

Navigating Complex Divorce

What To Think About When Disentangling
A Marriage With Complex Assets



A White
Paper
Presented
By

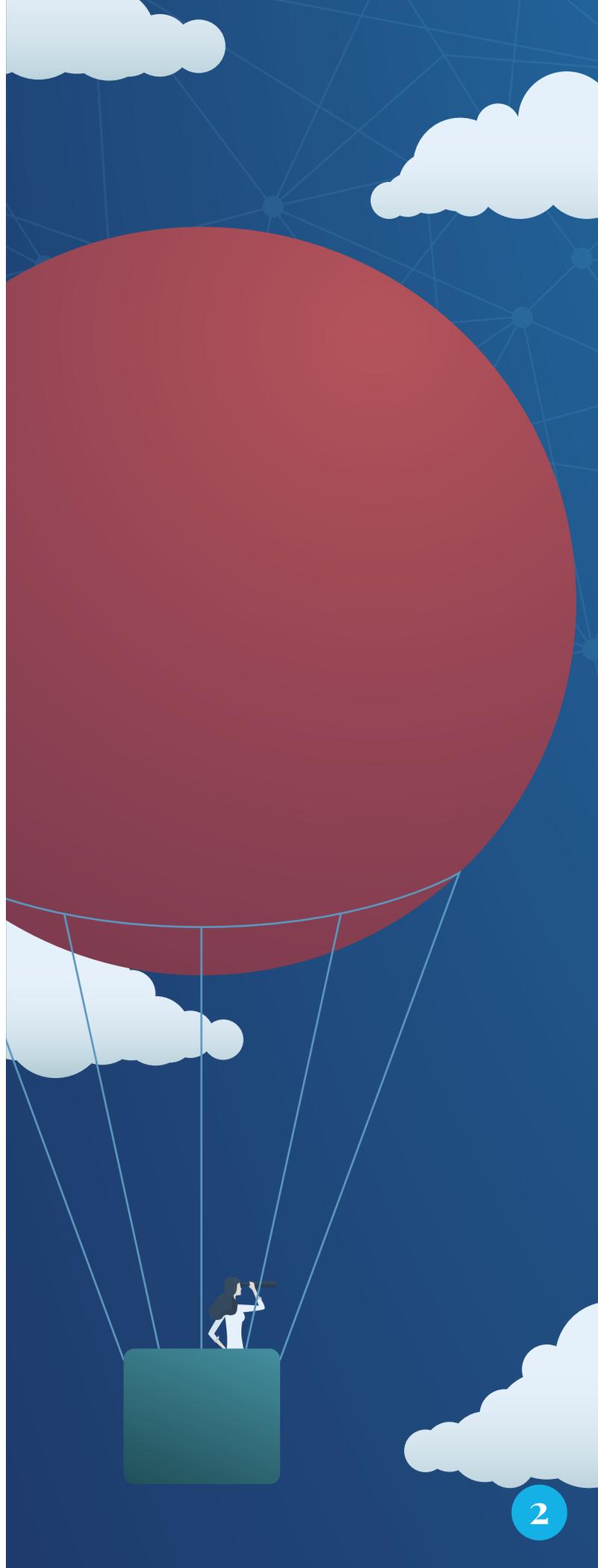
ZACHARY D. SMITH, LLC

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Divorce is rarely a simple or straightforward process. It's ever more complicated when a couple owns illiquid, inherited, premarital or difficult to value assets. Disentangling the shared life you've built can seem incredibly daunting. The financial aspects alone are often a significant hurdle. Understanding the process – particularly the unique factors that often come into play in complex asset cases – is critical for making informed decisions.

