

Are Contingency Fee Cases Part of the Marital or Communal Estate?

By
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I. Introduction

This article deals with whether an attorney spouse's interest in work in progress on contingency fee cases worked on and/or acquired during the marriage constitutes part of the marital/communal estate subject to division.¹ The article also explores some of the concerns and nuances associated with valuing such interests and protecting attorney-client confidentiality. There is a dearth of appellate cases directly dealing with this issue.

Of the few appellate decisions that have ruled on these issues, the majority hold that compensation which a divorcing attorney-spouse might receive from contingent fee cases pending at the time of dissolution of marriage or divorce does constitute marital or community property subject to distribution. However, one must recognize that problems exist in accurately valuing pending contingency fee cases and in protecting the confidentiality of the attorney spouse's clients. Appellate cases comprising the majority view come from Arizona, Arkansas, California, Colorado, Louisiana, Maryland, Massachusetts, New York, Washington and West Virginia courts.²

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¹ A contingent fee contract is defined as one in which an attorney is entitled to compensation only if his/her client prevails in the matter in which the attorney represented the client. 7A C.J.S., *Attorney & Client*, § 313 (West 1980). See also, *Musser v. Musser*, 909 P.2d 37, 38 n.1 (Okla. 1995) (quoting *Pocius v. Halvorsen*, 195 N.E.2d 137, 139 (1964)). "A contingency fee contract is defined as 'one that provides that a fee is to be paid to the attorney for his services only in case he wins, that is, a fee which is made to depend upon the success or failure to enforce a supposed right, and which fee is generally paid out of the recovery for the client'."

² Arizona, California, Louisiana and Washington are community property states. ARIZ. REV. STAT. ANN. § 25-211 (1998); LA. REV. STAT. ANN. CC. § 2335 (1998); and WASH. REV. CODE § 26.16.030 (1998). California and Loui-

The minority view holds that the very nature of contingency fee cases renders them too speculative to accurately value, and consequently that they cannot be deemed marital property or part of the community for distribution. Some minority view cases also question whether any pending contingent fee cases can be evaluated by third-party experts due to the attorney-client privilege. Florida, Georgia, Illinois, Oklahoma, and Pennsylvania comprise courts employing this minority viewpoint.

II. The Minority View

The minority view is clearly the most simplistic, as it avoids the complicated issues of valuing pending contingency fee cases and the attorney-client problem. The minority view seems to be the “easy way out” and is perhaps an abdication of the court’s duty to equitably or equally distribute the parties’ marital or community assets. It is unfair to the non-attorney spouse, who will be deprived of the fruits of the marital or community efforts (labor) performed by the attorney spouse during the marriage on those pending contingency fee cases, because these courts label the fees non-marital property without considering the extent that the non-attorney spouse contributed to the end result. Nevertheless, the cases representing the minority view do suggest legitimate concerns supporting their holdings.³

*Beasley v. Beasley*⁴ first held that contingency fees are not marital assets. In *Beasley*, the Pennsylvania Superior Court distinguished between cases in which a fee is fixed based upon the work performed (billable hours expended) and cases in which the fees are contingent upon the outcome.⁵ The court noted that

siana mandate equal distribution, while Arizona and Washington require an *equitable* distribution of “the community.” ARIZ. REV. STAT. ANN. § 25-318(A) (1998); WASH. REV. CODE § 26.16.030 (1998).

³ See generally, *Roberts v. Roberts*, 689 So. 2d 378 (Fla. Dist. Ct. App. 1997); *Goldstein v. Goldstein*, 414 S.E.2d 474 (Ga. 1992); *Marriage of Zells*, 572 N.E.2d 944 (Ill. 1991); and *Beasley v. Beasley*, 518 A.2d 545 (Pa. Super. Ct. 1986). These courts divulge various reasons for applying the non-marital property label.

⁴ 518 A.2d 545 (Pa. Super. Ct. 1986).

⁵ Valuing contingency fee cases was also questioned because of the client’s “right of confidentiality.” *Id.* at 555. The confidentiality concern is discussed *infra* at Section V of this article.

in contingency fee cases, the value of the services rendered and the costs advanced are absorbed by the attorney, cannot be recouped, and as such remain indeterminable until the case is completed. The court compared such indeterminable case values to ones applying fixed fee rates, where work performed *can be appraised* and a *value established* prior to the time of distribution. The court ultimately concluded, “It is tenuous and risky to attempt to evaluate the likely return on contingent fees and as such, no value can be placed on them for purposes of equitable distribution.”⁶

However, the *Beasley* court did not completely foreclose the non-attorney spouse. It observed that for *support* purposes:

[T]he income producing capacity reflected by such [contingency] cases can be estimated on the basis of compensation for completed cases and, therefore, that record should be sufficient to project the earning capacity of the attorney without speculating on the nebulous return that might be derived from examining active contingent fee cases.⁷

*In re Marriage of Zells*⁸ later offered another court the opportunity to weigh the contingency fee property argument, and it also rejected that concept. In *Zells*, the Illinois Supreme Court held that an attorney’s contingent fee cases were *not* marital assets, reasoning that contingency fee contracts provide the attorney no right to receive or assurance of receiving a fee until the case is concluded.⁹ The court said that any value given to a contingent fee case would be “highly speculative” and therefore, “intangible”, since it depends on an unknown award or settlement.¹⁰ In addition, the *Zells* court observed that there was an “impermissible ethical conflict posed by a court-ordered division of contingent fees”, because such would constitute a violation of the rule barring a lawyer from sharing fees with a non-lawyer.¹¹

⁶ *Id.* at 554. The court distinguished contingent fees from pensions, stating that contingent fees “do not have the same expectation of vesting which permits greater certainty in fixing value and for establishing present worth.” *Id.* at 555.

