Comment, Valuing Trusts During Divorce Proceedings

Arguably, the most tedious part of a divorce proceedings is the division of assets. When two people get married, they economically become one unit.[1] In most states, assets and income obtained during marriage are generally presumed to be marital property, regardless of whose name appears on the account or title.[2] This means that family attorneys spend enormous amounts of time scavenging through bank accounts, retirement accounts, debts, investments, and other financial records, to piece together all assets and debts a couple possesses.

Another layer of challenge can be added when one or both of the parties have property inside a trust. This could be a trust that the parties entered into together, a trust one of the parties made during or before marriage, or a trust in which one of the parties is a beneficiary. The trusts must be valued, then a determination must be made whether the property inside the trust is marital, nonmarital, or a combination of the two. The courts take into consideration the type of trust, who the grantor and beneficiaries are, the method of distributions, and the amount of marital property, in order to divide the assets inside of the trust.[3] Trusts are becoming increasingly common, especially as "gray divorces" (spouses sixty five and older) have significantly increased in the past decade (meaning more divorces will involve parties who have estate plans).[4] Therefore family attorneys are going to need to pay particular attention to how trusts are divided during divorces.

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1 *See* Nicole K. Levy, *Nine Ways Marriage Changes Your Legal Rights and Responsibilities*, Lynch & Owens P.C. (Jan. 21, 2019) https://www.lynchowens.com/blog/2019/january/nine-ways-marriage-changes-your-legal-rights-and/.

2 *See Who Gets What? Dividing Property and Sharing Debts,* 42 Fam. Advoc. 19 (2019), https://advance.lexis.com/api/permalink/267ce0ee-afd9-4c00-89b2-c2904f160ce1/?context=1000516.

3 Deborah Rysso, *Know Thy Trust: A Plain English Guide to Orchestrating Assets in Divorce Cases* 38 Fam. Advoc. 6 (2015). This presumption is subject to exceptions, such as property acquired by gift or inheritance, depending on the state's marital property laws.

4 Catherine Pearson, *Older Adults Are No Longer Staying in 'Empty Shell' Marriages*, N.Y. Times (June 22, 2026), https://www.nytimes.com/2026/06/22/well/family/gray-divorce-empty-shell-marriage.html.

Part I of this Comment will discuss the basics of property division including the methods and determinations of property. Part II then addresses the basics of trusts, including the actors involved and the different types of common trusts. Part III of this Comment will examine the different methods courts use to value trusts and apply those values to property division. In Part IV, the Comment will explain how courts determine marital and non-marital property when it comes to trust division.

I. Property Division Methods

A. *Equitable Distribution and Community Property*

The method of property division is typically established by statute.[5] The most common type of property division is equitable distribution, used by forty-one of the states and the District of Columbia.[6] In equitable distribution states, the goal is to ensure that the division of property is equitable, not necessarily equal; however, most states start with a rebuttable presumption of a 50/50 divide.[7] For example, in determinations of whether to depart from the presumed equal division, in Arkansas courts may consider the following factors:

> The length of the marriage; Age, health, and station in life of the parties; Occupations . . .; Amount and sources of income; Vocation skills; Employability; Estate, liabilities, and needs of each party . . .; Contribution of each party in acquisition preservation; [and t]he federal income tax consequences of the court's division of property.[8]

The other type of property distribution is termed community property. Community property views marriage as a "joint

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5 Margaret Ryznar, *All's Fair in Love and War: But What About in Divorce?; The Fairness of Property Division in American and English Big Money Divorce Cases,* 86 N.D.L. Rev. 115, 119 (2010), https://advance.lexis.com/api/permalink/c24e8f08-3692-4f69-b253-578c6e5b05d7/?context=1000516

6 *Community Property vs. Equitable Distribution: A State-by-State Guide for Advisors*, Institute of Business & Finance (Mar. 22, 2026), https://icfs.com/specialists-desk/community-property-equitable-distribution. *See also* Ryznar, *supra* note 5, at 119.

7 Ryznar, s*upra* note 5, at 119*; see, e.g.,* Ark. Code § 9-12-315 (a)(1)(A)(i)–(ix).

8 Ark. Code § 9-12-315(a)(1)(A)(i)–(ix).

undertaking in which both spouses are equal partners."[9] This means that all property obtained during the marriage belongs to the marital community. [10] In community property states, all of the marital community property will be divided evenly during a divorce proceeding.[11]

Five states, including Alaska, Florida, Kentucky, South Dakota, and Tennessee, allow couples to opt-in to community property ownership of marital assets, and, if they do, those couples' property will be divided using community property distribution rules instead of the state's presumed equitable distribution.[12]

B. *Marital and Non-Marital Assets*

During property division, the spouses' assets will be classified as either marital or non-marital. Marital property is every asset or income the parties have obtained since they entered into marriage.[13] However, the presumption that said property is marital is rebuttable.[14] Property that is considered non-marital is all the assets the individuial owned prior to entering the marriage, as well as all gifts, bequests, devises, descents, and inheritance obtained after the marriage.[15] Classifying certain assets as marital or separate property can involve complex legal determinations. Categorizing specific property types is not always a straightforward process.

