Family Law Issues That Impact the Professional Athlete

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I. Introduction

Representation of a professional athlete is a challenging and demanding task. Attorneys occupying this role not only have to deal with routine issues but will face unique problems solely because of their client's profession. This article addresses some of the specific family law problems that the practitioner will encounter in representing a professional athlete. It is, of course, impossible to give the reader an explanation of the law in all 50 states. Instead, this article identifies specific issues and provides examples of how some states address such problems. Visible throughout this article is a disproportionate number of cites to Texas statutory and case law as examples because that is where the authors practice.

II. Contracts, Bonuses, Incentive Clauses & Divorce

Athletes who perform under contract and those who do not can be segregated into athletes who play for a team versus those who perform individually. Accordingly, this section will not apply to athletes who perform for themselves. Athletes such as professional golfers and tennis players base their income solely on their performance at individual events and do not receive a fixed salary. This can make valuation of an individual athlete's income very speculative. The number of professional individual athletes is quite small compared to the number of professional athletes playing team sports. Accordingly, most sports law cli-

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ents will be athletes playing for an organization and will have signed a contract. Obviously, the terms of the contract can have a tremendous effect on what the client may be awarded upon divorce.

A. *Contracts: Guaranteed and Otherwise*

Divorce cases involving athletes who are contractually obligated to an organization present unique issues to the family law practitioner because of the interesting valuation problems presented by a professional athletic contract. The threshold question presented by a professional contract is whether future payments to the athlete according to his/her contract are subject to division at divorce. In a routine case, a party's future income would not be subject to division by the court because it would qualify as that party's separate property.[1] In most states, a court could indirectly award away a party's future income through an award of alimony. However, most parties to a divorce do not have a contract stipulating a certain amount to be paid.

1. *Case law*

A few courts have addressed the issue of a professional athlete's contract in the context of a divorce.[2] In reviewing these cases, two general conclusions appear evident: 1) courts are more likely to construe cash in hand as divisible marital property; and 2) if an athlete must perform services post-divorce, courts are inclined to view the contract as not divisible at divorce.

a. Anderson v. Anderson

In *Anderson v. Anderson*[3] the principal issue on appeal concerned whether Richard Anderson's contract with the Portland Trail Blazers was a marital property asset subject to division. The divorce decree was entered on March 1, 1989, while Richard Anderson was still under a three-year contract with the Portland Trail Blazers. The contract provided that he was to receive three

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[1] *See* Eggemeyer v. Eggemeyer, 554 S.W.2d 137 (Tex. 1977)

[2] *See* In re Marriage of Sewell, 817 P.2d 594 (Colo. Ct. App. 1991) (professional football player with the Denver Broncos); In re Marriage of Anderson, 811 P.2d 419 (Colo. Ct. App. 1990) (professional basketball player with the Portland Trail Balzers); Chambers v. Chambers, 840 P.2d 841 (Utah Ct. App. 1991) (professional basketball player with the Phoenix Suns).

[3] 811 P.2d 419.

yearly lump sum payments for the 1988 through 1991 seasons.[4] The terms of the contract provided that: 1) on October 1 and December 1, 1998, he was to receive payments totaling $267,000 after taxes; 2) he would receive a payment of $475,000 in December, 1989; and 3) he would receive a payment of $575,000 in December, 1990. At the time the decree of divorce was entered, Richard Anderson had already received payments totaling $267,000. The trial court ruled that the money due under the husband's NBA contract, including the payment he had already received, was not marital property, but rather income for Anderson's future services.[5]

The NBA player contract was not admitted into evidence. However, both Richard Anderson and his attorney agent testified as to the terms. The terms of the contract provided that payment under the contract was guaranteed if: 1) he died; 2) he sustained an injury during an NBA game or an official practice session; 3) he had a mental breakdown or disability; 4) he was terminated for lack of skill; or 5) he was traded away by the team. Payment was not guaranteed, however, if: 1) he sustained an injury unrelated to NBA game or practice; or 2) he failed to pass a physical exam at the beginning of a season.

On appeal, Ms. Anderson argued that the contract was marital property and based this argument on a series of cases holding that a spouse's compensation, which is deferred until after dissolution of marriage, but fully earned during the marriage, is marital property.[6] Richard Anderson argued on appeal that the contract was not property, but merely future income.[7]

The court of appeals ruled that the money Anderson had already received was marital property and not future income.[8] The court noted that this money was received during the marriage and was cash on hand. The court further noted that Anderson had already passed his physical for the 1988-89 season and if he died, became mentally or physically disabled, played poorly, was fired, or traded away, he was still entitled to retain that first

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4 *Id*. at 420.

5 *Id*.

6 *See* In re Marriage of Vogt, 773 P.2d 631 (Colo. App. 1989) (contingent attorney's fees).

7 *See* In re Marriage of Faulkner, 652 P.2d 572 (Colo. 1982).

8 *Anderson*, 811 P.2d at 420.

lump sum payment.[9] The court took a different view, however, with respect to the two future lump sum payments. It merely stated that the payments to be received for the 1988-89 and 1990-91 seasons did not constitute marital property, rather they constituted future income. Accordingly, the two future lump sum payments were not divisible upon divorce. The court of appeals remanded the case and instructed the trial court to divide the first lump sum payment received.

b. Chambers v. Chambers

The court of appeals in Utah reached a similar result in *Chambers v. Chambers*.[10] When Erin Jo Chambers and Thomas Chambers were divorced on November 30, 1990, Chambers was in the midst of a five-year contract with the Phoenix Suns. He completed two years of the contract prior to divorce. At trial, the court ruled that the remaining three years of the contract were post-marital income and not subject to division. The court of appeals focused on when the right to salary would accrue. The *Chambers* court cited the Utah Supreme Court, stating that "the essential criterion is whether a right to the benefit or asset has accrued in whole or in part during the marriage. To the extent that the right has so accrued it is subject to equitable distribution.[11] The court of appeals, in applying this analysis, upheld the trial court's ruling and held that payments from the final three years of Chambers' contract were future income and not marital property to be divided. The court noted that "Mr. Chambers future income will be derived from his playing basketball during the entire term of his contract, rather than from some past effort or product produced during the marriage. Furthermore, his right to the benefit of that salary will accrue at that time, and did not accrue during the course of the marriage."[12]

The court also seemed to base its ruling on the fact that the payments were not certain to occur. The court noted that "the contract payments will only be made provided that Mr. Chambers does not suffer injury, illness, disability or death as a result of participation or involvement in any one of a number of off-

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9 *Id*.

10 840 P.2d at 844 (Utah Ct. App. 1992).

11 *Id*. at 844 citing Woodward v. Woodward, 656 P.2d 431, 432 (Utah 1982).

12 *Chambers*, 840 P.2d at 844.

court activities."[13] The fact that the payments were subject to some divestiture appeared to sway the court into ruling that the remaining payments were future income.

c. Sewell v. Sewell

In another Colorado case, the court of appeals had to interpret future earnings under an NFL player contract. In *Sewell v. Sewell*,[14] the husband was a professional player for the Denver Broncos football team. The parties were granted a divorce on December 20, 1989, four days prior to the husband's sixteenth and final regular season football game. The trial court awarded Sewell's wife a share of his earnings for the final 1989 regular season game and the ensuing 1989-1990 playoff bonus. The court of appeals cited *Anderson* and stated "the rule is that compensation that is either received or fully earned during a marriage is marital property subject to equitable distribution."[15] The court of appeals overruled the trial court and held that Ms. Sewell should not have been awarded any of Sewell's earnings for the final regular season game and the playoff bonus because those amounts were not actually earned by Sewell until after the effective date of the decree of dissolution.[16]

All three courts focused on the fact that the players still had to perform after the date of the divorce. Despite the numerous guarantees of payment contained in Richard Anderson's contract, the court still found this was future income and not a vested right. Accordingly, at least in these jurisdictions, it appears that as long as there is some possibility of the money being divested and the athlete still has to perform at a date subsequent to the divorce, income due under the contract will be viewed as future income and not a marital property asset to be divided at divorce.

