional services and describe each parent's desired plan. If the family appears to be "high conflict", that family can be identified earlier in the case and channeled to appropriate resources with the goal of changing the conflict dynamic before it becomes hopelessly entrenched. The judge can receive information that might help direct the family through the litigation process faster. The ultimate goal is to direct families to the services they need as soon as possible.

Conciliation will normally be ordered as a result of the Parents Forever screening process. Families who self-identify as more conflicted will be recommended for conciliation instead of mediation. The great majority of cases will still go to mediation as it is the most broadly useful tool for the vast majority of families. Attorneys may request conciliation but the courts will often want some reason for not selecting mediation. Updated mediation, conciliation and other forms are available at http://courts.jocogov.org/local_civ22.aspx and http://courts.jocogov.org/local_civ25.aspx.

If conciliation is successful, the process is very similar to mediation. The conciliator will draft an agreement that is then forwarded to the parents for review with their attorneys and submission to the court. The biggest practical difference between conciliation and mediation is that if conciliation is only partially successful, or is wholly unsuccessful, the report to the court goes beyond the simple statement that conciliation was unsuccessful.

The Parents Forever and Conciliation programs are a response to burgeoning domestic court dockets and the heavy emotional and financial toll of protracted litigation on families. The judges of the 10th Judicial District have approved and promoted the implementation of these two new programs as an opportunity to provide earlier, more efficient and more satisfying resolutions of disputed cases. These new programs also reflect the increasing recognition that courts have an opportunity to render affirmative, constructive assistance to parents and children as they navigate the difficult separation process.

For questions about these programs or any other service or parent education class offered by Court Services the best source is Erin Poolman, Director of Domestic Court Services. She may be reached at (913) 715-7481.

III. SPREADSHEET PROBLEMS; WHY SO MANY ERRORS? by Greg Kincaid



The financial backbone of most divorce cases is depicted on a spreadsheet. Here, the attorneys, the clients and the judge can look at one piece of paper and determine whether the division of the marital assets and debts is equitable. When done right, it's a great tool. When done poorly, it can be a disaster.

The process of preparing the spreadsheet is not easy, particularly when trained in law and not accounting. Simple math is something we should all be able to do on our own. Accounting is not math and the distinction is easily lost. In my practice as a divorce mediator and attorney, I have repeatedly seen very capable and experienced lawyers make significant errors on spreadsheets. Candidly, I cannot exclude myself from that observation. In fact, I decided to pen this discussion not because I'm better at this than most. I'm not.

Spreadsheet errors understandably upset clients and their expectations. It also puts opposing counsel in an awkward position of having to correct mistakes that might not be in their own client's best interest.¹

Here are three quick spreadsheet considerations. **One:** There is not a lot of mileage in being a spreadsheet King or Queen. Encourage the client, opposing counsel or, best of all, the client's accountant or financial planner, to prepare it. I'm pretty blunt about this. "There are better people to do this than me." Of course, even if someone else prepares the spreadsheet, you still have to understand it. I often prepare my own spreadsheet as a tool to double check that the division is equitable. It's my personal work product and I don't share it. **Two:** If you must prepare and share one with the client, get a written disclaimer. I ask clients to sign, as part of their settlement agreement, a statement that the spreadsheet was prepared with their assistance, review and approval; with information they provided to me which I did not independently verify, and that they were advised to have an accountant review it. **Three:** Make sure you understand the underlying accounting principles. Failure to understand the accounting principles spawns most of our errors. The more complex the asset and debt mix, the more likely it is that errors will be made. My wife, Michale Ann Kincaid, is a tax accountant, at RSM McGladrey. She offered a few tips to help us to better understand the underlying accounting concepts.

There is one easy rule of thumb to help us think about spreadsheets more clearly. Everything on the spreadsheet is owned one-half by each spouse. Assume, for example, that Spouse #1 has \$200,000 of

¹ By the way, YES, you are ethically obligated to disclose a mistake. KRPC Rule 3.3(3) prohibits a lawyer from introducing evidence he knows to be false. Rule 3.4(1) prohibits a lawyer from concealing evidence from opposing counsel. See, also Rule 4.1, Truthfulness in Statements to Others.

assets in the initial division and Spouse #2 received \$150,000. Many clients and perhaps even a lawyer or two will compare the balances and conclude that Spouse #2 was shorted \$50,000. This is incorrect. The correct equalization payment is \$25,000 so that both spouses end up with \$175,000 of assets.

Accountants typically do financial reporting on balance sheets and income statements. Spreadsheets are a bit of a variation of the balance sheet concept. They are most definitely not income statements. Avoid putting income-related items on a spreadsheet. A common example of this mistake is placing unpaid child support obligations on the spreadsheet as a marital debt. This is not a marital debt and has no place on the spreadsheet.

Also be careful to not include in the marital asset mix childrens assets, non-marital and premarital property. I've seen spreadsheets that include non-marital assets above the line and then attempt to subtract them later, below the line, as a part of an equalization payment. It's easy to make mistakes using this method.

Our local guidelines suggest that it may be appropriate to treat premarital debt paid off during the marriage as an asset in the debtor spouse's column. This works. I've seen it done a myriad of other ways that don't work. I'd follow the suggestion in our guidelines.

It's perfectly appropriate to tax affect retirement assets so that the court can do an apples-to-apples comparison of the final asset division. Remember, however, when you draft the marital settlement agreement and describe the amount of the retirement account each spouse is ultimately going to receive that you have to "unwind" the tax effect. Put another way, what is on the spreadsheet is not what is in the written document.

What about marital debts paid off while the divorce is pending? These debts should probably go on the spreadsheet with the balances due on the date of valuation or separation. Often, however, in lieu of making child support or maintenance payments, a spouse is satisfying their maintenance or child support obligation by paying off current obligations as they arise each month. Although most try, it's probably not appropriate to satisfy two different obligations with the same dollar.

Hope that helps. If you have a few tips of your own, please share them at <https://www.facebook.com/sensibleseparation>

Sensible Separation is a Quarterly Newsletter, edited by Greg Kincaid. Submissions are welcome. If you would like to contribute, I may be reached at (913) 782 2350 or at gkincaid@hrkklaw.com. My web address is www.sensibleseparation.com. If you would like to initiate a dialogue on a issue of interest to you, where others can participate, please do so at www.facebook.com/sensibleseparation.