Property that was once non-marital can become, at least partially, marital due to commingling or transmutation.[16] Commingling happens when property of one characteristic is combined with property of another characteristics.[17] For example, if one spouse

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9 *Community Proper vs. Equitable Distribution in Property Division Law,* Justia (Sept. 2025), https://www.justia.com/family/divorce/dividing-money-and-property/community-property-vs-equitable-distribution-divorce/.

10 Anthony J. Pagano, Valuations and Distribution of Marital Property ch. 20 (Grace Ganz Blumberg ed., 1996) (1998), https://advance.lexis.com/api/permalink/48bea798-12ca-4752-825f-99616b9c0550/?context=1000516.

11 *See Who Gets What? Dividing Property and Sharing Debts*, *supra* note 2.

12 Ryznar, *supra* note 5, at 141.

13 *Marital Property*, Legal Information Institute, https://www.law.cornell.edu/wex/marital_property (last visited Sept. 14, 2026).

14 *See* Keith Herman, *How to Protect Trust Assets From a Beneficiary's Divorce,* 63 J. Mo. B. 228, 229 (2007).

15 *See id.*

16 *See Who Gets What? Dividing Property and Sharing debts, supra* note 2.

17 *See* Herman, *supra* note 14, at 229.

purchases a home prior to marriage, but uses marital income to pay the mortgage, then the asset has become commingled.[18] Courts have different methods that can be used to determine the marital and non-marital amounts of the property and divide them accordingly.[19] Transmutation happens when one of the spouses changes the character of their non-marital property.[20] For example, the spouse adds the other spouse to the deed of their non-marital property.[21] This act would change the property from non-marital to marital. The assets that are determined to be non-marital will be left out of the division of property process, and only those determined marital will be taken into account for the asset and debt equalization.[22]

II. Trusts

Trusts can cause another level of difficulty when it comes to dividing property. This could be a trust that one party created either prior to or during marriage, a trust that both parties created together, or a trust made by a third party, where only one of the spouses is a beneficiary. The type of trust may also have an effect on its ability to be determined as marital property or its divisibility.[23] Thus, it is important that family attorneys clearly read all provisions of the trusts to determine how, if at all, the property can be dividing during a divorce proceeding, and if necessary, reach out to an estate law attorney.[24]

A trust is a part of a greater estate plan that can accomplish many different goals.[25] Divorcing spouses' roles in a trust are important to how the trusts are classified as marital vs. non-marital,

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18 *See* Anita Ventrelli & Michele Jochner, *Home Is Where the Heart Is? Legal and Practical Strategies for Navigating Real Property in Divorce,* 48 Fam. Advoc. 9 (2026).

19 *See Who Gets What? Dividing Property and Sharing debts, supra* note 2.

20 *See* Herman, *supra* note 14, at 229.

21 *See Separate vs. Marital Assets Under Property Division Law*, Justia (Aug. 2026), https://www.justia.com/family/divorce/dividing-money-and-property/separate-vs-marital-property-in-divorce/ (last visited----)

22 *See* Mark Strasser, *Dividing Up the Marital Home,* 49 S. Ill. U.L.J. 17, 18 (2024).

23 *See* Herman, *supra* note 14, at 229.

24 *Id.*

25 Rysso, *supra* note 3, at 6–7.

as well as how they are divided.[26] The grantor is the person who makes the trust.[27] The grantor will determine who the trustee and successor trustee are, as well as designate who the beneficiaries will be.[28] The grantor then has to fund the trust by transferring assets into the trust, such as deeding real property to the trust.[29] Once the grantor creates the trust and funds it, the grantor conveys the property to a trustee who is a fiduciary to the beneficiaries.[30] A trustee is someone who takes legal title of the assets within the trust, which allows the trustee to communicate with third parties about the assets held in trust.[31] The trustee has a duty to manage the terms of the trust including distributions.[32] Beneficiaries hold equitable title to the assets inside the trust, and therefore they have the ability to hold the trustee liable for lack of performance of their duties.[33] Beneficiaries can be lifetime, meaning people who receive distributions during the lifetime of the grantor, or at-death, meaning they receive distributions after the death of the grantor.[34] A person, or even spouses acting together, may be hold three roles in a trust; the grantor, trustee, and beneficiary, or any two combination of the roles. One spouse may also be a trustee and/or beneficiary of a third party's trust. The role that the spouse or spouses hold in a trust is critical in determining the interest they have in the trust for property division purposes.