⁷ *Id.* at 554.

⁸ 572 N.E.2d 944 (Ill. 1991).

⁹ The court essentially adopted the conclusions of the intermediate appellate court. 554 N.E.2d 289 (Ill. App. Ct. 1990).

¹⁰ *Id.* at 945.

¹¹ *Id.* at 945. This latter point appears somewhat strained. Surely, *all* attorneys’ spouses share *indirectly* in the attorney spouse’s fees during the intact

However, the court in *Zells*, like the Pennsylvania court in *Beasley*, did not completely discount consideration of such contingent fees. It noted,

The context for the consideration of fees, contingent or otherwise, is in the determination of income for support and maintenance. Fees earned by an attorney contribute to the annual income figures relied upon in awarding maintenance and support. Future earned fees would be considered should the subject of maintenance be revisited.¹²

In *Goldstein v. Goldstein*,¹³ the Georgia Supreme Court found it “impossible” to determine in advance whether a contingent fee case will ultimately yield a fee or the amount of any such fee.¹⁴ The court held that the “qualities of contingent fee agreements make them too remote, speculative and uncertain to be considered marital assets in making an equitable distribution of property.”¹⁵

In *Musser v. Musser* the Oklahoma Supreme Court similarly concluded that it is impossible to accurately predict a client’s recovery on a contingency fee case.¹⁶ Based on this conclusion, the court held such cases constitute nonvested interests and are *not considered* part of the marital estate.

Florida is the most recent State to reinforce this minority view. In *Roberts v. Roberts*,¹⁷ the Florida Fourth District Court of Appeal found “real differences” between contingency fee contracts and other intangible interests, such as nonvested pension benefits. The Court noted that “[r]ecoveries in contingency cases

marriage. Awarding a divorcing spouse a share in the attorney’s spouse’s fees is really no different. As the Court of Appeals of Washington recently noted in *Marriage of Estes*, 929 P.2d at 503, “[f]ees earned during marriage are community property, necessarily shared with a nonattorney spouse; this has never been viewed as a violation of the rules of professional conduct.”

¹² *Id.* at 945. This, of course, would leave a spouse who was not awarded maintenance, alimony or spousal support, without any remedy.

¹³ 414 S.E.2d 474 (Ga. 1992).

¹⁴ *Id.* at 476.

¹⁵ *Id.* at 476. One should observe that Justice Hunt’s dissenting opinion in *Goldstein* acknowledges that “[p]ractically all jurisdictions that have addressed the issue have determined that contingent fee contracts constitute marital property.” *Id.* at 476 (Hunt, J., dissenting).

¹⁶ *Musser*, 909 P.2d at 40.

¹⁷ 689 So. 2d 378 (Fla. Dist. Ct. App. 1997).

lack any suggestion of the probability that pension benefits have for the employee.”¹⁸

The common thread among these minority view cases is the speculative nature of the potential value of pending contingency fee cases. One may debate whether such holdings are fair and equitable, since valuation problems have not precluded other “speculative” or “intangible” assets, including professional goodwill or nonvested pension plan interests, from constituting part of the marital or communal estate subject to division. The valuation of pending contingency fee cases and alternatives to “speculative” valuation are discussed in greater detail below in Section IV.

III. Majority View

*Due v. Due*¹⁹ first established the majority and arguably the better-reasoned view. In *Due*, the Louisiana Supreme Court held that the attorney-husband’s interest in contingency fee contracts, pending as of the date of dissolution of the marital community, constitute “patrimonial asset[s]”²⁰ provided that the spouse acquired the contracts during the marriage and their value depended upon the spouse’s services performed during the marriage.²¹

The *Due* court rejected the attorney-husband’s threefold argument. First, the court disagreed when he argued that such contracts are aleatory, since these contracts depend on an uncertain event. As such, he claimed no obligation, or fee entitlement, is created until and unless the actual happening of the event.²² Second, even if such a contract creates a contemporaneous right to enforce it upon the happening of the event, any such right is “only [one] of specific enforcement”²³ and not a retroactive vesting to the contract’s creation. To this end, the attorney husband claimed that the client could revoke or the attorney’s death terminate the attorney-client relationship (and concomitant entitle-

¹⁸ *Id.* at 381.

¹⁹ 342 So. 2d 161 (La. 1977).

²⁰ *Id.* at 165.

²¹ *Id.* at 165-66.

²² *Id.* at 164.