2. *Guaranteed contracts v. mere expectancy*

The three cases referenced above represent the majority of reported cases interpreting professional athletes' contracts. It is also important to note that two of the cases are from Colorado. In other jurisdictions, the law is unsettled. It is doubtful though that a contract without substantial guarantees would ever be held

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13 *Id*. at 844-45.
14 817 P.2d 594 (Colo. Ct. App. 1991).
15 *Id*. at 596.
16 *Id*.

to constitute marital property, subject to division, unless the payments have been received. The main reason for this is that the marital estate does not actually own the money yet; it is simply expected to be received in the future. Texas courts have repeatedly held that certain interests are too remote to divide at divorce.[17]

Most players who sign professional contracts have only an expectancy of receiving future income. It is not a vested or guaranteed right. The standard NFL Player's contract has numerous provisions which will allow termination. Paragraph 11 of a standard NFL Player's contract provides as follows:

> No. 11 - Skill, Performance & Conduct
> The Player understands that he is competing with other Players for a position on the Club's roster within the applicable Player limits. If at any time, in the sole judgment of the Club, Player's skill or performance has been unsatisfactory as compared with that of other Players competing for a position on the Club's roster, or a Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then Club may terminate this contract. In addition, during the period any salary cap is legally in effect, this contract may be terminated if, in Club's opinion, a Player is anticipated to make less of a contribution to Club's ability to compete on the playing field than another Player or Players who the Club intends to sign or attempts to sign, or another Player or Players who are or are already on the Club's roster, and for whom Club needs room.

Accordingly, an NFL player who signs the standard NFL Player's contract is in much the same position as any regular employee. They can be terminated at will, and termination ends their salary.

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[17] Vibrock v. Vibrock, 549 S.W.2d 775, 778 (Tex. App. 1977), *writ ref 'd n.r.e.*, 561 S.W.2d 776 (Tex. 1977) (holding that future income on renewal commissions from insurance policy written during marriage cannot be awarded because its existence was too tenuous); Echols v. Austin, Inc., 529 S.W. 2d 840 (Tex. App. 1975), *writ ref'd n.r.e.* (deciding that bonus awarded to husband after marriage was not community, because the bonus was contingent and based on the board of directors discretionary judgment after divorce); Cunningham v. Cunningham, 183 S.W.2d 985 (Tex. App. 1944) *cert. denied* (deeming future renewal commissions on insurance premiums a mere expectancy, and not part of the community estate).

3. *The argument for marital property*

Courts should be much more likely to find that a contract with substantial guarantees is marital property, rather than merely future income. Several valid arguments exist for why this should be the case.

If the contract was entered into during the marriage, it is presumptively divisible marital property in most states. The inception of title rule provides that property acquired during the marriage takes the status of separate or community at the time of its acquisition and its status becomes fixed at that time.[18] The inception of title rule applies to both real and personal property.[19] It should also be pointed out that in both common law and community property states, property acquired during the marriage is presumptively divisible marital or community property.[20]

Arguably, professional sports contracts signed during the marriage will presumptively be marital property. It can be argued that this is no different from the act of signing a deed of trust during the marriage that makes a house presumptively marital property. In theory, this should primarily place the burden of proving that the contract is not marital property on the athlete.

Underlying this argument is the proposition that the contract is sufficiently guaranteed to be viewed as an almost vested right and not a mere expectancy. The level to which a contract must be guaranteed before it is viewed as more than an expectancy is unclear. It should be pointed out that the court in *Anderson* still viewed his contract as only future income. His contract provided that it was guaranteed if he died, sustained an injury during an official game or practice, had a mental breakdown or disability, was terminated for lack of skill, or was traded.[21] This contract can be reasonably viewed as substantially guaranteed. However, it was still not enough to be classified as a divisible marital property right. Accordingly, based upon *Anderson*, it is very likely that any court addressing this issue will view

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18 Welder v. Welder, 794 S.W.2d 42 (Tex. App. 1990) *no writ.*

19 *Id.*

20 *See* TEX. FAM. CODE § 3.003 (1998); Price v. Price, 503 N.E.2d 684 (N.Y. 1986).

21 *Anderson*, 811 P.2d at 420.

income due under a contract as a vested right only when the chance of the contract being terminated is very slight.

Another argument that could be advanced is that it was the time, toil, talent and effort of the marital partnership that secured the contract in the first place. A guaranteed contract is a relatively rare occurrence in most fields. It can be argued that the marital partnership put the parties in a position to attain such a contract. Guaranteed contracts are rarely given to rookies, so anyone receiving one is likely to have played several years in his chosen profession. Because the marital estate places the athlete in the position to obtain this sort of contract, it should be entitled to something in return. This would give rise to a claim for reimbursement under Texas law because the parties' community estate has benefited the husband's separate estate to the community's detriment.[22] Reimbursement claims are equitable in nature and are never mandatory; rather, they are available at the discretion of the trial court.

B. *Bonuses*

The introduction of the NFL salary cap in the 1990's opened the flood gates for signing bonuses to NFL players. The proliferation of these signing bonuses has occurred as NFL teams try to outmaneuver the salary cap. Of course, signing bonuses may represent only a small financial reward compared to the financial awards that athletes can receive as a result of meeting incentives. Bonuses may be awarded for: making the playoffs, making an All-Star Team, or reaching a certain performance level. The Chicago White Sox baseball team in 1997 contracted with a pitcher for a $10,000.00 bonus each time he was selected the American League Pitcher of the Week or Pitcher of the Month. Unfortunately for this pitcher, he must be nominated by the team. This section will address how bonuses have been viewed by courts in the context of a divorce.

1. *NFL salary cap & divorce*

In the National Football League, it is rare to hear of a marquee player signing a contract without a significant signing bo-

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[22] McCurdy v. McCurdy, 372 S.W.2d 381 (Tex. Civ. App. - Waco, 1963) *cert. denied*.

nus. This has become standard practice because of the realities of the NFL salary cap. The NFL salary cap is fixed at a certain amount each year. Counted against this cap are the players' base salary and bonuses, whether signing or performance. When an NFL club gives a signing bonus to a player, the amount of that bonus is spread equally throughout the number of years of the contract, as it applies to the salary cap. For example, a player signs a contract with a length of five years and a $10 million signing bonus. The net effect of this will be that the $10 million signing bonus will count $2 million per year against the cap during the length of the contract. If the player is cut during the term of the contract, the remaining portion of the bonus is accelerated and applied to the final year of his service. This is why NFL clubs occasionally have essentially non-contributing players on their roster who were signed to a large signing bonus and have several years left on their contract, but cannot be cut because of the salary cap impact.

In essence, the signing bonus allows an NFL club to set the amount of a player's base salary artificially low because the player has received such a large signing bonus. Most contracts of this nature are structured with a term of three years or more, with low base salaries during the initial years, which escalate during the last years of the contract. Because it is presumed that the NFL salary cap will go up each year, it is beneficial to defer the charges against the cap to later years. Some NFL contracts are now structured so long that a player will never realistically continue playing through the end of his contract.

"Capenomics" can have an enormous impact when a client has received a large signing bonus and is now going through a divorce. The realities of the NFL cap have made a signing bonus a much more important source of income than it first appears. It is no longer a small financial reward for inking the contract, but a substantial portion of what the player expects to make under the total contract. Accordingly, it can be argued that a signing bonus, or a large portion of it, is really future income, even if this has already been paid to the player.

2. *Characterization of the signing bonus*

The argument that a signing bonus actually constitutes future income is based on equitable considerations. The court then

must be persuaded to recognize the realities of the NFL salary cap. In other words, the argument is one of substance over form.

First, it must be conceded that a court is likely to consider a signing bonus that has already been received by the parties a vested marital property right. A Texas court has defined the word "vested" as "a fixed right of present or future enjoyment."[23] Therefore, although the court is going to view the signing bonus as a vested asset, it is up to the advocate to show the court that this should be characterized as future income. In the case of a retirement benefit, courts often look to see if the benefit was earned during the course of the marriage to determine if it is divisible.[24] The court must be shown that the signing bonus was not earned during the marriage. Although the signing bonus actually may be received during the marriage, it may be in exchange for the athlete agreeing to take less salary in the future. The NFL's own salary cap policy takes this into consideration and distributes the signing bonus salary cap impact over the lifetime of the contract.

This kind of reasoning might appeal to a court. Ask the court to consider applying the effect of the signing bonus the same way it is calculated by the NFL. If this argument were successful, only a portion of the signing bonus would be divisible marital property. The remainder of the signing bonus would be allocated over the remaining years of the contract as future income, just as the base salary is allocated.

Acceptance of a signing bonus in return for accepting a lower base salary during the early years of the contract can be compared to a corporation offering employees a lump sum payment to retire early. Often a company will offer a highly compensated employee some type of subsidy to induce the employee to take an earlier retirement. This is not a mere altruistic gesture by the company, but an attempt to induce a highly compensated employee to retire early, so a less costly employee can replace him or the position can be eliminated altogether.