Trusts may be living trusts, meaning they are created and operated during the grantor's lifetime.[35] Trusts can also be testamentary, meaning they are part of the grantor's will and testament.[36] Living trusts are revocable, meaning that the grantor can change or

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26 *Id.* at 7.

27 *Glossary of Estate Planning Terms,* ABA, https://www.americanbar.org/groups/real_property_trust_estate/resources/estate-planning/glossary/ (last visited Sept. 1, 2026).

28 Rysso, *supra* note 3, at 6.

29 *Id.* at 7.

30 Robert H. Sitkoff & Jesse Dukeminier, Wills, Trusts, and Estates 395 (11th ed. 2022).

31 *Id.*

32 *Glossary of Estate Planning Terms, supra* note 27.

33 Sitkoff & Dukeminier, *supra* note 30, at 395.

34 Rysso, *supra* note 3, at 6.

35 *Id.* at 7.

36 *Id.*

revoke the trust whenever they wish.[37] This is possible because the grantor retains the control of the property even after it is placed into the trust; once the grantor dies, however, the trust will become irrevocable.[38] Testamentary trusts are irrevocable as the grantor releases control of the assets permanently once they are placed into the trust.[39] Irrevocable trusts created greater obstacles in determining property division, because often the spouse has a future interest in the trust rather than a present interest.[40] More specific types of trusts within the big three categories of living testamentary, irrevocable, and revocable, can add a level of complication for divorce purposes. Specifically, asset protection trusts with spendthrift clauses may bar a spouse from taking a claim to the trust assets.[41] These are trusts where the grantor and the beneficiary are the same person, or the grantor retains the right to enjoy the property, even when not the beneficiary, through their power to remove the trustee at any time.[42] The spendthrift clause of these trusts allows assets to be beyond the reach of creditors.[43] In a divorce proceeding, the grantor's spouse would become a creditor to the assets, and may be barred from having a marital interest in the trust assets, even if the assets were once marital.[44] Attorneys will need to pay close attention to the class of trust and specific trust terms when determining what type of interest the parties may have, and may need to join the trustee as a third party defendant to the divorce in order to obtain a claim to a trust with complex provisions.[45]

III. Valuing Trusts

Courts use multiple methods to determine the value of trusts. The four most common types include fair market value, present

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37 *Revocable and Irrevocable Trusts*, Fidelity (June 8, 2026), https://www.fidelity.com/viewpoints/wealth-management/insights/revocable-and-irrevocable-trusts.

38 *Id.*

39 *Id.*

40 *See infra* notes 110–123, and accompanying text.

41 *See infra* notes 117–123, and accompanying text.

42 James J. White, *Fraudulent Conveyances Masquerading as Asset Protection Trusts*, 47(4) UCC L.J. 1, 1 (Jan. 2018).

43 *Id.*

44 *Id.* at 4; *See infra* discussion at notes 117–123.

45 Rysso, *supra* note 3, at 6; *See infra* discussion at notes 117–123.

value, reserve jurisdiction, and intent based. Each of these types of valuations serves a different purpose for different types of assets spouses may have as well as to accommodate the varying circumstances of the parties.

Fair market value is defined as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."[46] States take into consideration the assets, debts, and liabilities when considering the fair market value.[47] The best evidence of fair market value is the actual sale of the assets, however, recent evidence of the purchase value of a similar asset can suffice and if no market exists then a hypothetical market will be created.[48] This hypothetical market is based on the "viewpoint of a hypothetical buyer whose only goal is to maximize his advantage."[49]

When calculating fair market value, states have varying requirements for what date should be used to determine such value.[50] For example, in Arkansas the valuation must be completed at the time a divorce decree is entered; however, courts interpret this as the first day of trial.[51] Other states may set the date, or give the trial court the discretion to set the date as the day the petition for divorce was filed, or the date of the separation.[52]

Another method of valuing trust assets is present value. Present value is based on the principle that money available today is worth more than the same amount of money received in the future, because if the money was received in the present it could be invested and would earn interest.[53] The concept of present value is often used in family law to determine the current value of future payments such as pensions or interests in businesses or trusts, to

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46 26 C.F.R. § 20.2031-1(b).

47 Dew v. Dew, 390 S.W.3d 764 (Ark. Ct. App. 2012).

48 Adriane Berg, *2 Valuation and Distribution of Marital Property*, Matthew Bender & Co., Inc. (Eleanora DiLorenzo ed.) (last visited Aug. 30, 2026), https://plus.lexis.com/api/permalink/39ebb18d-ae87-4caf-aad9-370355411d4e/?context=1530671.