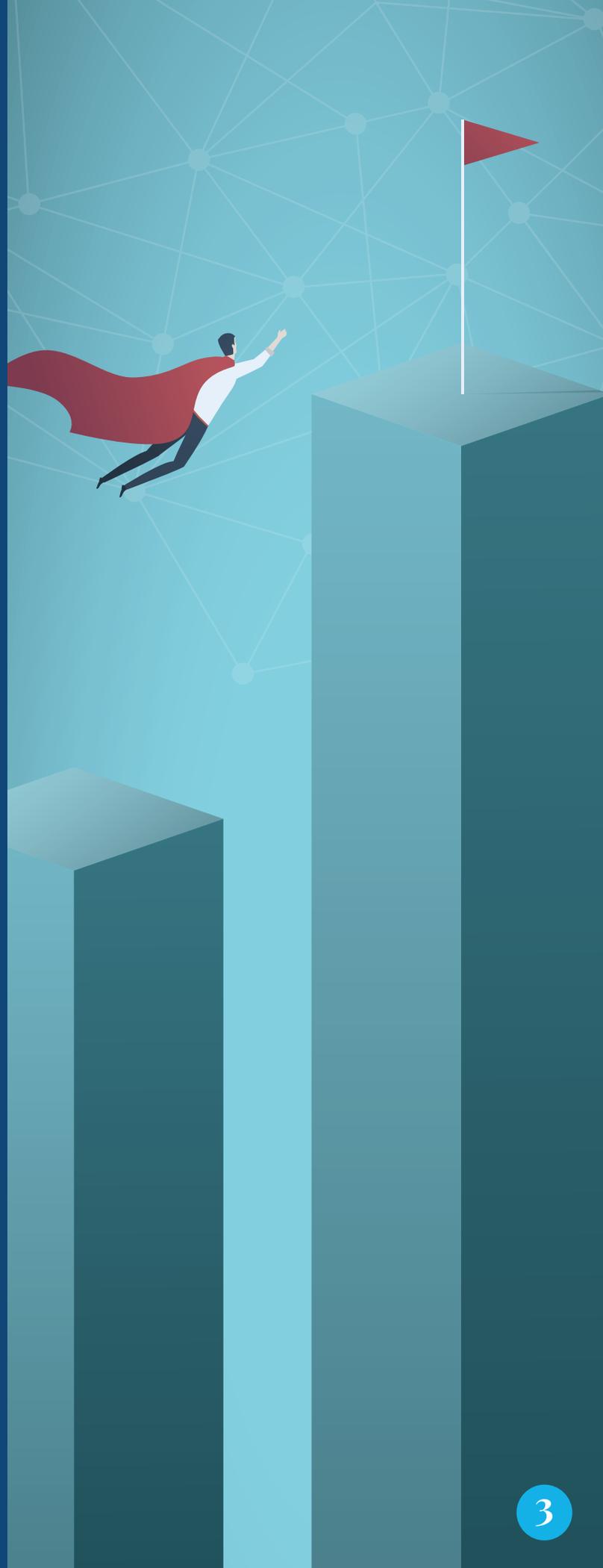
Read on to learn more about the key considerations that impact three areas of high-stakes divorce cases: property division, parenting issues and reputation management.



I. Property Division

From a financial perspective, a marriage is a bit like a business venture. Each spouse may come into the marriage with their own assets and debts. Each makes significant contributions along the way. And each is entitled to an equitable share of the assets and debts on the way out.

There are multiple facets to addressing property division in Ohio, depending on the type and nature of the assets or debts. Here are some key things to think about.



Marital Versus Separate Property

In Ohio, all marital property is subject to equitable division during divorce. By statute, “Marital Property” includes all assets and debts acquired by either spouse during the course of the marriage. “Separate Property” refers to assets or debts that one spouse acquired before the marriage and kept separate throughout the marriage. This “Nonmarital Property” can also include gifts that were made to a single spouse during the marriage, inheritances, or those assets excepted by a valid prenuptial agreement. However, if separate property is commingled with marital property – meaning it isn’t kept separate – it may be treated as marital property for purposes of property division.

One of the monumental tasks of property division is dealing with separate property – identifying it, valuing it, and determining whether it became marital property by virtue of commingling. Effective negotiation is critical for getting a fair share of the assets. Through creative leveraging, parties may come out in a better position than they would if a court determined the outcome.