²³ *Id.* at 163.

ment to a fee).²⁴ Third, such a contract has absolutely “no ascertainable value prior to successful completion of the [case].”²⁵

In disagreeing with the attorney-spouse’s claims, the Louisiana Supreme Court concluded,

[A]n attorney’s rights under a contingent contract, whatever their nature, clearly have pecuniary value. . . . [T]he attorney himself, or his heirs, have enforceable rights that arise even before final completion of an attorney’s services. The valuation of these interests in pending contracts have arisen, for example, in suits by former law partners for a division of the assets following dissolution of the partnership.²⁶

Subsequently, in *Garrett v. Garrett*,²⁷ the Arizona Court of Appeals found that rights flowing from the attorney husband’s contingent fee contracts entered into during the marriage, which were not fully performed at the time of dissolution, were community property subject to division. The court disagreed with the attorney husband’s contention that the court “lacked jurisdiction” to award any part of such contracts to the wife because they are his “separate property” since fees will be received, if at all, after the dissolution.²⁸ In significant part, the court explicated:

[W]hile it is true that an attorney is not entitled to the full benefit of his contract until the contingency upon which it is based is fulfilled, this does not mean that valid enforceable contract rights do not exist regardless of its fulfillment. For example, an attorney under a contingency fee contract who is discharged prior to fulfillment of the contract is entitled to reimbursement for the reasonable value of his services [o]r his heirs are so entitled in the event death of the attorney precluded fulfillment of the contract. . . . It is therefore clear that a contingency fee contract does not involve a mere expectancy in which no enforceable rights exist in the holder of the expectancy.²⁹

Interestingly, the court in *Garrett* compared contingency fee contracts to pension plans and concluded that contingency fee con-

²⁴ *Due*, 342 So. 2d at 165.

²⁵ *Id.* at 163 (citing in part *Wampler v. Wampler*, 119 So. 2d 423 (1960) and LA. CIV. CODE ANN. art. 1776, 2982 (West 1998)).

²⁶ *Id.* at 165 (citing *Trice v. Simon*, 233 So. 2d 609 (La. App. 1970)).

²⁷ 683 P.2d 1166 (Ariz. Ct. App. 1983).

²⁸ *Id.* at 1168. It is suggested that the timing of the contingency fee payment should never be determinative, since the attorney spouse, at least to some extent, may control the timing of the payment.

²⁹ *Id.* at 1169 (quoting in part *Neal v. Hinchcliffe*, 189 P. 1116 (1920); and *Marriage of Brown*, 544 P.2d 561 (1976)).

tracts are part of the community of property. The Pennsylvania Superior Court in *Beasley*³⁰ made a similar comparison, but it came to a different conclusion.

In *Lyons v. Lyons*,³¹ the Supreme Judicial Court of Massachusetts analogizes an interest in a contingent fee contract with the interest of a litigant in a pending lawsuit, citing its decision of same date in *Hanify v. Hanify*.³² The *Lyons* court held that the attorney-spouse's interest in a contingent fee agreement of a pending case constituted marital property and remanded the matter to the trial judge for a determination of an appropriate distribution of the contingent fee.

A fellow court in Colorado adopted this same majority view in its decisive holding from *In re Marriage of Vogt*.³³ Here, the Colorado Court of Appeals rejected the attorney-husband's contention that the proceeds from two contingency fee cases were only an *expectancy*, reflecting his future income acquired after dissolution and did not constitute marital property.³⁴ Further, the court held that the contingency fee cases were part of the

³⁰ 518 A.2d at 557.

³¹ 526 N.E.2d 1063 (Mass. 1988).

³² 526 N.E.2d 1056 (Mass. 1988). In *Hanify*, the Supreme Judicial Court of Massachusetts held that the husband's pending lawsuit, essentially for breach of an employment contract seeking damages for income and assets *lost during the marriage*, constitutes part of the marital estate. The court concluded, "[r]ecovery of this loss should be considered . . . [a marital] asset . . . , because such recovery replaces monies that would have benefited both spouses had the alleged legal wrong not occurred. The fact that the pending lawsuits are of uncertain value does not require their exclusion from the marital estate." *Hanify*, 526 N.E.2d at 1059.

Parenthetically, it would seem that any recovery for lost wages or assets which would have been received *before or after* the marriage should *not* be classified as part of the marital estate or community. *See, e.g.*, *Bandow v. Bandow*, 794 P.2d 1346 (Alaska 1990) (Compensation for lost wages is separate property if the wages would have been received after the marriage. Conversely, such compensation is marital property if the lost wages would have been received during the marriage.); *Weisfeld v. Weisfeld*, 545 So. 2d 1341 (Fla. 1989); *Lynch v. Lynch*, 505 N.Y.S.2d 741 (N.Y. App. Div. 1986) (Husband's entire potential recovery from his lawsuit against his former employer was not marital property subject to equitable distribution division, where it related almost entirely to employment in which husband would have engaged subsequent to commencement of matrimonial action.).

³³ 773 P.2d 631 (Colo. Ct. App. 1989).

³⁴ *Id.* at 632.

marital estate to the extent that the husband performed the work during the marriage entitling him to such fees.³⁵ The court found the *Garrett*³⁶ holding compelling, and concluded that “[d]eferred compensation earned during marriage but payable after dissolution constitutes marital property subject to division.”³⁷

In *In re Marriage of Kilbourne*,³⁸ the attorney-husband’s practice consisted almost entirely of personal injury cases with contingency fees. As in most divorces, after separation, the husband continued to conduct his law practice, working on cases that had been opened before separation, as well as new cases. He received fees from cases that he had worked on both before and after the separation. The California District Court of Appeal held that the husband’s work in progress on the contingency fee cases constituted community property subject to division stating, “There is no dispute that the fact that husband’s right to receive his fees is contingent on future events does not negate their status as divisible community assets.”³⁹

In *Metzner v. Metzner*,⁴⁰ the West Virginia Supreme Court fully considered the cases from other jurisdictions on both sides of the issue and concluded,

Contingent and other future earned fees which an attorney might receive as compensation for cases pending at the time of a divorce should also⁴¹ be considered as marital property for purposes of equitable distribution. However, only that portion of the fee that represents compensation for work done during the marriage is ‘marital property’ as defined by our statute.⁴²

The most recent appellate decisions to follow the majority view are *In re Marriage of Estes*⁴³ and *McDermott v. McDer-*

³⁵ *Id.*

³⁶ 683 P.2d 1166 (Ariz. Ct. App. 1983).