49 Estate of Curry v. United States, 706 F.2d 1424, 1428 (7th Cir. 1983).

50 Berg, *supra* note 48.

51 Ark. Code § 9-12-315(a).

52 Berg, *supra* note 48.

53 *Accounting for Lawyers; 7.4 Present Value,* Boise State University, https://boisestate.pressbooks.pub/accountingforlawyers/chapter/present-value/ (last visited Sept. 14, 2026).

ensure that each spouse receives an equitable share of the marital estate at the time of distribution.[54] Present value uses a mathematical equation where present value (PV) is equal to the future value (FV) divided by the annual interest rate (r) to the power of the number of compounding periods per year (n), or PV=FV/(1+r)^n.[55] This calculation is used to determine the present value: the "current worth of future payments."[56]

In some circumstances, such as irrevocable trusts, courts may need to use a "case-by-case approach based upon the intent and conduct of the relevant parties with regard to the formation and the operation of the trust."[57] Courts, however, have found that a present vested interest in an irrevocable trust is marital due to the beneficiary spouse receiving income from their trust interest, and may be distributed using the present value valuation method.[58]

Courts may also use reserve jurisdiction to value trust assets. This is often used to determine the worth of hard-to-value assets such as pensions.[59] Reserve jurisdiction allows courts to avoid putting a fair market value or present value price on trust assets or interests.[60] It instead allows the court to retain jurisdiction for when the future payment from the asset begins.[61] This means that once the distributions begin, the receiving ex-spouse will then have to pay a portion of the distribution to the ex-spouse.[62] This method, however, runs counter to the public policy approach that assets are typically divided at the time of divorce, and it is a method that keeps the spouses tied together financially. Due to this continuing entanglement, legislatures may prescribe that courts should use this method as a last resort.[63]

States may have other statutory requirements for how the trial courts should proceed with the evaluation; however, the

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54 *In re* Marriage of Sadecki, 825 P.2d 108 (Kan.1992).

55 *Accounting for Lawyers; 7.4 Present Value, supra* note 53.

56 *Id.*

57 Kim v. Kim, 150 N.E.3d 1229 (Ohio Ct. App. 2020); Oakes v. Oakes & Leadwise, Inc., 261 N.E.3d 434, 463 (Ohio Ct. App. 2024).

58 Hotle v. Hotle, 837 N.W.2d 849 (N.D. 2013).

59 Bender v. Bender 785 A.2d 197, 208, 215–16 (Conn. 2001); *In re* Marriage of Harrison, 769 P.2d 678 (Kan. Ct. App. 1989); *Sadecki,* 825 P.2d at 108.

60 *Bender,* 785 A.2d at 202; *Harrison*, 769 P.2d 678; *Sadecki*, 825 P.2d 108.

61 *Bender*, 785 A.2d at 202.

62 W. Va. Code § 48-7-104 ("Determination of worth of marital property").

63 *Id.*

majority of states leave the discretion on how to value a trust to the trial courts. For example, the West Virginia statute on assessing the value of marital property requires courts to determine the net value of marital property at the date of separation, unless another date would be more equitable. The statute then goes on to say that when valuing the marital portion of a spouses "entitlement to future payments, "if the receipt is contingent or not reasonably assured, or other equitable circumstances indicate the value cannot be determined at the time of the final judgement, the court may decline to find the value and instead either fix the spouses' respective shares in such future payments or reserve jurisdiction to make an appropriate order at a future date."[64]

IV. Dividing Trust During a Divorce Proceeding

Like most lawsuits today, divorces are usually settled outside of a courtroom.[65] More than 95% of divorces are settled though settlement offers or mediation, with an estimated only 2–5% of cases going to trial.[66] This means that in the vast majority of cases, the parties are the ones determining the method to value the trust, and if they reach an agreement, that valuation will control the property settlement. Out of the few cases that do go to trial, even fewer will be appealed. Thus it is primarily the trial court judges who are determining the appropriate way to divide a trust during a court proceeding, if that is an issue in the case. Research is limited on how appellate or supreme courts determine trust divisions. In fact, many states give their trial courts the discretion to determine the value of property, vaguely stating that the method of valuation has to be equitable under the circumnutates and fair to all parties involved.[67] If the method for determining the value does not seem unfair to the higher courts, then they will not investigate the

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64 *Id.*

65 *See* Jacqueline Newman, *Separation and Marital Settlement Agreements (Drafting the Agreement)(NY)*, Berkman Bottger Newman & Rod, LLP (Practical Guidance Attorney Team eds., July 2025) https://plus.lexis.com/api/permalink/4b398142-d237-4c36-9a88-154aea94454f/?context=1530671.