Long-Term Marriages

The longer the marriage, the more your lives are intertwined. Couples who pursue divorce later in life are more likely to have ongoing and significant financial entanglement for the rest of their lives. Choosing a lawyer who is knowledgeable about the challenges inherent to ending a long-term marriage is critical.



Retirement Assets

Retirement assets might account for a significant portion of your net worth. You or your spouse may have worked for decades to build up those assets. Now, facing divorce, you must address the complicated question of whether (and how) to divvy up those assets.

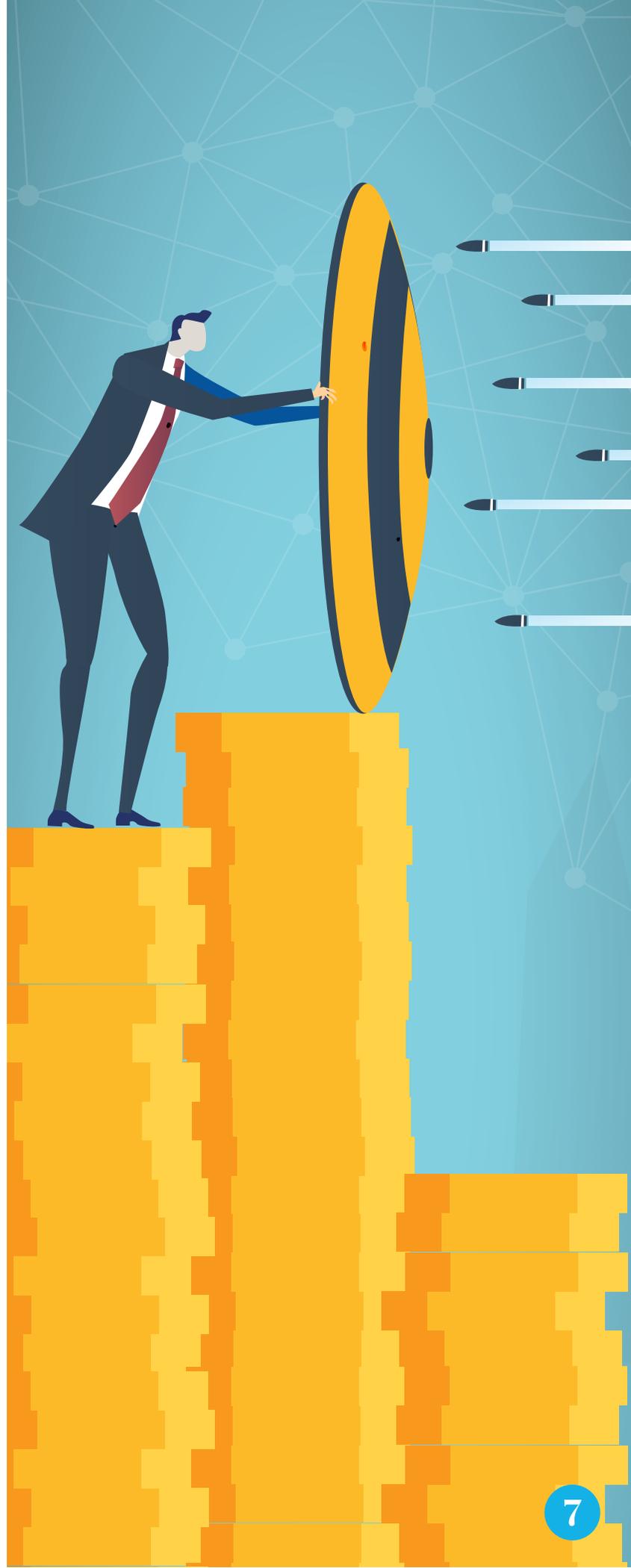


Many people are familiar with qualified domestic relations orders (QDROs) – court orders that require plan administrators to divide retirement accounts due to divorce. These orders apply to qualified retirement plans such as 401(k)s, various Profit-Sharing Plans, and

the like. Depending on your circumstance, you might decide to split your portion into a second account or cash it out. A QDRO must specify the exact mechanism of division for the plan it purports to divide.