Similarly, NFL teams do not pay players large signing bonuses because they want to reward the player for signing the contract. They pay a signing bonus to maneuver around the NFL

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23 Anderson v. Menefee, 174 S.W. 904, 908 (Tex. App. 1915) *cert. denied.*

24 Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976).

salary cap and free up more money to sign other skilled players, thereby making the team more competitive. The player has to forgo the right to earn more money under the base salary because he accepted the signing bonus. Texas case law supports the position that a payment to induce an employee to retire early is not a benefit which is earned or accrued during the employee's tenure, but is merely an incentive to get the employee to retire early, thereby benefiting the company financially.[25] The court may be persuaded to view a signing bonus the same way. The player is giving something up in the future to get the bonus. The court needs to understand that the signing bonus was not to reward past or current services, but actually to compensate the athlete for future services.

The main obstacle in successfully arguing that a signing bonus is not marital property is the fact that the marital estate has already received payment. Even if a signing bonus is subject to forfeiture, a court is likely to still view the bonus as a vested property right. A Texas court has stated "the possibility that a property right may be subject to total or partial forfeiture, does not destroy its character as a vested property right for the purposes of division on divorce."[26]

3. *Forfeiture of signing bonuses*

The division of a signing bonus on divorce can create additional problems if that bonus is subject to subsequent forfeiture. Assume a player has just signed a new contract with a team. The four-year contract provides for a $2 million signing bonus. The contract also provides that the player must complete the full length of his contract, or return a pro rata share of the signing bonus, in relation to the number of seasons he missed. The day after he receives his $2 million check, his wife files for divorce. At trial, the court finds the signing bonus is marital property and gives each party $1 million of the bonus. Two years into the contract, the player is injured and is cut by the team. The team then

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[25] *See* Whorrall v. Whorrall, 691 S.W.2d 32, 37-38 (Tex. App.–Austin, 1985) (holding that payment from IBM to induce an employee to retire was not to reward past services, but to induce the retirement of a highly ranked employee).

[26] Ables v. Ables, 540 S.W.2d 769, 770 (Tex. Civ. App. - Waco, 1976).

demands $1 million of the signing bonus back from the player for the last two years of the contract he missed.

You represent the player. What do you do? If this issue was not addressed in the original decree of divorce, your client may be burdened with the full amount of liability owed to the club.[27] If you are not successful at trial in convincing the court that a signing bonus is future income, it is incumbent on you to emphasize to the court that professional athletic careers are tenuous at best. If retention of the signing bonus is conditioned on the player's continued employment, emphasize that the risk of forfeiture of this bonus is extremely high. This is especially true in professional football.

A New York court has taken judicial notice of the fact that "in professional football, there are no guarantees."[28] The New York court in *Gastineau* was faced with the issue of to what extent Mark Gastineau had dissipated a marital asset when he quit the New York Jets.[29] At the time Gastineau quit, he was still under contract, and the court found that he had dissipated marital assets to the extent of what he was still owed on that one-year contract. His wife made a claim that Gastineau also dissipated a marital asset because he failed to play football the following year while he was still married.[30] The court refused to recognize this claim and stated "variables such as age, how an athlete plays, the ability of other players seeking to fill his position, as well as possible injuries sustained during the season, make it impossible to determine with certainty, whether or not Mark Gastineau would have re-signed."[31] This type of reasoning may convince a court that even if the court is going to divide the signing bonus, it should take into consideration the tenuous nature and short length of a professional athlete's career, as well as the possibility the bonus must be returned.

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27 *See* Harris v. Holland, 867 S.W.2d 86, 88 (Tex. App. 1993) (reversing and holding abuse of discretion for trial court to award husband credit in recognition of potential future tax consequences, in the event of sale of property awarded to the husband).

28 Gastineau v. Gastineau, 151 Misc. 2d 814, N.Y.S.2d 819, 821 (N.Y. Sup. 1991).

29 *Id*.

30 *Id*.

31 *Id*. at 821.

Finally, point out to the court that many athletes have extreme difficulty in making money outside of their chosen athletic profession.[32] An athlete may realistically make substantially his life earnings during a very short span of years.

C. *Incentive Clauses and Playoff Bonuses*

Incentive clauses and playoff bonuses also present tricky characterization issues on divorce because of the difficulty in determining "when are they actually earned?"

Most athletes have contract provisions for additional payments if they reach certain goals during the season or seasons. For purposes of this article, these will be referred to as "incentive clauses." The principal issue with incentive clauses is at what point they are no longer a mere expectancy and are, therefore, subject to the court's power to divide them.

1. *When does the incentive bonus vest*

This type of problem can be illustrated by the following example. Your client is a professional baseball player. He is a solid veteran player who has good, not spectacular, numbers. Included within his contract is an incentive clause providing that if he leads the national league in batting averages, he will receive a $500,000 bonus.[33] It appears this will be the season of his career, and he is hitting .365 toward the end of August. Coincidentally, his divorce is also set for trial in late August. Two days before trial, a bad pitch shatters his forearm. He is out for the rest of the season. Fortunately, he already qualified for the national league minimum for judging batting average. The player trailing him is more than 15 points behind. Although mathematically the number two player might be able to catch him, it is almost impossible. At trial, the wife's counsel argues the bonus is marital property because the husband earned it while playing baseball during the course of the marriage and he is substantially certain to receive it. What is your response?

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[32] *Id.*

[33] The above example is purely hypothetical since major league baseball teams do not provide incentive bonuses outside of plate appearances, games pitched or game appearances. The idea is to discourage individual goals over team goals.

The initial response, obviously, is to argue that the bonus is not yet vested and is outside of the parties' marital estate. At this point, it is only a mere expectancy and is not subject to division by the court. The parties do not have a present right to the bonus and a chance still exists that your client will lose the batting title.

The argument in response is that even though the present right to this bonus is not fully matured, it is still divisible marital property. Texas courts have held that "retirement benefits are subject to division as vested contingent community property rights, even though the present right has not fully matured."[34] Under Texas law, another easy way to support this argument is to analogize the incentive bonus to retirement rights that have accrued by reason of work performed during the marriage. In the case of retirement benefits, courts will often review if the benefit was earned during the course of the marriage to determine if it is divisible.[35] Since the bonus was earned, in whole, because of time, toil and effort of the community estate, the court may be more inclined to view it as marital property, which is divisible. Because of the lack of case law on this specific issue, the answer to this type of characterization is still relatively open.

2. *The "gimmie" incentive clause*

Another incentive clause situation that can pose problems occurs when the athlete has a "gimmie" incentive clause provision in his contract. This type of incentive clause provision is one for which the athlete almost certainly will receive payment in the future. Taken to an extreme, such a provision might be a clause in Troy Aikman's contract, providing that he will receive a $500,000 bonus if the Cowboys win one game during the 1997/1998 season. While this example is extreme, teams have used this type of arrangement to defer income payable under the player contract. In general, this device is often used in the NFL to get around the salary cap. When an event is almost certain to happen, the marital estate may try to claim a portion of this money, even though it is going to occur in the future, after the parties are divorced.

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[34] Naydan v. Naydan, 800 S.W.2d 637, 640 (Tex. App. - Dallas, 1990), *citing* Taggart v. Taggart, 552 S.W.2d 422, 423 (Tex. 1977).

[35] Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976).

This again leads back to the argument of whether the property is certain enough to be received to be divided by the court, or whether it is simply a mere "expectancy." The California Supreme Court defined the term as follows: "Expectancy describes the interest of a person who merely foresees that he might receive a future beneficence, such as the interest of an heir apparent or of a beneficiary designated by a living insured who has the right to change the beneficiary as these examples demonstrate the defining characteristic of an expectancy is that the holder has no enforceable right to his beneficence."[36] This statement was made in the context of the court trying to determine whether future retirement benefits, subject to divestment, were a mere expectancy or divisible property right. The California court held that pension benefits were not gratuities, but part of the consideration earned by the employee and represented a form of deferred compensation for services rendered.[37] Other courts have taken a more restrictive view.[38] In general, the community property states are more liberal in allowing a spouse to claim an interest in retirement and pension benefits.[39] This article is not intended to be a treatise on the law of expectancy in all fifty states, but merely points out issues that you should be prepared to address when representing a professional athlete.

3. *Playoff bonuses*

Almost all athletes playing with a professional organization will receive some form of additional compensation if their team is successful in reaching post-season competition or "the playoffs." One court has specifically addressed the issue of division of playoff money in the context of a divorce. In *Sewell*, the trial was held December 20, 1989, four days prior to husband's six-

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36 In re the Marriage of Brown, 544 P.2d 561, 565 (Cal. 1976).

37 *Id*.