³⁷ 773 P.2d at 632 (quoting *Marriage of Johnson*, 576 P.2d 188 (Colo. Ct. App. 1977)).

³⁸ 281 Cal. Rptr. 211 (Cal. Ct. App. 1991).

³⁹ *Id.* at 215 n.4. Supporting said statement, the court made analogy to, among others, nonvested pensions, observing that unvested pension rights constitute a contingent community asset. *Id.* (citations omitted).

⁴⁰ 446 S.E.2d 165 (W. Va. 1994).

⁴¹ “Also” meaning in addition to accounts receivable.

⁴² *Id.* at 174.

⁴³ 929 P.2d 500 (Wash. Ct. App. 1997).

mott.⁴⁴ The *Estes* court essentially followed the holding and reasoning of the Arizona Court of Appeals⁴⁵ in *Garrett v. Garrett*.⁴⁶ Although not all the cases representing the majority view are precisely clear on this point, it appears irrelevant whether the contingency fee contract was actually acquired *before or during* the marriage. This is so because it is the *marital labor* (the extent of labor/services performed during the marriage toward the ultimate goal - the FEE) that renders the contingency fee or portion thereof marital or communal. As the *Garrett*⁴⁷ court espoused,

it is theoretically immaterial if the contingency fee contract was entered into prior to marriage, if after marriage community labor was expended to bring it to fruition. For the same reasons, it is immaterial if the contract was entered into during marriage, but no community labor was expended to fulfill the contract. When the nature of the asset requires continuing services to reap an ultimate benefit (such as contingency fee contracts and pension plans) it is not when the inception of services begin (either before or after marriage) which is material in assessing the community interest, but rather the amount of community labor expended in perfecting the ultimate benefit.⁴⁸

The majority view certainly seems the fairest and most equitable because, unlike the minority view, it does not shortchange

⁴⁴ 986 S.W.2d 843 (Ark. 1999).

⁴⁵ *Id.* at 502 (referring to *Garrett*, 683 P.2d 1166 (Ariz. Ct. App. 1983)).

⁴⁶ *See also*, *Litman v. Litman*, 506 N.Y.S. 2d 345 (N.Y. App. Div. 1986) (In valuing attorney-husband's law practice, wife is entitled to have her expert value pending contingent fee case files.) *See Quinn v. Quinn*, 575 A.2d 764, 770 (Md. Ct. Spec. App. 1990). "While we are aware that other courts have held that contingent fees cannot be considered as assets of a law firm or as marital assets, we are not prepared to say that the value of a contingent fee can *never* be determined or considered as an asset of a law firm." *Id.* (emphasis added).

⁴⁷ 683 P.2d 1166 (Ariz. Ct. App. 1983).

⁴⁸ *Id.* at 1170. *See also*, *Metzner v. Metzner*, 446 S.E.2d 165 (W. Va. 1994) (Only that portion of the contingency fee that represents compensation for work done during the marriage constitutes marital property.). *White v. Williamson*, 453 S.E.2d 666 (W.Va. 1994), reaffirmed and expanded the *Metzner* rule when the court explained, "that compensation for work performed prior to the separation is marital property. . . . [while the] remainder of the fee award, that which is attributable to work performed following the separation, constitutes separate property." *Id.* at 672 (citing W. VA. CODE 48-2-1(f) (Lexis 1998)). The *White* court further noted that "[i]n many contingency cases, it may prove easier to calculate the amount of the fee which can be attributable to work performed post-separation and simply deduct that amount from the total fee realized to arrive at the amount which constitutes marital property." *Id.* at 672 n. 11.

the non-attorney spouse and provide the attorney spouse with a windfall when and if the contingency fee cases upon which work was performed in whole or in part during the marriage come to fruition.⁴⁹

IV. Valuation Concerns

The main concern of the courts comprising the minority view is the speculative and tenuous nature of valuing pending contingency fee cases. Difficulty in determining value, however, should not justify ignoring the *existence* of the asset, which is the effect of the minority view. As the court explained in *Weiss v. Weiss*,⁵⁰ “[a]s to the contingent fee receivables, we recognize that it was impossible to establish a present value. The fact that an asset is impossible to value on the day of divorce, however, is not sufficient reason to ignore the asset when dividing the marital estate.”⁵¹

⁴⁹ *Rabbit v. Rabbit*, 539 N.E.2d 684 (Ohio Ct. App. 1988). The court held that a referral fee owed to the attorney spouse at the time of divorce constituted marital property subject to division. Undoubtedly, classifying a referral fee as a marital asset should be less complicated simply because no post-dissolution efforts would be necessary to earn the said fee.

