Successful Strategies

for Litigation and Trial of Marital Property Disputes

By James J. Harrington III

Experienced litigators do not begin to prepare for trial of a marital property dispute the week or month before trial. Preparation begins with the initial client interview and continues through the court's final verdict.

The following strategies implement a global, long-range approach and employ a concerted course of action involving case analysis, issue evaluation, and targeted legal research long before the trial. This process will enhance your prospects for success to and through trial of a marital property dispute.

Identify the Likelihood of Trial: File First!

Family law litigators instinctively identify the trial potential of a marital property dispute as early as the initial client interview. While an estimated 97 percent of divorce cases in Michigan ultimately settle, the other 3 percent of cases resulting in trial frequently involve one or more of the following factors: (1) a volatile history of high conflict between the spouses; (2) a large marital estate; and (3) significant marital versus separate property issues, triggering an all-or-nothing battle. Because many divorcing couples reach the decision to file for divorce at nearly the same time, *carpe diem* must be the guiding principle. File the divorce complaint first.

An early advantage of filing first involves immediate access to carefully crafted ex parte orders. The long-range strategic impact of being first to file the complaint cannot be overestimated. Filing first also means that you have seized initial control of the trial. It will be your argument, testimony, and evidence that the court receives first. Experience suggests that the trial court has already formed firm impressions of the evidence and issues by the conclusion of the plaintiff's case. Many times the judge has neither the time nor the patience to deal with a protracted presentation by the defendant that simply summarizes the testimony and exhibits you have submitted.

Monitor and Master the Assets and Liabilities from Day One

While the mantra for trial attorneys is "preparation, preparation, preparation," how does this translate into the practicalities of the litigation and trial process?

Although there is no one-size-fits-all method for mastering the assets and liabilities in a divorce case, highly effective techniques may include:

- A master spreadsheet containing all assets and liabilities, values, areas of dispute, and document source

Fast Facts

Early and thorough research is a priority for the family law litigator when complex separate property issues are in play.

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Family law attorneys are well-advised to subject their witness testimony and exhibits to a rigorous evidentiary scrutiny in light of the Michigan Rules of Evidence.

- A "trial notebook" approach in which all assets and liabilities command their section
- Separate file folders, cross referenced by a master index
- A Bates-numbered (i.e., consecutively numbered) computer file, containing unlimited subfiles, readily accessible through a text or numeric search

It is critical that this process begin *immediately* upon retention by client and evolve throughout discovery, mediation, and trial. There are also sophisticated software programs that make file management and cross reference of documents, exhibits, testimony, and issues a routine task even in the most complex case.

Analyze Separate Versus Marital Property Issues at the Earliest Possible Opportunity

The first duty of the trial court in a contested property case is a determination of the marital estate.[1] Early and thorough research is a priority for the family law litigator when complex separate property issues are in play.

Since *Reeves v Reeves,*[2] there has been an exploding body of caselaw analyzing every nuance of separate property issues. These fact patterns may involve premarital property,[3] inherited property,[4] gift property,[5] or personal injury awards.[6] The next level of analysis involves statutory invasion of separate property because of the contributions by a spouse (§ 401 claims[7]) or because of financial need (§ 23 claims[8]). A final analysis involves determining whether increases in the value of separate property assets during the marriage arise out of active or passive[9] appreciation.

Underlying caselaw and many seminar resources furnish a clear and precise roadmap to prosecuting or defending separate property claims. Culling the caselaw and matching specific cases to your fact patterns gives you a critical advantage in discovery, deposition, mediation, and trial. The maxim that "enough research supports your conclusions" is the rule in marital property disputes.

Depositions May Be the Most Critical of all Trial Preparations

Precisely honed interrogatories and document production requests are the foundation for litigation of marital property cases. Many divorce attorneys, however, are reluctant to take depositions, perhaps because of anxiety about the deposition process, cost, or time constraints. Yet an argument can be made that the standard of care for divorce lawyers mandates the deposition of the opposing party before trial in every significant marital property case.

Critical advantages afforded by depositions include:

- The deposition of the opposing party is a dry run of your cross examination at trial.
- The admissions obtained at deposition can provide the bedrock foundation for dispositive motions.
- Depositions will streamline your proofs at trial.
- Admissions in deposition are independently admissible at trial and do not *require* unavailability of the other party.
- This is the one and only opportunity you will have before trial to observe the demeanor and credibility of the other party.

File Pre-Trial Motions: Narrow the Issues for the Court

Many family law practitioners have never filed a dispositive summary disposition motion[10] or a motion *in limine* in a marital property case. A well-drafted motion for partial summary disposition arguing "no genuine issue of material fact" on one or more key issues provides the following advantages:

- The trial research must be done anyway.
- The trial court is invited to calmly deliberate on a carefully targeted legal issue that you have selected.
- The motion not only educates the court regarding the facts of your case, but also your legal theory.
- The court is presented with the opportunity to substantially streamline the proofs at trial and shrink the litigation process.
- Even if unsuccessful, filing the motion provides "two bites at the apple" because your proofs will target the identical issue at trial.