38 In Re Marriage of Ward, 657 P.2d 979 (Colo. App. 1982) (holding that where husband's pension was subject to total divestment, it would not be considered marital property, despite the facts that complete divestment would only occur if two contingencies were met: 1) employment termination prior to age 55; and 2) death prior to age 55; Lentz v. Lentz, 117 Misc.2d 78, 457 N.Y.S.2d 401 (N.Y. Sup. Ct. 1982) (holding the husband's non-vested pension was not marital property subject to equitable distribution).

39 TINGLEY & SVALINA, MARITAL PROPERTY LAW, Chapter 10 at 11 (1994).

teenth and final regular season game. At that time, the Denver Broncos had already qualified for the playoffs. The court held that compensation that is either received or fully earned during the marriage is marital property, subject to equitable distribution.[40] The court determined that the husband did not earn the playoff money until after the effective date of the decree of dissolution, and accordingly, was not subject to distribution. The court did not elaborate but it can be inferred that the court viewed this income as not actually being earned during the marriage because Sewell still had to participate in the playoff game or games post-divorce. This comports with many jurisdictions that hold that post-divorce income is not subject to division. It is also important to note the Colorado court's statement that compensation must be *fully* earned during the marriage to be subject to division. If this rationale is applied to all other situations where a divorce occurs prior to the playoffs, then the spouse of the athlete is unlikely ever to receive any of the playoff bonus money. This is because the bonus is not *fully* earned during the marriage. The athlete still must perform some services post-divorce, i.e., participate in the playoff games, practices, etc.

It is possible, however, that the way different sports structure their playoff bonuses could affect whether a bonus is marital property. For example, in the National Football League the player will receive an additional game check for the wild card round of the playoffs, the divisional round and so on. In other sports, after a team has qualified for the playoffs, the players are entitled to additional compensation. In this type of situation, it may be possible to argue successfully that the compensation received was *fully* earned during the marriage, applying the Colorado rule. Most sports structure playoff bonuses slightly differently, so it is important to understand how this will impact your particular client. For example, Major League Baseball has an entirely different structure than football. Playoff bonuses for players are based upon a percentage of the "gate" during the playoff series. During the first round of the playoffs, 60% of the gate for the first three games is allocated to the teams, with the winning team receiving a larger share. During the second round of the playoffs and the World Series, the playing teams share

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40 *Sewell*, 817 P.2d at 596.

60% of the gate of the first four games. The players are not actually paid until after the season. What this means from a family law standpoint is once a player participates in a playoff series, future income to be paid in the spring is likely going to be a divisible marital asset.

III. Endorsements

An athlete who has risen to prominence in his or her field of endeavor may be presented with the opportunity to endorse products or make personal appearances. Depending on the size of the market your client is in, he or she may have a great many endorsement opportunities or very few. However, an athlete can often make endorsement money in the purely local market without being a household name, even regionally. The problem encountered most often in the context of endorsements with family law is the situation where an athlete has signed an endorsement contract pre-divorce, but will receive compensation and have to perform some services post-divorce. Is future money due under the endorsement contract part of the community or marital estate to be divided by the court at divorce or solely the athletes' future income? Several competing arguments will be examined.

A. *The Marital Estate's Time, Toil and Effort Secured the Endorsement Contract In the First Place*

Similar to guaranteed contracts, large endorsement contracts are not given to the run of the mill athlete. Usually when athletes are rewarded with this type of compensation, it is because they have reached the pinnacle of their profession. The argument that it was the marital or community estate's time, toil and effort which procured the contract is even stronger for endorsements than in the case of a guaranteed contract. Even with the financial security provided by a guaranteed contract, the athlete must still compete in his particular field for the length of the contract. With an endorsement contract, the company is paying for your client's status, reputation, marketability, and image as it exists now. If a client does not have the power to sell products now, it is unlikely a company will sign him to an endorsement contract in hopes that he will become a star in the future. (The obvious exception to this is Tiger Woods with Nike.) Accordingly, what the company is paying for is the client's current status

linked with their product and nothing more. This argument can be demonstrated in the example of an athlete doing a television commercial; the company is not paying for the athlete's skill as an actor, but merely his name recognition and image. This would support the proposition that the future sums of money due under the contract were fully earned at the time the contract was signed. The sums due under the contract will more than likely be divisible marital property.

B. *Future Services = Future Income*

In response to the above argument, the client may say, "I've got to sit through a day and a half of makeup, perfectionist directors, bad food, and stupid costumes so my ex can take half my money even though we got divorced six months ago." That argument may actually be a good one, if the court is likely to apply the "compensation received" or "fully earned" test. If the client is going to shoot a commercial six months after the marriage, how could the compensation be *fully* earned during the marriage? If this argument is followed, then the compensation received would be the client's separate property.

A factor that will likely weigh heavily in the court's determination is the nature and extent of the services that need to be performed according to the endorsement contract after the divorce.

For example, assume that a successful NBA player signs an endorsement contract to make a one hour public appearance for a local restaurant chain each time it opens up a new franchise. Courts will be more likely to view the money anticipated under this contract as a divisible marital asset at divorce because the extent of the post-divorce services required are so slight. This might even constitute a fully earned right during the marriage. On the other hand, a contract providing for a player to film several TV commercials over a multi-year period likely will not receive the same treatment by the court. The characterization and division of endorsement money raises many of the same issues that an athlete's contract does — does the community have a vested interest? Is the community being awarded future income of the athlete? Is the interest forfeitable, and when is the interest actually earned? Because of these uncertainties, no hard and fast rule exists and most cases will turn on the specific issues.

C. *Morality Clauses and Other Forfeiture Provisions*

Although this section appears under the heading Endorsements, it could just as easily apply to a professional athlete's contract. Most standard professional athlete contracts, as well as endorsement contracts, contain "morality" clauses. Section 11 of a standard NFL player's contract provides that "if player has engaged in personal conduct reasonably judged by club to adversely effect or reflect on club, then club may terminate this contract." A uniform player contract for the National Basketball Association has similar provisions. Sections 5 (Conduct) and 8 (Prohibited Substance) provides as follows:

> 5. Conduct
>
> (a) The player agrees to observe and comply with all team rules, as maintained or promulgated in accordance with the NBA/MPBA collective bargaining agreement, at all times whether on or off the playing floor.
>
> (b) The player agrees. . .not to do anything that is materially detrimental or materially prejudicial to the best interest of the team or of the league.
>
> (c) For any violation of team rules, any breach of provision of this contract, or for any conduct impairing the faithful and thorough discharge of the duties incumbent upon the player, the team may reasonably impose fines and/or suspensions on the player in accordance with the terms of the NBA/NPBA collective bargaining agreement.
>
> 8. Prohibited Substances
>
> The player acknowledges that in the event he is found in accordance with Section 1 of the NBA/NBPA anti drug agreement, to have engaged in the use, possession, or distribution of a "prohibited substance" as defined therein it will result in the termination of this contract and the player's immediate dismissal and disqualification from any employment by the NBA and any of its teams. Notwithstanding any terms or provisions of this contract (including any amendments hereto) in the event of such termination, all obligations of the team, including the obligations to pay compensation, shall cease except the obligation of the team to pay the players earned compensation (whether current or deferred) to the date of termination.

In reality, enforcement of the above provisions will often vary according to how valuable a player is to a club on the field. Most professional teams and the League Commissioner will come down hard on "middle of the road" players, but will often look the other way for a star player's transgressions. A noted example of this is Steve Howe, the left-handed pitcher suspended

by Major League Baseball seven times, but who is still playing today.[41]

Recently, however, there have been a series of incidents that have caused even the most popular athletes to realize that they can be subjected to the same punishment as the average player. In one of the most publicized incidents, Mike Tyson was suspended from boxing after biting off a piece of Evander Holyfield's ear during a heavyweight title bout. The incident cost Tyson millions of dollars in future income and may force him from the ring for like, although he is eligible to apply for reinstatement in July 1998.[42] Tyson's appeal to endorsers was already non-existent because of his prior conviction of the rape of a beauty pageant contestant in Indiana. Tyson applied for reinstatement in New Jersey and, after losing his temper at the hearing by the commission, withdrew that application. It is now assumed that he will apply for reinstatement in Nevada.

Following the Tyson incident, another prominent sports figure found himself in trouble as the result of his poor judgment. In December, 1997, Latrell Sprewell made himself one of the most infamous players in sports as the result of his actions. During a practice session with the Golden State Warriors, Sprewell took exception to the criticisms of his coach and attacked the coach. He allegedly grabbed Coach P.J. Carlesimo by the throat and attempted to strangle him. After being pulled off of the coach, Sprewell return to the locker room to cool off. After a fifteen-minute break, Sprewell returned to the practice floor and again attached Carlesimo and threatened to kill him.