⁵⁰ 365 N.W.2d 608 (Wis. Ct. App. 1985).

⁵¹ *Id.* at 613 (referring to *Leighton v. Leighton*, 261 N.W.2d 457, 464 (1978)). In addition, *Due v. Due*, 342 So. 2d 161, 164 (La. 1977), provides that the speculative or uncertain nature of a contingency fee contract does not render it a “non-asset”. By analogy, in *Whitfield v. Whitfield*, 535 A.2d 986, 991 (N.J. Super. Ct. App. Div. 1987), the court observed in addressing the issue of valuation problems regarding a nonvested pension interest, “If we were to accept . . . [the arguments regarding valuation problems] as a bar to the inclusion of this significant asset in the marital estate, we would be paying lip service to the theory of equitable distribution while ignoring the reality before us.” Similarly, regarding goodwill in a professional practice, the Washington Supreme Court in *Marriage of Fleege*, 588 P.2d 1136, 1140 (Wash. 1979), articulated,

“The value of goodwill to the professional spouse, enabling him to continue to enjoy the patronage engendered by that goodwill, constitutes a community asset and should be considered by the court in distributing the community property. The value is real, and the mere fact that it cannot be precisely determined should not deter the court from assigning it a reasonable value within the evidence. Just as in other areas of the law where precise proof cannot be made, such difficulty does not constitute an insurmountable obstacle.”

Moreover, the minority view ignores the fact that attorneys who handle contingency fee cases, such as personal injury practitioners, routinely place a value on such cases in the regular course of business. As the *Due* court commented,

In the everyday world, when a partnership dissolves or a partner withdraws from his law firm, the valuation of the interest of a lawyer in the contingent fee contracts and the appropriate accounting has usually been accomplished by agreement, without undue difficulty, on the basis of informed estimates as to the prospective recovery or settlement value of each case, the chances of loss, and the amount of work involved before and after the dissolution or withdrawal.⁵²

Indeed, the attorney husband in *Musser v. Musser*,⁵³ agreed to an “average value of \$2,000.00” on each of his “400 pending contingency fee cases.”⁵⁴ In *Roehrdanz v. Roehrdanz*,⁵⁵ the attorney husband was held bound to the value of “\$2,500 for work in progress — contingency cases”⁵⁶ he placed on that component of his law practice.

The ultimate value of a jury award (verdict value) is uncertain, but such uncertainty does not mean the case is without value absent a trial (e.g., settlement value). Contingency fee cases are necessarily valued by the attorney or attorneys contemplating such a case, beginning with an initial estimate in the determination of whether to handle the case or refer it out, by settlement offers, and by demand letters.

Contingency fee cases often settle. How could a client make an informed decision concerning settlement offers without advice of counsel, which advice necessarily contemplates a value to the particular case?

Additionally, it is standard practice for attorneys with contingency fee cases, such as personal injury firms, to regularly inventory and value their pending cases in providing reports and information to banking and lending institutions when seeking loans and lines of credit. As the California District Court of Ap-

⁵² 342 So. 2d 161 at 166 n.5.

⁵³ 909 P.2d 37 (Okla. 1995).

⁵⁴ *Id.* at 41.

⁵⁵ 410 N.W.2d 359 (Minn. Ct. App. 1987).

⁵⁶ *Id.* at 362.

peal aptly noted in *Kilbourne v. Kilbourne*,⁵⁷ work in progress can be and usually is one of a law firm's largest assets.⁵⁸ Undoubtedly, such an asset factors into the criteria for approving a loan or line of credit.

Qualified experts can and frequently do place a value on pending contingency fee cases. Such persons include attorneys for insurance companies who regularly analyze cases in determining whether to "fight" or settle. Another such appropriate expert would be a disinterested attorney, who regularly handles the type of pending contingency fee case(s) at issue.⁵⁹ Again, such an attorney would (or in theory should) have experience in valuing such cases in suggesting settlement offers for his or her own clients. Perhaps even a retired judge, who has had vast experience in hearing and presiding over such cases could give a reasonable value to the case or cases at issue? Giving a value to the attorney spouse's contingency fee cases at the time of the final judgment of dissolution of marriage or divorce promotes the desired *finality*.⁶⁰

In attempting to place a present value on contingency fee cases, some points of reference the expert may wish to explore include the following:

1. The attorney's or law firm's internal inventory of the pending contingency fee cases which may include estimated or projected values and fees therefrom.
2. Information provided to banks or lending institutions such as loan applications and credit applications. Such applica-

⁵⁷ 281 Cal. Rptr. 211 (Cal. Ct. App. 1991) (previously published at 230 Cal. App. 3d 163 with limited availability for citing only to part II concerning valuation of cases, not parts I, III, and IV).

⁵⁸ *Id.* at 213 (quoting *Marriage of Green*, 261 Cal. Rptr. 294, 297 (1989)). The phrase, "work in progress" has also been used within such cases as "work in process."

⁵⁹ See generally, *Frink v. Frink*, 494 N.Y.S.2d 271, 273 (N.Y. Sup. Ct. 1985) (where court outlines necessary qualifications for appropriate valuation expert/attorney).