66 *Id.*

67 Ark. Code § 9-12-315(a); W. Va. Code § 48-7-104; *In re* Marriage of Finby 166 Cal. Rptr. 3d 305 (Cal. Ct. App. 2013); *In re* Marriage of Mohrlang, 85 P.3d 561, 563 (Colo. Ct. App. 2003); *Bender*, 785 A.2d at 202; *Harrison*, 769 P.2d 678; Fox v. Fox, 592 N.W.2d 541, 546-47 (N.D. 1999).

issue.[68] This makes it hard for practicing attorneys to know which method to use to value their clients' trust or interest in a trust in any state or circumstance.

A. *Fair Market Value*

Courts do, however, have a standard valuation method that is used in estate planning. For tax purposes, estates are valued using fair market value, for all the decedent's assets at the time of death.[69] This method requires an inventory of all assets, getting appraisals for the fair market value of real estate, and specialized valuations by experts for the fair market value of hard-to-value assets (such as business, private equity, collectables, etc.).[70] Here, instead of finding the fair market value at the time of death, the parties are expected to agree to a date upon which to value the trust, if a date is not required by state statute.[71]

Since this method is used for tax purposes, after the person has died and no longer holding future interests in a property, this method should primarily be used for assets held in trust in which spouses presently have an interest. The parallel treatment makes sense because these assets can be presently sold, spent, or transferred.

Another method family attorneys can utilize as a tool in trust valuation is the trustee's report.[72] The Uniform Trust Code has been enacted by 36 states and lays out provisions that require trustees to file an annual report of the trust accounting.[73] U.T.C § 813 (c) requires trustees to

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68 *See Fox*, 592 N.W.2d at 546-47.

69 26 U.S.C. § 1014 (addressing the basics of property acquired from a decedent); 26 U.S.C. § 2031 (a); *Estate of Curry,* 706 F.2d at 1431.

70 *See 2 California Probate Practice § 11.06,* Matthew Bender & Co., Inc. (Robert Blaylock et al. eds., Mar. 2026) https://plus.lexis.com/api/permalink/d1cbdf70-7ecd-4003-93f3-8e71978289dd/?context=1530671; *See also, e.g.*, Janis v. Comm'r, T.C. Memo 2004-117, 2004 Tax Ct. Memo LEXIS 116 (May 12, 2004). (showing the use of appraisers during fair market value determinations for trust tax purposes).

71 *Compare 2 California Probate Practice § 11.06, supra* note 70*, with* Berg, *supra* note 48.

72 *See, e.g.,* Kaladic v. Kaladic 589 P.2d 502, 502 (Colo. Ct. App. 1978) (evidencing the use of a trustee's report, testimony, and accounting in a divorce proceeding).

73 Connie Eyster, *The Uniform Trust Code Turns 25*, ACTEC (Jan. 2025), https://actecfoundation.org/podcasts/uniform-trust-code-utc/.

> send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values.[74]

If applicable, family law attorneys can advise their clients to request such reports from the trust's trustee to find the values of the trust at issue. The U.T.C., however, only requires the trustee to find the market value if it is feasible to do so; therefore, the client may not receive the value of the trust assets, but the report will give both parties some clarity regarding the assets.[75] In addition, having the list of assets and debts provided by the report will then afford attorneys a starting place to hire appraisers and experts to determine the value of such assets, similar to the method of valuation used for tax purposes.[76]

Using either of these methods to determine the fair market value of the trust assets could provide the clients with a clear value of the trust assets and would likely be an agreeable method of valuation based on the widespread use of fair market value in estate planning.[77] In addition, it would be helpful to have the parties agree to appraisers or experts prior to the value determination.[78] This could be done by the party seeking the appraisal offering a list of possible appraisers or experts and allowing the other party to pick from that list. If the parties agree to the values assigned, then the attorneys would need to find an agreed way to distribute such property. If this process is successful, the case likely will not see a courtroom for this issue. If the parties cannot agree to a distribution method of the assets, it is likely that a trial court would accept the agreed upon values found using the fair market value

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74 Unif. Tr. Code § 813(c) (Unif. L. Comm'n 2000), amended 2010.

75 *See id.*

76 *See id.*

77 *See* 26 U.S.C. § 2031(a); *See* First Nat'l Bank v. United States, 763 F.2d 891, 893–94 (7th Cir. 1985)*; See, e.g., Kaladic*, 589 P.2d at 502.

78 *See generally* Wood v. Wood 361 S.W.3d 36, 40 (Mo. Ct. App. 2011) (showing the rejection of an expert who failed to find the fair market value of a business interest); Schorer v. Schorer, 501 N.W.2d 916, 920 (Wis. Ct. App. 1993) (demonstrating the use of experts and appraisers in determining the marital value of stock options).

method and/or trust report.[79] The court would then only be tasked with how to distribute the already valued property.