The price for Sprewell's indiscretion has been incredibly high. Following his attack, the Golden State Warriors announced that they were voiding the balance of his contract under paragraph 17(a)(i) of the Uniform Player Contract which prohibits engaging in "acts of moral turpitude." The contract that Sprewell lost was to pay him $32 million dollars over the next four years. On top of losing his contract, Sprewell also received

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41 The *Dallas Morning News* reported on April 23, 1997, that he was trying to sign with a minor league team after being cut by the Yankees.

42 The Nevada State Athletic Board recently reinstated Mike Tyson's license.

the longest suspension ever handed out by the NBA.[43] The league's commissioner banned Sprewell from the sport for one year. To add to his problems, Sprewell also lost his endorsement deal with a shoe company.

Most endorsement contracts contain similar provisions allowing a company to terminate the contract if the athlete violates a "morality" clause of the contract. A recent example of this was when a North Texas Toyota Dealer Association sued Michael Irvin for the return of a Toyota Land Cruiser given to him in exchange for his endorsements. Not only did they want the Land Cruiser back, they wanted $1.4 million in damages. The lawsuit was later settled out of court.[44]

The way in which a violation of one of these morality clauses will impact family law is that it will likely set up a claim for wasteful dissipation of assets. This claim is based upon one spouse's conduct, which wrongfully causes the community or marital estate to lose assets. Most jurisdictions allow a court to consider this type of conduct in apportioning the marital property upon dissolution of marriage.[45] Accordingly, it is important to inform your client that a violation of a morality clause either in the players' contract or in their endorsement contract can have ramifications beyond simply losing the money that was due under that contract.

IV. The Athlete as the Target Defendant

Because professional athletes are often viewed as a "deep pocket," they might as well have a bulls-eye painted on them as a target for litigation. In 1995, the average annual major league baseball salary was $1,089,621. It is estimated that by the year

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[43] The results of this suspension have yet to be determined. Sprewell hired a number of lawyers to represent him in his claim against the team and the league, filed suit and the suit was dismissed. Since that dismissal, it appears that he has re-filed a suit against both the team and the league. According to some sources, Sprewell's total loss will likely be somewhere around $7.7 million as the result of his actions.

[44] Associated Press, October 26, 1998.

[45] *See, e.g.*, Baker v. Baker, 199 A.D.2d 9687, 608 N.Y.S.2d 129 (N.Y.A.D. 4 Dept., 1993); Gastineau, 573 N.Y.S.2d 819; Vannerson v. Vannerson, 857 S.W.2d 659 (Tex. App. - Hous. (1 Dist.) 1993) *cert. denied*; Mazique v. Mazique, 742 S.W.2d 805 (Tex. App. - Hous. (1 Dist.) 1987).

2000, the average National Basketball Association annual salary could be more than $2.5 million. The National Football League also recently increased the minimum annual salary from $178,000 to the $250,000 range. Many athletes are viewed as relatively unsophisticated people who have suddenly come into a large amount of money. Accordingly, con artists and other undesirables often target them. From a family law point of view, the client may be exposed to paternity claims; claims for common law marriage; palimony claims; unreasonable child support or alimony demands; and tort claims. This section will address issues raised by each of these claims.

A. *Paternity Claims*

Paternity claims can be one of the most potentially embarrassing claims the client will have to face. These types of lawsuits are often preceded by an extortionate demand for "hush money" or the complaining party will run to the media. This scenario is even more likely to occur if your client is married.

Regardless of the client's marital status, it is usually a bad idea to have the client pay this type of "hush money" before it is determined whether or not the client is the real father of the child. Even paying this money to "buy peace" rarely will do much good. A signed confidentiality agreement for most of these plaintiffs is worthless. They will sign and then have absolutely nothing to lose by coming back a second time and wanting more money to keep their silence. Little or no recourse exists against them — they simply have nothing to lose. Most, if not all, states do not impose an obligation upon a putative father to pay child support until it is determined he is actually the father of an illegitimate child.

In New York, at common law, the father of a child born out of wedlock was under no obligation to support that child.[46] New York has modified this common law rule by statute to provide that a man shown to be the father of an illegitimate child can be required to pay support for that child.[47] However, this statute

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[46] Czajak v. Vavonese, 428 N.Y.S.2d 986 (N.Y. Fam. Ct. 1980); Lawton v. Lawton, 111 N.E. 50 (N.Y. 1916).

[47] N.Y. Dom. Rel. Law § 513 (Consol. 1998).

which imposes liability for the support of an illegitimate child must be strictly construed and applied.[48]

Texas paternity laws apply the same way and provide that a putative father is under no obligation to pay support for an illegitimate child until it is proven that he is the father of that child.[49] Under Texas law, a court may only order a person to pay support for a child if that person is:

> 1) a presumed parent;
> 2) an alleged father petitioning to have his paternity adjudicated, or who admits paternity in pleadings filed with the court; or
> 3) found by the court at a pretrial conference not to be excluded as the biological father of the child.

Under this last provision, the court must make a finding based on genetic testing that at least 99% of the male population is excluded from being the biological father of the child.[50] On a finding of parentage, the court has discretion to order retroactive support back to the birth of the child, and upon proper showing, may order the father to pay an equitable portion of all prenatal and postnatal health care expenses for the mother and child.[51] It must be emphasized that this duty does not arise until a determination of paternity has been made. If you instruct your client to pay these expenses, and he is later determined not to be the father, then your client will likely be out that money with no recourse.

In a paternity suit, it is usually a matter of when, and not if, a person will actually be tested. DNA testing has become generally accepted.

> Paternity testing is hard science; therefore, the "battle of experts" so often found in family litigation when mental health professional or appraisers are involved is rarely found. Indeed, if experts disagree on whether a particular man is excluded from paternity testing of a child, they should unanimously agree to conduct the test again.[52]

New York also statutorily sets forth the sufficiency of evidence required to sustain a filiation order declaring paternity.[53] A re-

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48 46 N.Y. Jur. 2d § 780, at 330; Lattanzio v. Lattanzio, 83 Misc. 2d 899, 373 N.Y.S.2d 989 (N.Y. Fam. Ct. 1975).

49 TEX. FAM. CODE § 160.004.

50 TEX. FAM. CODE § 160.103.

51 TEX. FAM. CODE § 160.005(b).

52 Sampson & Tindalls, TEX. FAM. CODE ANN., comment to § 160.104.

53 CLS Family Ct. at § 857.

fusal to consent to paternity testing can result in a finding made against the reluctant party.[54]

A question also exists as to when the testing can be done if the child is a newborn. Texas Family Code Section 160.103 provides in relevant part as follows: "If the appearance [in the suit] is before the birth of the child, the Court will order the taking of blood, bodily fluid or tissue samples to be made as soon as medically practical after the birth."

What does "as soon as medically practical after the birth" mean? Depending upon the physician you consult, it could mean a wide range of times. Some physicians believe that children should not be genetically tested until children are 6 months old. Because of this, a significant amount of time can pass between the time a paternity claim is first asserted against your client and the time that he has been genetically determined to be the father of the child. This amount of time could easily exceed one year. Accordingly, if the client begins making payments for support before he is legally obligated, he may have been supporting someone for over a year when he had no obligation to do so. Again, this will be lost money.

In general, the issue of paternity is a very black and white issue; there are no shades of gray. Either a person is the father or he is not. Trying to assert the "she slept with the whole team" defense will not be successful. In fact, some states may prohibit evidence of the mother's sexual activity outside the window of conception.[55] Asserting this type of defense may only inflame the Court against your client.

What are some options you have when defending a paternity claim against your client? The first, and possibly best, option is to do little if anything at all. Do not call attention to the claim, hold press conferences, or let your client do TV interviews on the subject. This likely will only increase the leverage the plaintiff has with the media against your client. Unless your client voluntarily agrees to it, he will not be under any obligation to support

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54 TEX. FAM. CODE § 160.102; Morales v. Attorney General of Texas, 857 S.W.2d 55 (Tex. App. - San Antonio, 1992) (refusal to take blood tests authorizes the trial court to resolve paternity against the refusing party).