⁶⁰ Of course, valuation *evidence* is critical. In *Klein v. Klein*, 555 A.2d 382 (Vt. 1988), the attorney husband's law practice had twenty to thirty pending contingency fee cases at the time of dissolution. The wife requested the law practice be included in the property distribution. However, she and the husband failed to offer any evidence as to its value or the value of the pending contingency fee cases. As such, the law practice was distributed to the husband as an asset of "undetermined value." *Id.* at 385.

tions are usually renewed or updated on an annual basis. Moreover, banks and lending institutions have established sophisticated analytical criteria for determining the accuracy of the estimated values given to pending contingency fee cases on such applications by attorneys and law firms.

3. The “track record” of the attorney’s practice or the law firm’s contingency fee cases over the past four or five years to ascertain the income generated therefrom.

4. If the case is a referral to the attorney spouse (or his law firm), many times the attorney will receive a great deal of information from the referring attorney as to the potential value of a case. To this end, there is usually some criteria or standard that the attorney spouse (or his law firm) utilizes in establishing a value to a case in determining whether to handle it.⁶¹

5. If there are cases on appeal, the value of any supersedeas bond that may have been posted.

6. If the case involved insurance coverage, the liability and amount of coverage is very important.

7. In reviewing the files of a particular case, there may be reports from experts such as an economist or rehabilitative expert discussing the present value of a claim against mortality tables and providing that expert’s opinion of the case.

8. Whether any partners or associates have recently left the law firm. If so, the determination by the firm of the pay out (if one) may shed light on the value of the pending contingency fee cases.

9. Of course, the *entire* file of each case should be reviewed with particular attention to demand letters, offers of judgment, internal memorandum on the issue of settlement, and the like.

However, placing a present value could be unfair to either the attorney spouse or the other spouse because one spouse will be shortchanged if the projected value ultimately proves to be too high or too low. For this very reason, valuing contingency fee

⁶¹ There are some attorneys and law firms practicing in the areas such as personal injury, medical malpractice, and products liability that will not even handle a case unless it has a certain value (e.g., \$100,000). That information or reputation can probably be ascertained from speaking to attorneys for insurance companies, who have dealt with and defended cases against the attorney spouse or his/her law firm.

cases based upon a reasonable hourly rate has been rejected. In *Garrett v. Garrett*,⁶² the court said:

This overlooks the very nature of the contract—an all or nothing proposition. It is as unfair to require the attorney/spouse to pay the other spouse for reasonable services rendered when ultimately no fee is earned because the litigation was lost as it would be to require the non-attorney/spouse to accept a sum based upon an hourly fee when the attorney/spouse receives compensation far exceeding that amount.⁶³

If valuation is deemed unfair, not possible, or too speculative, then the court can always reserve the right to determine the spouses' respective interests in the marital (or communal) work in progress on the contingency fee cases upon the ultimate outcome of each case. This is the method the West Virginia Supreme Court of Appeals suggested in *Metzner v. Metzner*,⁶⁴ and the California District Court of Appeal echoed the same in *In re Marriage of Kilbourne*.⁶⁵ In addition, the Colorado Court of Appeals upheld this contention in *In re Marriage of Vogt*,⁶⁶ which the Arizona Court of Appeals reinforced in *Garrett v. Garrett*.⁶⁷ Courts have also used the reservation method, reserving jurisdiction, in dealing with other types of uncertain or contingent assets (and liabilities).⁶⁸

⁶² 683 P.2d 1166 (Ariz. Ct. App. 1983).

⁶³ *Id.* at 1170.

⁶⁴ 446 S.E. 2d 165, 174 (W. Va. 1994).

⁶⁵ 281 Cal. Rptr. 211, 214-15 (Cal. Ct. App. 1991). Interestingly, it was the attorney husband in *Kilbourne*, who argued on appeal that the “trial court erred in failing to place a present value on the work in progress and choosing instead to reserve jurisdiction to divide the unpaid fees in the future.” *Id.* at 214. The appellate court affirmed.

⁶⁶ 773 P.2d 631, 633 (Colo. Ct. App. 1989).

⁶⁷ 683 P.2d 1166, 1170 (Ariz. Ct. App. 1983).

⁶⁸ *See e.g.*, *Gemma v. Gemma*, 778 P.2d 429, 431 and 433 (Nev. 1989) (court should reserve jurisdiction to distribute defined benefit pension plan); *Marriage of Epstein*, 592 P.2d 1165 (Cal. 1979) (referring to *Marriage of Clark*, 145 Cal. Rptr. 602 (Cal. App. 2d 1978)). Regarding potential tax upon court ordered sale of marital home, “the court can take account of tax liability by providing that the liability incurred, if any, is owed equally by both spouses. In unusual cases, it could retain jurisdiction to supervise the payment of taxes and adjust the division of the community property.”; and *Karp v. Karp*, N.Y.L.J. 6/16/87, p. 1, col. 2 (N.Y. Sup. Ct.) (Court retained jurisdiction as to contingent tax liability projected to be determined within one year.).