If the court must determine the appropriate valuation method and concludes that neither the fair market value nor the present value approach would produce an equitable result, it may instead employ the reverse jurisdiction or the intent-and-conduct method.[80] However, fair market value cannot be used to determine other types of trust interests, such as future or contingent interests, since the parties do not currently have those interests available to divide.[81]

B. *Present Value Method*

For contingencies or future interests, the court will likely use the present value method. This method is widely used for pensions and retirement plans, though courts have acknowledged the similarities to future or contingent interests in a trust, and value them similarly.[82] For pensions, the equation described above uses accepted actuarial principles to factor in "mortality, interest, and the possibility of the employee remaining with the employer until retirement age," which in estates would instead factor in the likelihood of actually receiving a present interest in the trust.[83]

To find the present value of a future or contingent interest, courts typically use the equation to find the present value of the benefit, determine what percent of that value is marital and that the other spouse is entitled to, then award the property to the non-beneficiary spouse.[84] The court would then have the option to distribute the value at the time of divorce, referred to as the "present division method" or distribute the property as the beneficiary-spouse receives it, called the "deferred distribution method.[85]

The present division method allows a court to distribute the asset at the time of the divorce, even though the beneficiary-spouse

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79 *See Harrison*, 769 P.2d 678; *Finby,* 166 Cal. Rptr. 3d at 305; *Mohrlang,* 85 P.3d at 563; *Bender*, 785 A.2d at 202; *See Fox*, 592 N.W.2d at 546-47.

80 *Mohrlang,* 85 P.3d at 563; *Sadecki,* 825 P.2d at 108.

81 *Mohrlang,* 85 P.3d at 563; *Sadecki,* 825 P.2d at 108.

82 *Bender*, 785 A.2d at 202; Paulson v. Paulson, 783 N.W.2d 262, 271 (N.D. 2010).

83 *Bender*, 785 A.2d at 202; Bloomer v. Bloomer 267 N.W.2d 235, 241 (Wis. 1978); Ohn v. Ohm, 431 A.2d 1371. 1379 (Md. Ct. Spec. App. 1981).

84 *Ohm,* 431 A.2d at 1379.

85 Lund v. Lund 779 S.E.2d 175, 178 (N.C. Ct. App. 2015).

has not yet received any distributions from the trust.[86] As a result, the beneficiary spouse retains the trust interests but receives a corresponding credit in the property equalization, while the non-beneficiary spouse is awarded other marital assets of equivalent value.[87] This sort of present division would offset the portion of the interest to which the non-beneficiary spouse is entitled, either by receiving cash or other assets equal to the amount of the interest instead of the interest itself.[88]

The disadvantage of the present distribution method is that the court is basing its division on contingent unvested interests that might happen, rather than actual events and distributions that have happened.[89] That means it is possible that the court could award the non-beneficiary spouse something that will never be received by the beneficiary-spouse.[90] This method, though, does allow the parties to use experts and witnesses that can attest to the likelihood of the interest vesting and the values of those distributions.[91] The present value method also may not feasible if there are no other assets that the beneficiary-spouse c an use to offset the value of the interest during the equalization portion of the division.[92] However, courts favor this method when the interest is able to be properly calculated and there are other assets to offset the interest.[93]

Under the deferred distribution method, the court will still value the trust interest and determine the percent of interest the non-beneficiary spouse is owed at the time of trial.[94] Then, instead of being awarded off-set property at the time of trial, the nonbeneficiary-spouse will be entitled to a fixed parentage of the interest as the beneficiary-spouse receives it.[95] This is accomplished

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86 *Bender*, 785 A.2d at 202; *Bloomer*, 267 N.W.2d at 241.

87 *Bender*, 785 A.2d at 202; *Bloomer*, 267 N.W.2d at 241; Burchfield v. Burchfield, 103 Va. Cir. 447, 476 (2019).

88 Meyer v. East, 205 N.E.3d 1066, 1074 (Ind. Ct. App. 2023); Chilkott v. Chilkott 158 Vt. 193, 198 (Vt. 1992).

89 *Bender*, 785 A.2d at 202.

90 *Id.*

91 *Chilkott,* 158 Vt. at 197–98; Liciardello v. Liciardello, 570 A.2d 1062, 1065 (Pa. Super. Ct. 1990); Dahl v. Dahl 459 P.3d 276, 327 (Utah 2015).

92 *See* Endy v. Endy 603 A.2d 641, 644 (Pa. 1992)

93 Hare v. Hodgins, 586 So. 2d 118, 125 (La. 1991); *In re* Marriage of Hoobler 519 P.3d 715, 723 (Ariz. Ct. App. 2022).

94 *Lund,* 779 S.E.2d at 178.