55 In Interest of Martin, 881 S.W.2d 531 (Tex. App. - Texarkana, 1994); (father prohibited from showing evidence of the mother's sexual activity with others outside of a 90-day window when the child may have been conceived).

this child until it is determined to be his. Prior to the genetic testing, it will be extremely difficult for your client to conclusively prove that he is not the father of the child. In theory, you could possibly disprove paternity by affirmatively showing that the plaintiff had no opportunity to conceive the child based on the facts she is alleging. After some discovery, this could possibly be done through a pretrial motion such as a special exception or a motion for summary judgment. Courts, however, are unlikely to dismiss an action until the conclusive DNA testing is done. Further, courts are reluctant to dismiss paternity with prejudice where it would be inconsistent with the primary concern of the child's needs.[56] The more prudent course is probably to wait out the genetic testing unless you are substantially sure that you can affirmatively disprove her claim on its face.

B. *Unreasonable Child Support and Alimony Demands*

Professional athletes, because of their status, may be subjected to unreasonable child support and alimony demands during the course of divorce or paternity actions. While these types of claims are not necessarily unique in the scope of family law practice, they seem to apply with frequency to professional athletes. The majority of these types of claims request child support and/or alimony far in excess of what is reasonably needed by the child or the spouse, respectively.

1. *Unreasonable Child Support*

In theory, claims for unreasonable amounts of child support should have subsided with the passage of statutory guidelines that essentially turn the calculation of child support into a mathematical computation. Texas enacted child support guidelines in 1987, and amended them in 1989. These guidelines provide that a court shall compute the child support amount by applying a percentage figure, depending on the number of children, and multiplying it by the parent's net resources.[57] Likewise, New York, in 1989, passed the Child Support Standards Act ("CSSA") which changed what had been a discretionary determination by

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[56] 46 N.Y. Jur. 2d § 760, at 302; Clovsky v. Jeffrey,"SS," 152 A.D.2d 839, 544 N.Y.S.2d 46 (N.Y.A.D. 3 Dept., 1989).

[57] Tex. Fam. Code § 154.125 (1998).

the Court into a mathematical computation utilizing statutory percentages.[58] Florida has also passed the same type of child support guidelines, which presumptively establish the amount of child support to be paid.[59] The percentages required for support vary from state to state. For example, Texas provides that an obligor should pay 20% of his net resources as child support for one child.[60] On the other hand, the New York Child Support Standards Act provides that a parent should pay 17% for one child.[61]

Even with the percentage guidelines, a great deal of variation can occur. For example, the 17% figure for New York is the basic child support obligation and may be increased pursuant to other subsections of the statute. Added to this basic amount can be costs for child care expenses future reasonable health care expenses of the child not covered by insurance and educational expenses for the child.[62] So while at first blush it may appear that the Texas percentage is higher, that is not likely to be the case.

One important concept that must be understood is that the percentage guidelines only apply up to a certain amount of income. For example, under New York law, the basic child support guidelines are applied to the first $80,000 of combined parental income.[63] For combined parental income above $80,000, the court has discretion to award additional child support based upon consideration of certain enumerated factors.[64] New York appellate courts have held that a court may not blindly apply percentage guidelines to income over $80,000 without consideration of the actual needs of the child.[65] Texas courts also apply a cap to the amount of income to which the statutory guidelines apply. The following section will give the reader a look at what is specifically addressed under Texas law when the obligor's resources exceed the statutory guidelines.

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58 N.Y. DOM. REL. LAW § 240(1-b) (Consol. 1989).

59 FLA. STATE, ch. 61.30 (1997).

60 TEX. FAM. CODE § 154.125 (1998).

61 N.Y. DOM. REL. LAW § 240(1-b)(b)(3).

62 N.Y. DOM. REL. LAW § 240(1-b)(c)(4)(1998) (providing that each parent's prorata share of child care expenses must be separately stated and added to the sum of basic child support).

63 N.Y. DOM. REL. LAW § 240(1-b)(c)(3) (1998).

64 N.Y. DOM. REL. LAW § 240(1-b)(f) (1998).

65 Chasin v. Chasin, 582 N.Y.S.2d 512 (N.Y.A.D. 3 Dept., 1992).

2. *A Texas example: what are the proven needs of the child?*

The child support guidelines only apply to the first $6,000 of the obligor's net resources per month.[66] Theoretically, cases involving obligors with resources under $6,000 per month should be the routine, as this figure purportedly covers 95% of all potential obligors in the state.[67] Cases involving obligors with income over $6,000 per month involve a different set of rules. The court only applies the guideline percentage to the first $6,000 of the obligor's net resources, which is presumed to be sufficient for the child.[68] Before the court will award child support in addition to the presumptive amount, the obligee must affirmatively show that the child's needs justify that additional amount.[69] Section 154.126 of the Texas Family Code controls on this point and provides as follows:

> (a) If the obligor's net resources exceed $6,000 per month, the Court shall presumptively apply the percentage guidelines to the first $6,000 of the obligor's net resources. Without further reference to the percentage recommended by these guidelines, the Court may order additional amounts of child support as appropriate, depending on the income of the parties and the proven needs of the child.
>
> (b) The proper calculation of a child support order that exceeds the presumptive amount established for the first $6,000 of the obligor's net resources requires that the entire amount of the presumptive award be subtracted from the proven total needs of the child. After the presumptive award is subtracted, the Court shall allocate between the parties the responsibility to meet the additional needs of the child according to the circumstances of the parties. However, in no event may the obligor be required to pay more child support than the greater of the presumptive amount or an amount equal to 100% of the proven needs of the child.

The application of this section would work as follows:

> (a) The child support guidelines are applied to the first $6,000 of the obligor's Net Resources. Assuming there is only one child before the Court and that the obligor does not have any other children, this would result in a child support figure of $1,200 per month.

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66 TEX. FAM. CODE § 154.125.

67 Sampson v. Tindall, TEX. FAM. CODE ANN., Introductory Comments at 398 (1998).

68 *See* TEX. FAM. CODE § 154.125.

69 *See* Mai v. Mai, 853 S.W.2d 615 (Tex. App. - Hous. (1 Dist.) (1993).

> (b) Calculate the total proven needs of the child. Assume that the obligee was able to prove that the total needs of the child amount to $1,500 per month.
>
> (c) Subtract the presumptive amount of guideline support from the total proven needs of the child. This leaves a figure of $300 above the presumptive guideline amount. This amount would be allocated between the parties according to their respective circumstances. The maximum amount an obligor can be ordered to pay is no more than 100% of the child's total proven needs

The battle here comes over what is the child's total proven "needs." Texas courts have not defined needs of the child, nor are they statutorily defined. However, in *Rodriguez v. Rodriguez*, the Texas Supreme Court stated that "needs of the child include more than the bare necessities of life, but it is not determined by the parents' ability to pay or the lifestyle of the family.[70] The result of this is that the obligee will always claim the expenses are legitimate needs of the child, while the obligor will claim the expenses are merely lifestyle choices. The court of appeals has stated that the need of a child "is an ambiguous term which has never been defined by the Code and consequently has been left for the Court to determine in their discretion on a case-by-case basis."[71]

Although the needs of a child will almost solely be determined on a case-by-case basis, an examination of the court's opinion in *Scott v. Younts* is illustrative of how the needs of a child can be defined.[72] In *Scott*, the court was faced with a situation where the obligor clearly had net resources in excess of $6,000 per month.[73] The trial court had awarded child support in the amount of $2,500 per month and the obligor appealed on the basis that the child's proven needs did not justify such an award.[74] At trial, the obligee presented the court with two lists of her daughter's expenses.[75] The first list contained her daughter's actual monthly expenses.[76] Items on this list included such

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70 Rodriguez v. Rodriguez, 860 S.W.2d 414, 417 (Tex. 1993).

71 Scott v. Younts, 926 S.W.2d 415, 420 (Tex. App. - Corpus Christi, 1996) *reh'g overruled*.

72 *See* Scott, 926 S.W.2d at 415.

73 *Id*.

74 *Id*.

75 *Id*. at 419.

76 *Id*.

things as food, clothing, utilities, automobile expenses, entertainment expenses, repair expenses, taxes, birthday and Christmas expenses, and day care.[77] The second list included items which the obligee believed would either be necessary or beneficial to her daughter, but which she could not currently afford.[78] Items on this list included expenses for a housekeeper, travel, private school tuition, a college fund, a horse, counseling, extra-curricular activities, educational books and summer camp. The monthly expenses for the items on the second list totaled approximately $1,800 alone.[79]

These two lists were submitted into evidence without objection. The obligee also testified that: her daughter had some emotional problems resulting from the lack of a father in her life; she did not have the funds to send her daughter to counseling; she did not have the funds for her daughter to participate in various extra-curricular activities which might help her daughter's self-esteem; the child had done well in school and wanted to attend college; she believed her daughter's self-esteem would be improved by going to a private school; she believed summer camp and other extra-curricular activities were necessary to develop her daughter's self-esteem.[80]

The obligor attacked this evidence on appeal, contending that the mother's testimony alone was not sufficient to warrant a finding of needs in excess of the presumptive amount. The obligor argued that expert testimony was needed in order to justify a finding that a private school or extra-curricular activities are "needs" of the child.[81] The obligor based his argument on *In Re: Paced*, in which the court of appeals found that testimony of a licensed psychologist familiar with children provided sufficient evidence of their special needs.[82] The court of appeals rejected this argument and stated that "the Code gives an expansive view of the needs of a child, emphasizing that a child's best interest

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77 *Id*.