A wide range of issues can be efficiently addressed in your motion *in limine.* Although these motions are typically designed to preclude admission of certain evidence or testimony, they can be a sword rather than a shield. Whether your motion *in limine* involves a *Daubert*[11] challenge to a proposed expert witness or seeks to exclude testimony consisting of rampant speculation regarding values, earnings, or income or targets irrelevant or cumulative evidence,[12] a favorable ruling on your motion can have a devastating effect on the other party or lay the foundation for a favorable settlement or an even more favorable property award.

Pre-Qualify Your Witnesses and Exhibits in Light of the Michigan Rules of Evidence

Just as prospective homeowners go through exhaustive prequalification procedures, family law attorneys are well-advised to subject their witness testimony and exhibits to a rigorous evidentiary scrutiny in light of the Michigan Rules of Evidence. This can be a simple process involving pre-qualifying all testimony and exhibits and anticipating evidentiary objections before the trial begins. This also arms you with citations to the Michigan Rules of Evidence and controlling caselaw, which will stymie ill-founded objections.

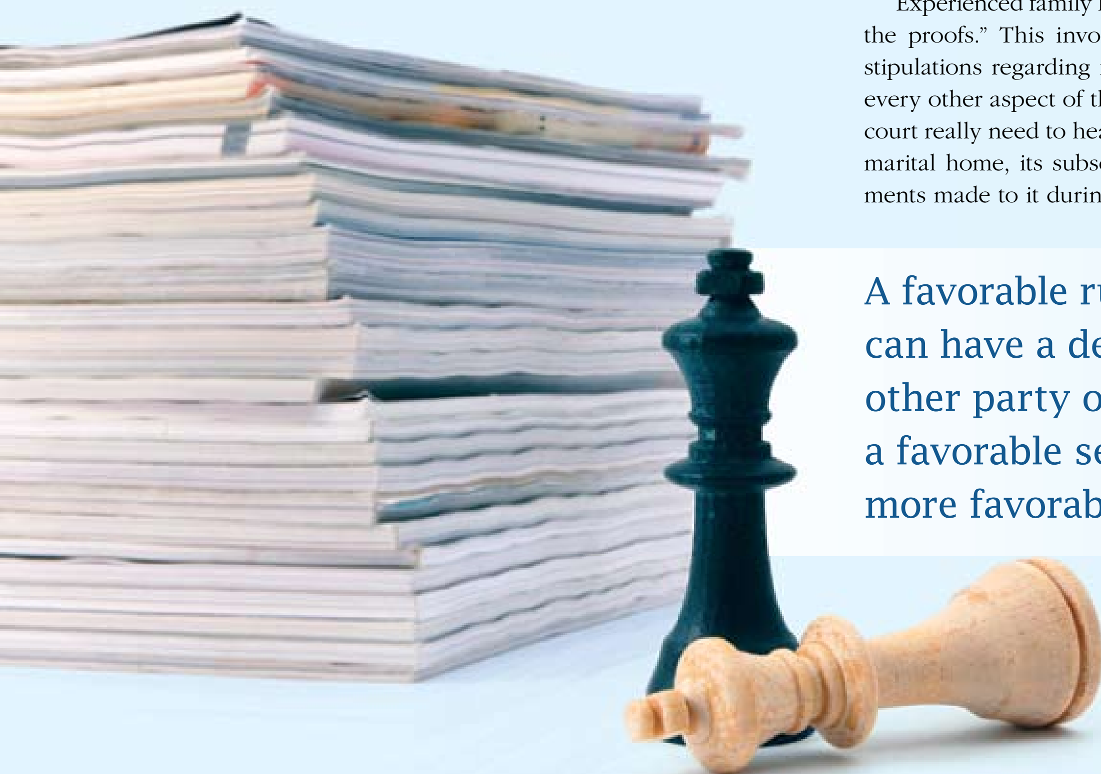
While this may be a challenging process, it is clearly an exercise best conducted in the relative calm of your office rather than under enemy fire in the courtroom. A common alternative to hoping that the trial court will somehow see how much you need this evidence to support your case is not an acceptable risk.

Every attorney in a marital property case should carefully analyze whether the evidence is relevant, can be authenticated, and will withstand hearsay, privilege, or other objections. This is particularly critical when dealing with electronic evidence. Prudent practitioners need to be vigilant regarding state[13] or federal statutes[14] that might trigger criminal liability for illegally obtained evidence not just against your client, but also against counsel who divulged the illegal information.[15]

Shrink the Proofs and Streamline the Trial Process

Family law attorneys should operate under certain assumptions: our trial courts are overworked, underpaid, and short-staffed and, while they may be genuinely focused on custody and parenting-time issues, they may have little patience or interest in conducting a microscopic examination of reams of documents associated with contested marital property disputes.