The reservation method may create a burden on already overburdened trial court dockets, because each time a contingency fee is received by the attorney spouse which was pending at the time of divorce or dissolution of marriage, the court will have to determine what percentage or amount thereof is part of the marital estate (or the community) and the division thereof (unless mandated to be equal) between the spouses.⁶⁹ However, the time spent on the reserved questions might be less than the time devoted up front in attempting to place a value on speculative or uncertain recoveries. And the reservation method certainly seems to be the fairest to *both spouses*. Neither spouse receives anything if no fee is ultimately received, but both receive their fair and equitable share of *any* fee that actually is received.⁷⁰

Finally, on the subject of valuation, in *White v. Williamson*⁷¹, the court held that all “legitimate liabilities” of the attorney spouse must be deducted from the contingency fee realized in calculating the portion which qualifies as marital property subject to equitable distribution.⁷² “Legitimate liabilities” include income taxes owed based solely on the contingency fee received and not on the attorney spouse’s income in general for the relevant tax year, debt owed to the law firm if the debt represented an advance of income, and a bonus to a secretary provided the giving of the bonus is a contractual obligation and not simply “an act of generosity” on the attorney-spouse’s part.⁷³

⁶⁹ See e.g., *Roberts v. Roberts*, 689 So. 2d 378, 382 (Fla. Dist. Ct. App. 1997). “We thus conclude that jurisprudential reasons militate against such a reservation of jurisdiction.” *Id.*

⁷⁰ The court in *Garrett* held “that in evaluating the community interest in a contingent fee contract, the trial court may consider the following factors: the amount of time expended before and after the dissolution, how that time was expended, the settlement history of the case, and any other relevant factor as may bear on the equitable division of this community asset.” 683 P.2d at 1172-73.

⁷¹ 453 S.E.2d 666 (W. Va. 1994).

⁷² *Id.* at 673.

⁷³ *Id.* at 673-74.

V. Attorney-Client Confidentiality Concern

In attempting to avoid the inclusion of pending contingency fee cases in the marital estate or community, the attorney spouse may argue that the attorney-client privilege precludes the disclosure to the other spouse or the other spouse's expert of contingency fee case files in progress. It is a legitimate concern that has been judicially recognized.⁷⁴

In *Beasley*, the non-attorney spouse's expert "testified that he would handle the confidentiality by not disclosing or identifying any of the files or names of persons contained in those files and do whatever was required by a non-disclosure Order issued by the court."⁷⁵ The court found the expert's promise to be insufficient, observing that

there is the right of confidentiality and for the clients to have their personal affairs be absolutely privileged and private. . . . [T]o permit inquiry into confidential files for the purpose of evaluating contingent fees as potential earnings is inappropriate. The review by an outsider of confidential files, which can contain information which would never be revealed except to the lawyer in a confidential relationship, would have a chilling effect on that relationship which far outweighs the need to appraise those files for these purposes.⁷⁶

However, to alleviate such a concern, the court may order and implement appropriate safeguard measures to protect attorney-client confidentiality.

In a 4-3 decision, the Georgia Supreme Court in *Goldstein* held contingent fee agreements to be "too remote, speculative and uncertain to be considered marital assets in making an equitable division of property."⁷⁷ The majority opinion thus does not address the attorney-client privilege argument posed by the attorney husband. However, in his dissenting opinion, Justice Hunt suggested that potential privilege concerns could be eliminated with narrowly tailored discovery rules. Justice Hunt stated,

I would fashion a rule for cases such as that presented here, as follows: all discovery would be produced pursuant to strict protective order by

⁷⁴ See generally, *Beasley*, 518 A.2d 545, 556 (Pa. Super. Ct. 1986).

⁷⁵ *Id.* at 551.

⁷⁶ *Id.* at 555-56.

⁷⁷ *Goldstein*, 414 S.E.2d at 476 (referring to *Zells*, 554 N.E.2d 289 (Ill. 1990)).

the trial court designed to ensure that no confidential information is disseminated (including, where necessary, the redaction of the names, addresses, civil action numbers, and other identifying information of clients in any documents).⁷⁸

In *Frink v. Frink*,⁷⁹ the “wife sought an order compelling her husband, an attorney, to produce for examination” by the wife’s expert the husband’s outstanding negligence litigation files to value same for equitable distribution purposes.⁸⁰ The husband sought a protective order prohibiting the production of his outstanding litigation files “upon the ground that disclosure would violate the confidentiality of the attorney-client relationship.”⁸¹ The court denied the plaintiff-husband’s request for a protective order and required the production of the requested files, but with certain safeguards.⁸² The court directed:

The examination of plaintiff’s case files shall be conducted by defendant’s expert in plaintiff’s office or such other place as mutually agreed upon between the parties. Defendant’s expert shall be an attorney admitted to practice in the State of New York whose practice includes negligence law. No other individual shall accompany defendant’s expert during his inspection of plaintiff’s case files. Plaintiff or his representative may be present during the inspection.

Defendant’s expert shall be restrained and permanently enjoined from disclosing any information, not previously made public by plaintiff, contained in plaintiff’s case files for any purpose beyond that necessary for the evaluation of plaintiff’s law practice. In addition, defendant’s expert shall be restrained and permanently enjoined from revealing the name of any party to any action in which a court index number has not been obtained and shall refer to these case files by a method of identification other than the names of the parties. Prior to the inspection by defendant’s expert, plaintiff may, if so advised, redact the names of the parties from his case files in which a court index number has not been obtained.

The official court files in any action in which a court index number has been obtained will contain the names of the parties as well as any motion papers in the action and may contain copies of the pleadings. . . .

Plaintiff may remove from his outstanding negligence litigation files any correspondence, personal notes or other material which would be excludable from evidence pursuant to [the state’s attorney-client privi-

⁷⁸ *Id.* at 476. (Hunt, J. dissenting).