Not all plans are eligible for QDROs, however, examples of nonqualified plans include long-term and short-term incentive plans, restricted stock plans, certain deferred compensation plans, and supplemental executive retirement plan (SERPs or “top hat plans”). These plans provide an additional form of deferred compensation for executives, managers and other highly compensated employees. Also called “golden handcuffs” (since they provide a significant enticement for high-level employees to stay on long-term), these assets can be extremely valuable and can have guaranteed growth structures that must be accounted for.

Because nonqualified plans can't be divided through a QDRO, it takes a more creative approach to address them in property division. One spouse might buy out the other's share in the plan, which can be complicated, given the uncertainties involving valuing these plans. Another option is giving the nonowner spouse a right to receive their portion of the plan at the same time the titled spouse claims their payout – often called an “as if and when” approach. Both approaches require meticulous analysis and drafting to address all the variables, risks and unknowns.



Stock Options, Restricted Stock Units, Long Term Incentive Plans

People are often surprised to learn that their stock options, restricted stock units (RSU) or other long-term incentive plans are subject to property division in an Ohio divorce. They may be even more surprised to know that these assets are subject to division even if they have not yet vested. These assets must be handled with care, not only because of the complex mechanisms required to divide them in a divorce, but because of the nuances of valuing these unique assets.

When determining the value and how to divide long-term incentive plans, there are many questions that can impact the outcome:



What is the grant date?



When were or when will the plans be vested?



What is the potential sale date?



Are the plans or units being offered for past performance or future performance?

What makes the division of assets such as restricted stock units so complex is the nature of these assets. It's not like dividing the family car, which is a single item with a clear value that can be transferred to someone else with relative ease. Something like a restricted stock unit may not even seem like an asset, at least when it was first granted.

Typically, a RSU is not vested until after a certain time period or until certain conditions are met. To make matters more complicated, vesting often occurs on a rolling basis. For example, X number of shares will be vested after a year, Y after two years, and so on. Then, the employee may be granted more units over time, potentially on a different vesting schedule.

Identification, classification and valuation of these assets must be handled diligently by a lawyer experienced in addressing them.



ESOP

Closely Held Business Interests

With closely held businesses – especially family-run enterprises – the books aren't subject to the scrutiny and auditing requirements typically required by larger companies. As a result, the records are more susceptible to manipulation (or even just sloppy bookkeeping), and owners have a far greater ability to exert control over the profits which directly impact income used for support and valuation purposes.

As with other assets, a thorough, accurate valuation is key when it comes to dividing business interests. The process of valuing a closely held business – determining the appropriate standard of value, compensation (excess owner compensation), goodwill, and discounts – is daunting and typically requires an accredited valuator. An attorney that has existing and strong relationships with a stable of qualified valuers can work toward a reliable resolution in a much more efficient way.



Real Estate Portfolios

Many people invest in real estate to take advantage of the tax benefits and growth potential. In the case of residential rental properties, the amount of time you've owned the property may impact its valuation. As with the primary home, the valuation will depend on current market conditions.

Commercial properties are valued differently – often on a cash-flow basis. The liabilities tied to those properties are also handled differently than residential mortgages.

With either type of property, parties typically have two options: buy out the other person or sell the property and divide the proceeds.



II. Parenting Considerations

When minor children are involved, custody issues add another major layer of complexity to high-stakes divorce cases. Determining a workable parenting arrangement – and learning how to coparent effectively – is no easy task. Likewise, it takes a thorough, thoughtful approach to meet the physical, emotional and financial needs of each child.