95 *Id.;* Baccanti v. Morton 752 N.E.2d 718, 731 (Mass. 2001).

by the court reserving its jurisdiction over the matter.[96] The reserve jurisdiction method is a favorable alternative when a present value or distribution method is inequitable due to the circumstances.[97]

C. *Reserve Jurisdiction Method*

The reserve jurisdiction method is often used during retirement or pension division but could similarly be used when the parties have a future interest in a trust.[98] This method is appropriate when the present value and/or distribution is unhelpful due to difficulties in finding the value, the parties' needs, "the inability to set off certain amounts of property," or if the trust interest has not yet vested.[99] The trial court has discretion to use this approach of reserving its jurisdiction by determining the "formula for division" during the divorce proceeding but delaying the actual dissolution until the distributions are received by the party.[100] In unvested interests, the court also may hold off determining the value at the time of divorce, and instead wait until the interest is vested to calculate the portion that is marital property based on the value of the interest during the marriage.[101] Under this approach, the court would retain jurisdiction over the parties in order to determine and award, or award the previously decided percentages of the marital interest as the distributions are received.[102] This method is beneficial because the party owning the interest is not having to pay the other spouse with monies not yet received.[103]

The benefit of using the reserve jurisdiction approach is that it illuminates the risk of an interest not vesting for the beneficiary-spouse, therefore, both parties are ensured to receive equal outcomes for the interest.[104] This method is favorable when there are not sufficient assets to offset the amount owed to the

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96 *In re* Marriage of Dill, 779 P.2d 468, 476 (Kan. Ct. App. 1989).

97 *See Ohm*, 431 A.2d at 1379.

98 *Harrison*, 769 P.2d 678; *Bender*, 785 A.2d at 202.

99 *Harrison*, 769 P.2d 678; *See Hotle,* 837 N.W.2d 849; Laing v. Laing, 741 P.2d 649, 657 (Alaska 1987).

100 *Hotle,* 837 N.W.2d 849.

101 *Laing,* 741 P.2d at 657.

102 *In re* Marriage of Brown, 544 P.2d 561, 567–68 (Cal. 1976).

103 *Laing,* 741 P.2d at 657.

104 Gemma v. Gemma, 778 P.2d 429, 431 (Nev. 1989); Damiano v. Damiano, 94 A.D.2d 132, 138 (N.Y. App. Div. 1983).

non-beneficiary spouse or when there is insufficient evidence to determine the percent of the interest and the amount that interest is worth at the time of decision.[105] The reserve jurisdiction method allows the money to be valued and distributed as the beneficiary-spouse receives the funds, which illuminates risks and ensures a more accurate understanding of the interest's worth.[106]

The major disadvantage is that the method prolongs the ex-spouses' entanglement with each other.[107] The court will likely have to continue its supervision over the matter for years.[108] Greater costs are associated with the reserve jurisdiction method, because the parties will need to go back to court, perhaps even multiple times, to determine the percentage of interest each is owed.[109] However, trial courts routinely use a similar retaining approach to monitor other property division devices, such as maintenance; therefore it is not too unusual or burdensome.[110]

D. *Intent-and-Conduct Method*

The intent-and-conduct method is primarily used for irrevocable trusts. Irrevocable trusts are, generally, not included in property distributions during divorce proceeding, primarily because they operate as their own entity instead of being the property of the divorcing spouses, and that third party entity is not a party to the trust.[111] This means that the court would not be able to direct the trustee to divide the marital property inside the irrevocable trust because they are not parties.[112] However, in some scenarios, the court may have to take the property of the irrevocable trust into consideration, despite the inability to divide its assets.[113] For example, in *Kim v. Kim*,[114] the Ohio Court of Appeals found it to be against public policy when a husband unilaterally created an irrevocable

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105 *Laing,* 741 P.2d at 657; Weir v. Weir 413 A.2d 638, 640–41 (N.J. 1980).

106 *Weir*, 413 A.2d at 640–41.

107 *See* Endy v. Endy, 603 A.2d at 641, 644 (Pa. 1992) (describing how present distribution is favorable in the aspect of avoiding contact between the parties).

108 *Harrison*, 769 P.2d 678.

109 *Id.*

110 Janssen v. Janssen 331 N.W.2d 752, 756 (Minn. 1983).

111 *See Oakes,* 261 N.E.3d at 463.

112 *See id.*

113 *See id.*

114 *Kim,* 150 N.E.3d 1229.

trust and placed marital life insurance policies inside the trust. The court reasoned that holding otherwise "would allow a spouse to unilaterally, and without the consent or knowledge of the other spouse, move marital money out of the reach of the other spouse by merely placing it in an irrevocable trust."[115] In that case the court credited a cash value of the marital life insurance policy to the husband during the equalization of the division of marital property.[116] The court was able to do this because it was within the court's discretion to try to reach equitable division of property and the court was not actually compelling the trust to do anything. Instead, the court simply determined the cash value of the husband's interest in the trust and applied it to the amount of assets the husband would receive for equalization reasons.[117] The court would not have been able to give the wife an interest in the life insurance policy, due to the structure of the trust.[118] For example, in a parallel case, *Oakes v. Oakes David C. Oakes & Leadwise, Inc.,*[119] the appellate court held that the trial court erred in assigning the wife real property held in trust, because it was held in an irrevocable trust.[120]