Experienced family law attorneys work from day one to "shrink the proofs." This involves seizing the initiative with proposed stipulations regarding factual chronology, ranges of values, and every other aspect of the marital property dispute. Does the trial court really need to hear the history of the acquisition of the premarital home, its subsequent sale and resale, and the improvements made to it during the marriage?



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A bored or inattentive trial judge soon becomes a frustrated trier of fact, which can be dangerous for your client. Surprisingly, MCR 2.401(E) is largely ignored by family law practitioners; however, this court rule furnishes an invaluable opportunity to achieve goals such as "the simplification of the issues,"[16] "the possibility of obtaining admissions of fact and of documents to avoid unnecessary proof,"[17] and resolving "other matters that may aid in the disposition of the action."[18] Investment of time and energy in the preparation of proposed stipulations regarding facts, issues, and exhibits may be favorably received by opposing counsel, particularly when opposing counsel is not as prepared for trial as you are. The temptation to join in your stipulations will be enhanced when opposing counsel has to explain to the trial judge at the pre-trial conference why your stipulations are neither reasonable nor well grounded in law and fact.

Submitting to the court the comprehensive exhibit notebooks in which counsel has stipulated to admissibility and authenticity but reserves the right to argue the *weight* of the evidence will generate incalculable good will from the trial court.

Prepare Your Proposed Findings of Fact and Conclusions of Law Before Trial

Few family law litigators are concerned with "proposed findings of fact and conclusions of law" before the conclusion of a case. However, a compelling argument can be made for preparation of these proposed findings and conclusions of law well before you call your first witness. Strategic advantages of this diligence include:

- The cutting-edge caselaw supporting your proofs is at your fingertips.
- The unfolding of your testimony and exhibits will mirror the controlling law.
- The proposed findings of fact can be sculpted in accord with the evidence at trial.
- No trial ever proceeds in a straight line; this pleading will help keep you on track during trial.

Present Your Evidence in Summary Form

The trial court is committed to providing the parties a fair trial. However, the inclination of the judge to get to the bottom of the dispute is overpowering. Using a chart or spreadsheet in your opening statement (enlarged 10 times or more) allows you to leapfrog hours of tedious testimony and furnish the court with a ready grasp of the marital estate.

In addition, using a summary chart or spreadsheet permits you to focus precisely on those assets that are troublesome or disputed. The judge will be relieved to know that while the marital estate may consist of 40 or more assets or liabilities, the heart of the matter involves a small number of disputed items. It is never too early to employ charts and summaries that inform the court of the relief you are requesting and the rationale for it.

Make a Thorough and Complete Record on all Major Issues

The stress and rigors of trials present an irresistible urge to take shortcuts. Beware the false sense of security because the trial attorney "knows" that the judge is going his or her way. This may tempt the litigator to ignore the necessary predicate for a disproportionate property award or a separate property determination.

The converse is also true: a frustrated or discouraged trial attorney may be tempted to shortcut the proofs that the trial court doesn't want to hear, but totally ignore the fact that a dispassionate appellate court may be keenly interested in making new law on the issue in the case.

Our appellate courts are not in the business of finding legal authority for attorneys who neglect to submit caselaw supporting their clients. They are also not inclined to fill in the blanks for trial counsel who have failed to make a record on critical issues in the lower court. This is, first and foremost, the nondelegable responsibility of competent and committed trial counsel.

Conclusion

Litigation of marital property cases does not involve a random sequence of unrelated events. To the contrary, the trial of your client's marital property dispute begins with the initial client interview and continues until the judge issues the final award. A global view of your case and implementation of efficient, effective, and proactive strategies maximizes the possibility of winning at trial. ■

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FOOTNOTES

1. *Byington v Byington*, 224 Mich App 103; 568 NW2d 141 (1997).
2. *Reeves v Reeves*, 226 Mich App 490; 575 NW2d 1 (1997).
3. *Korth v Korth*, 256 Mich App 286; 662 NW2d 111 (2003).
4. *Dart v Dart*, 460 Mich 573; 597 NW2d 82 (1999).
5. *Darwish v Darwish*, 100 Mich App 758; 300 NW2d 399 (1980).
6. *Stoudemire v Stoudemire*, 248 Mich App 325; 639 NW2d 274 (2001).
7. MCL 552.401.
8. MCL 552.23.
9. *Hanaway v Hanaway*, 208 Mich App 278; 527 NW2d 792 (1995).
10. MCR 2.116(C)(10).
11. *Daubert v Merrill Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).
12. MRE 801, 802, 803.
13. MCL 750.539.
14. 18 USC 2701 through 2712.
15. MCL 750.539(e).
16. MCR 2.401(C)(1)(a).
17. MCR 2.401(C)(1)(d).
18. MCR 2.401(C)(1)(l).