Those challenges multiply when one or more children have special needs. The child support award and custody arrangement should address factors such as:



Tuition for education and extracurricular activities



Therapeutic services



Special education programs



Medical care



And More

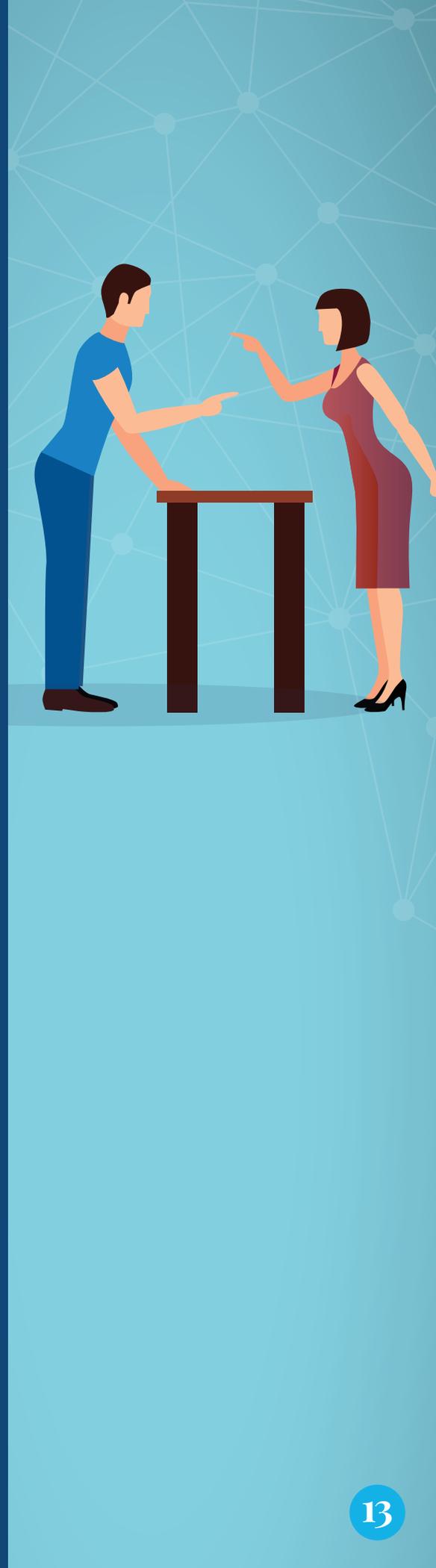
Doing what is best for the children is always the guiding principle. However, there's rarely a clear-cut answer to what's best. That's why strong advocacy and experienced guidance is so essential for navigating these gray areas.

III. Reputation Management

Discretion is often a top priority in complex divorces – especially if you’re prominent in the community. Nobody wants to air their “dirty laundry” through public divorce proceedings.

A court battle is rarely the most effective or efficient way to resolve a divorce, and it’s certainly not private. Thankfully, various forms of alternative dispute resolution may be available, including mediation and collaborative law. Both provide a path to resolving disputes in a private manner, without the stress, expense and potential reputational harm of public court proceedings.

Choosing the right attorney is the first step toward protecting your reputation. A good attorney will take proactive steps to mitigate the situation of an adversarial process. Likewise, by choosing an attorney who has an excellent reputation – one who is known to be informed, reasonable and prepared – that reputation can reflect on you, to your benefit.





About Zachary D. Smith

FOUNDING PARTNER - ZACHARY D. SMITH, LLC
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Attorney Zachary D. Smith is committed to helping clients navigate complex divorces in a discreet and effective manner. He has built a respected reputation in the Ohio family law field as an excellent negotiator, skilled problem-solver and strong advocate. His clients include executives, managers, business owners, politicians, physicians and other prominent people in the community.

As a trained family law mediator and board-certified family law relations specialist, Mr. Smith understands how to think outside the box to develop win-win solutions. He appreciates the financial and emotional “capital” that accompanies any complex matrimonial proceeding. Mr. Smith frequently helps couples reach favorable outcomes through the collaborative process and interest-based negotiation. However, he is also a skilled litigator who won’t hesitate to go to bat for clients in court.

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