The court in *Oakes* analyzed the intent and conduct of the trust by looking at the trust language, the parties' actions, and the testimony for the parties.[121] The court recognized that despite the parties placing the property into an irrevocable trust, they operated as if the property in question was marital, such as by paying for the utilities or maintenance with marital assets.[122] The wife testified that the intent of the trust was to protect the trust assets from creditors and that she had no intentions of gifting the property to the husband.[123] While the court took this statement into consideration, it also acknowledged that the trust was not a party to the litigation, and therefore the court could not compel the trust to convey the marital residence to the wife.[124] Interestingly, the court mentioned that the wife could

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115 *Id.*
116 *Id.*
117 *Id.*
118 *Id.*
119 *Oakes*, 261 N.E.3d 463.
120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.*

have named the husband as an individual and as a trustee in her initial complaint, or the husband could have moved to make himself as trustee a third-party defendant and interpleaded the trust in the proceeding.[125]

The methods attorneys should utilize, or expect courts to utilize, depends on the type of trust, assets, and interest the spouse holds. For assets inside the trust that are currently ascertainable, such as real and personal property that could be put on the market and sold, fair market value would give an equitable value of those types of assets.[126] For assets that have a future value, such as life insurance policies or future interests in a trust, attorneys should use the present value method.[127] If the parties are not agreeable to either method, then the trial courts will have the discretion to determine what method is the most appropriate.[128] When discussing the use of reverse jurisdiction, the Kansas Court of Appeals court aptly explained:

> The trial courts, of course, may consider other methods of valuation and other methods of making disposition of the marital assets of the parties which might better address the interests and needs of the parties. Diligent and innovative counsel may develop other methods of solving the problems inherent in this difficult issue. Our intent is not to create an inflexible rule of property valuation, but rather to provide trial courts with alternative methodologies that may prove effective. After all, a rule directed to the disposition of property in a divorce proceeding can only be as sound as the economic reality which it attempts to service. The key to an equitable distribution of marital assets is fairness, not mathematical precision.[129]

V. Future Interests and Contingent interests

Future and contingent interests are the most difficult interests in a trust to evaluate.[130] This is because the spouse who has the interest does not presently receive distributions or property

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125 *Oakes*, 261 N.E.3d 463.

126 *Dew,* 390 S.W.3d 764.

127 Marc Chorney, *Estate and Gift Tax Valuation of Temporal Interests*, 40 Univ. of Miami Law Center on Est. Planning 1604, 1604–5 (2026); *Mohrlang,* 85 P.3d at 563.

128 *Harrison*, 769 P.2d 678; *Finby,* 166 Cal. Rptr. 3d at 305; *Mohrlang,* 85 P.3d at 563; *Bender*, 785 A.2d at 202; *See Fox*, 592 N.W.2d at 546-47; Ark. Code § 9-12-315(a); W. Va. Code § 48-7-104 *Determination of worth of marital property*.

129 *Harrison*, 769 P.2d 678.

130 *Mohrlang,* 85 P.3d at 563.

rights that can be valued and divided in the present.[131] During the evaluation process, courts treat future interests similar to pensions. Trial courts are given the discretion to attempt a present value. [132]

VI. Conclusion

While trust divisions can seem daunting to family attorneys, there are fairly simple methods that attorneys can expect the courts to utilize to determine the marital portion and interest value of trusts. If the property that is to be divided in the trust is a vested interest and tangible, it is likely that the courts will use fair market value to determine the worth of the asset(s). If the asset is unvested or a vested future interest, the court has a few standard options they can utilizes to determine what percentage of the asset is marital and how it should be divided. Most likely, the court will utilize the present value method to value the asset. If there are sufficient funds or other assets to off-set the value of the interest, the courts will likely award 100% of the interest to the beneficiary-spouse while giving the other spouse other marital assets in return. If there are insufficient assets to make up for one spouse being awarded 100% of the interest, the court will reserve its judication to distribute the interest as the money becomes available to the beneficiary spouse. If the interest is too complicated to value at the time of the divorce, the court may also reserve jurisdiction to make this calculation at the time the interest becomes available to the beneficiary-spouse, then distributed it as equitable. In some scenarios, the court may have to use an intent-based approach due to the formation or actions of the party. After the final judgment for the divorce decree is entered, a grantor spouse, or both spouses, may want to amend their trust, if they entered the trust together, or if the trust lists the ex-spouse as a fiduciary and/or beneficiary.[133]

McKenzie Carson

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131 *Id.*

132 *Id.*

133 Rysso, *supra* note 3, at 7.