78 *Id*.

79 *Id*. at 421.

80 *Id*.

81 *Id*.

82 In re Paced, 874 S.W.2d 797, 801-802 (Tex. App. - Texarkana, 1994) *writ denied*.

should be the guiding principal."[83] The court of appeals seemed to give great deference to the mother's testimony, stating that "the child's mother is in the best position, as managing conservator, to explain the needs of the child."[84] However, the court of appeals also stated that college expenses may not be considered a need of the child as a matter of law because "barring a written agreement by each parent stating otherwise, child support orders are only valid until the child either graduates from high school or turns 18 years old, whichever occurs later."[85]

The court of appeals upheld the award of $2,500 and stated that the child's proven needs were an amount between $2,067 and $3,166. The $2,500 per month award by the trial court was less than 100% of the proven needs of the child and the court has discretion to allocate expenses between the parties over the presumptive amount. Accordingly, the trial court did not abuse its discretion.[86] Many appellate court decisions have upheld child support awards above the presumptive amount based almost exclusively on the testimony of the obligee and an exhibit detailing the child's expenses.[87] Some Texas courts have upheld awards over the presumptive amount based upon the obligee's testimony alone.[88] It is exceedingly important to determine what a child's claimed expenses are early in the case. Accordingly, the deposition of the obligee taken prior to any hearing would allow the attorney to prepare for what needs the obligee will claim.

While the example listed above is specific to Texas case law, it provides insight into what will be the battle in most states. This will reduce the cases to showing what the needs of the child are versus lifestyle choices by the other parent. In general terms, the two most important things a practitioner needs to remember in states applying percentage guidelines are:

1) Determining at what point and what income level those guidelines no longer apply; and
2) Knowing what the particular state's courts will view as legitimate needs and expenses of a child.

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83 *Scott*, 926 S.W.2d at 421.

84 *Id*.

85 *Id*. at 422.

86 *Id*. at 422.

87 *See Scott*, 926 S.W.2d at 420; Thomas v. Thomas, 895 S.W.2d 895, 896 (Tex. App. - Waco, 1995) *writ. denied*.

88 *Id*.

3. *Unreasonable alimony demands*

Almost all states now provide for some type of periodic maintenance or alimony under certain conditions following the dissolution of marriage. In fact, in 1995, Texas overcame its long held anti-alimony sentiment and passed a statute authorizing post-divorce alimony in Texas.[89] While the Texas statute is *extremely* restrictive as to who is eligible to receive alimony and how long it can be received, this is not the case in most other states.[90] While Texas is just beginning to develop its own case law, many states have a well-developed alimony history. This is largely the result of the passage of equitable distribution laws in common law states.[91] Previously under New York law, the concept of alimony often served as a means of lifetime support and dependence on one spouse, long after the marriage was over.[92] This has now been replaced with the concept of maintenance, which permits the receiving spouse an opportunity to achieve economic independence.[93]

The New York statute was later amended to expressly allow an award of permanent maintenance because the legislature believed the statute was being applied to the detriment of spouses who might not fully be capable of ever being self-supporting, even after a period of training.[94] The legislature apparently was concerned that women who were divorced after a long-term marriage or a short-term marriage where there were children might not ever be able to achieve "economic independence."[95]

New York case law has also allowed long-term and permanent alimony to be paid where one spouse has clearly subordinated her career to act as a homemaker or a parent.[96] This last category is one that obviously could impact a great

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89 *See* TEX. FAM. CODE § 3.9601, recodified at Tex. Fam. Code § 8.001.

90 *See* TEX. FAM. CODE § 8.002, 8.005.

91 *See* 48 N.Y. Jur. 2d § 2370 (1995).

92 *Id*.

93 *Id*.; Harmon v. Harmon, 173 A.D.2d 98, 578 N.Y.S.2d 897 (N.Y.A.D. 1 Dept., 1992) (the purpose of rehabilitative maintenance is to allow a spouse the opportunity to achieve economic independence).

94 *See* 48 N.Y. Jur. 2d § 2370 at 546. Sperling v. Sperling, 165 A.D.2d 338, 567 N.Y.S.2d 538 (N.Y.A.D. 2 Dept., 1991).

95 48 N.Y. Jur. 2d § 2370 at 546-47 (1995).

96 Fischer v. Fischer, 199 A.D.2d 1028, 606 N.Y.S.2d 494 (N.Y.A.D. 4 Dept., 1993).

many professional athletes. In many cases, because of the athlete's substantial income, the other spouse is able to stay home with the children, thereby foregoing a career to act as a homemaker. More commonly, if a spouse is capable of becoming self-supporting, then an award of indefinite maintenance is unlikely.[97]

Most states enumerate specific factors upon which to base an award of either durational or non-durational alimony. For example, under California law, the court may order either party to pay support to the other party in any amount and for such period of time as the court deems just and reasonable. This is based upon a number of factors, including the standard of living established during the marriage, having regard for the circumstances of the respective parties, the duration of marriage, ability to pay, tax consequences and ability of the supported spouse to engage in gainful employment without interfering with the interests of the children of the parties in custody of such spouse.[98] Most other states list other factors as well.[99]

It is impossible to know the fact-specific circumstances that will provide you specific defenses against large and/or long-term payment of alimony in every case, but several generalities should apply in the divorces of most professional athletes. First, in family law terms, it is likely to have been a short marriage if the athlete is still competing. Most professional athletes cannot keep up the level of skill to compete in the professional leagues past a certain age. Accordingly, emphasize to the court the short duration of the marriage. Second, the spouse seeking alimony is still likely to be relatively young. Because of this, he or she has ample opportunity to receive education or training to enable him or her to become economically independent. Third, professional athletes often will receive a disproportionate amount of their lifetime earnings during the few years in which they are employed in their sport. Taking this into consideration, many athletes live well beyond their means in terms of what they can afford over

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97 Culnan v. Culnan, 142 A.D.2d 805, 530 N.Y.S.2d 688 (N.Y.A.D. 3 Dept., 1988) *app. dismd. without opn*., 538 N.E.2d 357 (N.Y. 1989). (denying non-durational maintenance and replacing it with a 10-year maintenance award in the case of a 29-year-old wife who had a high school education and some work experience, where the parties' child was already nine years old).

98 *See* CAL. FAM. CODE § 3651, 3653-54, 4320, 4330-37, 4339.

99 CLS DOM. REL. LAW § 236; TEX. FAM. CODE § 3.9603.

the long run. Accordingly, emphasize to the court that it is not reasonable to make your client pay alimony sufficient to maintain the spouse's prior style of living. Use these factors and any other facts specific to refute an unreasonable claim for alimony.

C. *Palimony Claims*

A claim for "palimony" is based upon a non-marital relationship similar to a marriage relationship in that the parties operate on some level as an emotional, social, and (typically) sexual unit.[100] A palimony suit is a cause of action based upon an expressed or implied agreement for the parties to pool their earnings and share accumulations of property.[101] The bedrock case of *Marvin v. Marvin*, allowed unmarried couples living together to sue each other for property accumulated during the relationship based on an expressed or implied agreement.[102] While parties may agree that they will share their earnings and assets, they also may agree that neither will have any rights in the earnings or accumulation of the other.[103] In the absence of an agreement, community property laws do not apply, and non-marital partners are not entitled to community property rights and inheritance rights guaranteed to married couples.[104]

California courts have held that a non-married partner is entitled to share in property acquired during the cohabitation to the extent that his or her funds were used in making the purchase.[105] The *Marvin* case took this concept a step further and held that a non-marital partner can also acquire an interest in property purchased during the relationship to the extent that his or her rendition of services contributed to its acquisition. The rendition of services by one of the parties does not have to directly relate to the property acquired.[106] Such services need only have benefitted the other party by making it unnecessary for him or

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100 32 Cal. Jur 3rd § 107, 136.

101 *Id*. at 139.

102 Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (Cal. 1976).

103 *Id*.

104 32 Cal. Jur 3rd § 108, at 139.