⁷⁹ 494 N.Y.S.2d 271 (N.Y. Sup. Ct. 1985).

⁸⁰ *Id.* at 271, 272.

⁸¹ *Id.* at 272.

⁸² *Id.*

lege statute]. Plaintiff shall maintain a separate identifiable file until the conclusion of the trial of this action containing any material he has removed from his files.⁸³

For an example of the type of provisions such a confidentiality protective order should include, one may review the appendix attached hereto. Of course, any protective order must be specifically tailored to the particular aspects of the attorney-spouse's law practice on a case-by-case basis.

VI. Conclusion

The majority of the appellate courts that have directly addressed this issue have held pending contingency fee cases to be part of the marital estate or community. This article suggests the majority position is proper and equitable. Any other holding deprives the non-attorney spouse of the marital or community efforts (labor) of the attorney-spouse on the contingency fee case(s) when and if the fruit of such marital labor ever ripens into a fee.

Attorneys and law firms place a value on contingency fee cases every day. Admittedly, valuing contingency fee recoveries is not an exact science and is tenuous, but it can be and is done. Alternatively, the court can reserve jurisdiction to address each contingency fee case at the conclusion of each case.⁸⁴ Reserving the issue has the dual benefit of avoiding the valuation problem and the attorney-client confidentiality concern. It also allows *both* spouses to receive their fair and equitable share in any contingency fee *when* and *if* recovered. The "easy way out" minority view shortchanges the non-attorney spouse which is unfair and inequitable. After all, isn't the goal of marital dissolutions *equitable* or equal distribution of assets, not *inequitable* or unequal distribution?

⁸³ *Id.* at 273.

⁸⁴ *See generally*, section IV of this article addressing valuation concerns and the text discussed in note 56.

Appendix

1. The examination of the attorney spouse's case files shall be conducted by the non-attorney spouse's expert in the attorney spouse's office or such other place as the parties' may mutually agree that such examination take place.

2. The attorney spouse shall provide to the non-attorney spouse's expert an inventory list of case files opened and/or closed including case files referred to any other law office in which the attorney spouse has or had a right to compensation from [date of marriage] to present. In addition, the attorney spouse shall provide to the non-attorney spouse's expert a copy of any demand letter presented to the opposing side and any offers of settlement presented by the opposing side.

3. The attorney spouse shall provide a copy of the fee agreement or, if there is no fee agreement, a summary of the fee arrangement on each case file including all retainer or fee agreements with forwarding/referring attorneys.

4. The attorney spouse may remove from each case file any private, personal information regarding his or her clients or which may be sensitive and injurious to his or her clients and which would be excludable from evidence pursuant to [state's attorney client privilege statute] or which would seriously violate the client's right to privacy if divulged. Such information will not, however, be allowed to be used by the attorney spouse to argue a reduced value of a case file as found by the non-attorney spouse's expert unless such information is divulged to the non-attorney spouse's expert so that the expert can evaluate the impact of the information on the value of the case file. The attorney spouse shall not remove any of the following items: pleadings, evidence of special damages (past and future medical bills, lost income, property damage, earning capacity), medical or psychological reports, expert witness reports, offers of judgment, costs expended or advanced by the attorney spouse (his or her office), retainer agreements, insurance policies or portions thereof, statements of witnesses or parties investigational reports, and depositions (including deposition summaries).

4.1 The attorney spouse shall maintain a separate identifiable file containing any material that has been removed from each of the case files until further order of the court [i.e., until it is no longer necessary].

5. Each case file shall be labeled by a separate fictitious title (unless already assigned a number by the attorney spouse) and identified by its proper title or label with a legend listing all cases provided and all references in depositions, reports, and court proceedings shall be made by fictitious labels.

6. All records, documents, and information obtained by the non-attorney spouse's expert shall be confidential for all purposes besides this dissolution of marriage action.

7. This non-attorney spouse's expert shall be restrained and permanently enjoined from disclosing any information, conclusions or opinions in connection with this matter, not previously made public by the attorney spouse, contained in the case files for any purpose beyond that necessary for the evaluation of the law practice, except the parties hereto, their respective counsel, and the undersigned judge.

8. After the non-attorney spouse's expert has completed the examination of the attorney spouse's case files, and until the final hearing [or trial] in this matter, the attorney spouse shall immediately divulge to the non-attorney spouse's counsel any material changes which may affect the valuations placed on any case file by the non-attorney spouse's expert.

9. Any information, conclusions, opinions, testimony or documents in any way connected with the attorney spouse's case files which become a part of the court record in these dissolution of marriage [or divorce] proceedings shall be sealed. When there is a hearing on any matter in this case within the purview of this Order, the courtroom shall be cleared of all persons who are not entitled to access to such information and the court reporter shall be informed of his or her obligation to keep the information confidential. Any item to be sealed shall be placed in a sealed envelope with the following legend:

CONFIDENTIAL

This envelope contains documents which are subject to a Protective Order entered by this Court. This envelope shall not be opened or the contents thereof revealed except upon the order of the Court. Violations of such Protective Order shall be treated as a basis for contempt of court.

10. This Order shall survive the conclusions of this matter, and all documents, transcripts and exhibits that fall within the purview of this Order shall, pursuant to this Court's continuing jurisdiction, remain confidential wherever they are kept.