105 Keene v. Keene, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (Cal. 1962).

106 *Marvin*, 557 P.2d at 116.

her to pay someone else for the services.[107] The resulting savings would allow the other party to acquire the property.[108]

Additionally, if one of the parties contributes funds, property, or services for the improvement of property owned by the other party, then the contributing party may have a reimbursement claim to the extent of his or her contribution.[109] Under *Marvin*, the contribution of funds or services may be evidence that tends to show the existence of an implied partnership or joint venture.[110] A non-marital relationship, standing alone, does not confer upon either of the parties a duty to support the other.[111] California courts, however, will enforce expressed or implied agreements to support the other party even if that duty of support extends beyond the end of the relationship.[112]

Agreements entered into between non-marital partners are enforceable unless they are entered into for the rendition of sexual services. However, if sexual services were only part of the contractual consideration, then any portion of the agreement supported by independent consideration will still be enforced.[113] A palimony suit is in essence a suit on a contract and, accordingly, a civil suit. Palimony cases are filed in civil courts, not family courts.[114] It is important to note that although these types of agreements are enforced as contracts they do not need to comply with the formal statutory requirements for a valid premarital contract, i.e. be in writing.[115]

The potential danger posed by these types of lawsuits to professional athletes is very real. Although California Jurisprudence is at the root of these types of suits, remember that if your client is temporarily playing in California he can be exposed to such a suit while playing there. Advise your client very carefully before he or she consents to have someone move in. Many of these cases come down to a "he said," "she said" type of argument in

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107 *Id*.

108 32 Cal. Jur. 3rd § 108, 140.

109 *Id*.

110 *Marvin*, 557 P.2d at 119-120.

111 32 Cal. Jur. 3rd § 109, 141.

112 *Id*.

113 Whorton v. Dillingham, 202 Cal. 3d 447, 248 Cal. Rptr. 404 (Cal. App. 4 Dist., 1988).

114 32 Cal. Jur. 3rd § 107, 137.

115 *Marvin*, 557 P.2d at 122.

an attempt to establish an implied partnership. Accordingly, if the client insists on living with someone, try to encourage him or her to sign a cohabitation agreement.

V. Common-Law and Informal Marriage Claims

This section is designed to be an overview of various statutes and case law relative to the topic of common-law or informal marriages. It is also intended to provide, to a limited degree, helpful tips on defending suits involving non-ceremonial, cohabitating unions in which the paramour of the athlete determines that he or she may be able to obtain funds from the professional athlete either through making or threatening the claim of marriage.

Although the institution of common-law or informal marriage has been steadily declining across the United States in recent years, several states continue to recognize the validity of common-law or informal marriages entered into, not only within their borders, but entered into within other common-law marriage states. As of 1996, those states which recognized some form of common-law marriage are: Alabama, District of Columbia, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina and Texas.

Of the fifty states, the vast majority no longer allow common-law or informal marriages to be entered into within their boundaries. Texas is one of the exceptions. The requirements may vary somewhat from state to state, however, generally, the same criteria as codified in section 1.91(a)(2) of the Texas Family Code are applied in the vast majority of states recognizing common-law marriage. Furthermore, most states will recognize any marriage deemed valid in the state the parties resided in at the time of marriage.

Common-law or informal marriage cases fall into two distinct categories. When a common-law or informal marriage is entered into by a couple while residing in a common-law marriage state, courts in other states generally apply the marriage state's law to determine whether the marriage was validly contracted. However, when residents of a non-common-law marriage state visit a common-law marriage state for a brief time period without becoming residents of that state, some difficult situations will arise. In those situations, foreign state law and fo-

rum state policies come into play in determining whether a marriage will be recognized. Texas courts have long held that a brief trip to Texas does not result in common-law marriage.

The law of the jurisdiction determines the validity of a foreign common-law or informal marriage where the couple was married.[116] If a common-law or informal marriage is recognized by the jurisdiction where it was entered into, Texas courts will recognize it as well.[117]

Rule 202 of the Texas Rules of Civil Evidence provides that:

> A court upon its own motion may, or upon the motion of a party, shall take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common-law of every other state, territory, or jurisdiction of the United States. A party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. Judicial notice of such matters may be taken at any stage of the proceeding. The court's determination shall be subject to review as a ruling on a question of law.

Almost every state has a similar rule of evidence. If no motion is filed requesting that the court take judicial notice of another jurisdiction, the law of the other jurisdiction will be presumed to be the same as that of the state in which you are litigating. Therefore, if the case is filed in one of the states that statutorily recognized common-law and/or informal marriages, the court will apply those elements to the facts of your case.

If a marital relationship arose in a foreign jurisdiction, and later the couple moves to a different common-law state, the court may focus on the relationship that existed in the current state, as long as the relationship is determined to fulfill the necessary requirements of a common-law marriage under that state's law.[118]

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116 Texas Employers Ins. Ass'n v. Borum, 834 S.W.2d 395, 398 (Tex. App. 1992).

117 Nevarez v. Bailon, 287 S.W.2d 521, 523 (Tex. Civ. App. - El Paso, 1956) *writ ref'd*.

118 Gonzalez v. Viuda de Gonzalez, 466 S.W.2d 839, 840 (Tex. Civ. App. - Dallas, 1971).

Historically, Texas courts have hesitated to invalidate a marriage, particularly when children are involved or one of the parties acted in good faith. Under the doctrine of comity, a court need not enforce a foreign law or give effect to the rights arising under foreign law if the court concludes that: doing so would contravene the policy of the state where the litigation is occurring; or it would work an injury or injustice upon one of its citizens.[119] Furthermore, a court might choose to give validity to a relationship, which, although invalid in the foreign jurisdiction where contracted, would have been valid in the current state.[120]

The policy of Texas, as to the validity of marriage, whether ceremonial or common-law is reflected in Section 2.01 of the Texas Family Code, which provides:

> It is the policy of this state to preserve and uphold each marriage against claims of invalidity unless strong reasons exist for holding it void or voidable. Therefore, every marriage entered into in this state is considered valid unless it is expressly void by this chapter or unless it is expressly made voidable by this chapter and is annulled as provided by this chapter.

In Texas, a common-law or informal marriage is established if all elements of a statutory marriage are present, and only a license and a public ceremony are absent.[121] That is, the parties to a common-law or informal marriage must be of the opposite sex, of legal age and possess no legal impediments, such as those concerning kinship or the existence of a current marriage.

The Texas Supreme Court provided a historical overview of the state's position regarding common-law or informal marriages in *Russell v. Russell*.[122] The court stated that "[c]ommon law marriages have been recognized in Texas since 1847".[123] From the beginning, Texas has rejected the necessity of ritual formalities to establish the marriage relationship.[124]

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119 Portwood v. Portwood, 109 S.W.2d 515, 523 (Tex. Civ. App. - Eastland, 1937), *writ dism'd w.o.j.*

120 *Id*. at 523.

121 King v. King's Unknown Heirs, 16 S.W.2d 160 (Tex. Civ. App. - San Antonio, 1929), *rev'd on other grounds*, 34 S.W.2d 804 (Tex. App. Comm'n, 1931).

122 865 S.W.2d 929 (Tex., 1993).

123 *Id*. at 930 citing Tarpley v. Poage's Adm'r, 2 Tex. 139, 149 (Tex., 1847).

124 *Id*. at 931.

In 1995, the Texas legislature modified the common-law statute as follows: "If a proceeding in which a marriage is to be proved as provided by Subsection (a)(2) is not commenced before the second anniversary of the dates on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married."[125] Thus, this subsection, as amended, provides an evidentiary presumption of no marriage if no suit for divorce is filed within two years of the parties' separation.

VI. Conclusion

Hand in hand with the privileges that come from representing a professional athlete also come unique problems that must be addressed. Because of an athlete's profession, simple issues become complex and complex issues become that much worse. This article has attempted to point out the family law issues that potentially will arise in connection with your representation of your client. The complexity of today's professional athletic contracts present extremely difficult valuation and characterization issues upon divorce. Complicating contracts further are the additions of signing bonuses and incentive clauses. These are not easy issues and there is not an overwhelming body of case law upon which to rely. In negotiating your client's contract, try to keep in mind the impact the structure of the contract could potentially have upon divorce. The same is true for endorsement contracts: protect your client to the extent that you can when making this type of deal.

Lastly, because athletes are viewed as targets, it is important for you to educate yourself and your client as to what steps can be taken to protect them. One particular avenue in this regard is the proper drafting of cohabitation agreements, premarital agreements and post-marital agreements. In the end, while the representation of the professional athlete can be exceedingly challenging, it is rarely boring.

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125 Tex. Fam. Code § 2.401(b).