Brian Loughmiller Teleseminar

A top family lawyer from the McKinney law firm of Loughmiller Higgins discusses financial issues related to the process of divorce in Texas.

I'm Dan Couvrette, the CEO of Divorce Magazine and Family lawyer Magazine. I'm very pleased to have Brian Loughmiller, one of the top family lawyers in Texas on this Divorce Magazine teleseminar today.

Our goal at Divorce Magazine is to help divorcing people make better, more informed choices to ensure they are not simply surviving their divorce, but are actually thriving and growing through the process, as challenging as it may be. We find the best way to accomplish these goals is to have professionals like Brian Loughmiller share information about the divorce process from his years of working in the family law field.

Brian is a partner at the McKinney, Texas law firm of Loughmiller Higgins, a firm that serves the needs of people throughout the Dallas/Fort Worth Metroplex, and North Texas. For legal concerns and problems involving family law and divorce issues, Brian and his partner, Eric Higgins, have 47 years of combined trial experience, which is very helpful whether you're a divorcing person whose case goes to trial or not. Because it creates a base of experience to help guide and advise you as you are going through the process.

Of course, a divorce can be a very challenging and confusing process. At Divorce Magazine, we always recommend that divorcing people seek the guidance of top family lawyers, like Brian and his partner, Eric.

Brian has been recognized as a Super Lawyer every year since its inception in 2005. He's a member of The American Academy of Matrimonial Lawyers and he is rated by Martindale Hubbell as an AV Preeminent Family Lawyer. I know for our listeners these designations probably don't mean a heck of a lot, but these are all recognized. It just shows that Brian has been recognized by other lawyers as one of the top family lawyers in Texas. To learn more about Brian and the Loughmiller and Higgins firm, I recommend you visit their website: www.familylitigation.com.

Today Brian and I will be talking about financial issues and how they affect your divorce. Thank you very much, Brian, for joining me today.

Loughmiller: Thank you for allowing me to join you. This will be great.

We're going to start by talking about complex property issues. I know you deal with a lot of high net worth divorce cases particularly. So why don't you start off by telling us how property is divided in a Texas divorce?

Loughmiller: Sure. When I deal with clients, that's one the first things they say to me. When you start talking about community property, they automatically assume that's a 50/50 division. And that's not what community property means. Community property really means that each property has undivided interest in the whole. And then the judge has the responsibility of deciding what their division is.

So, you could have cases with a 50/50 division of community assets. You could have a 60/40 split, or 70/30—it's all fact-driven based on the types of assets that you have. Tax

consequences, children-related issues, and fault in the break-up of the marriage are what they look at. From an attorney's standpoint, the first thing we look at is the type of property you have in your community estate and whether there are tax-laden issues associated with it.

We look at who will have custody of the children; we look at why are you getting a divorce. One thing that is overlooked mostly in this area is the economic disparity between parties. Do you have somebody who has been a stay-at-home spouse for 30 years and their husband is a high-wage earner? That factors into how you divide it, and could lead to a disproportionate division as well.

So, when you're consulting with a client, do you tell them it is better to take more of the matrimonial property such as a house or an IRA instead of getting more in the way of say, spousal maintenance?

Loughmiller: Not necessarily. Because depending on the type of asset, if it is an IRA, for example, and depending on your age, there are penalties associated with withdrawal of the money, there are tax consequences.

If you have a client who is most likely going to have to immediately access funds related to what they are receiving, you are not going to focus on the retirement benefits as much as you are going to focus on the more liquid assets, such as a house that is going to be sold.

So, you really have to look at all of those issues, including the age of your spouse. What I tell my clients, especially if I am representing a wife who has not been working, I get them to understand if we are going for a division of retirement accounts as part of their settlement, we want to make sure that whatever they are getting out of that retirement account, will be a retirement account.

In other words, they are not going to touch it. They are going to receive some sort of other division in the other assets that will allow them to have cash flow to where they can still maintain retirement beyond age 65.

I know a big concern of divorcing people is if they should move out of their homes or not. Do they lose any rights if they move out of their matrimonial home, Brian?

Loughmiller: You don't really lose any rights because Texas is a community property state, so ultimately you have an interest in that home if it was bought during the marriage.

The tactical issue of moving out or not really has a lot more to do with custody issues. One of the things that judges will want to do at the beginning of the case if there are children involved is maintain stability for that child. And a lot of times they translate stability with, is the child going to be able to stay in the same home? Are they going to be able to go to the same school? Are they going to be able to associate with the same friends? That type of thing.

So, really, I don't look at the family home as a property rights issues as much as I look at it from a tactical standpoint. If you're coming in and you want custody of your children, then don't move out of your house unless the court orders you to move out.

I see. Now this is a little bit of an unusual case, but I've heard spouses can agree to divide property acquired during their marriage without actually going through a divorce. Is that the case? And how can that be done if it is?

Loughmiller: In Texas, because you are essentially married until you get a divorce, there is no true legal separation. I've actually had this happen in a few cases where we have entered into agreements of post-marital contracts between the spouses and not do a divorce with the understanding that they are effectively partitioning their property now in the event that they get divorced in the future.

I've actually had this happen several times over the last year to year and a half. One example I can give you is that I represented a woman who had separated from her husband, but she was 62 years of age so she couldn't qualify for medical benefits under Medicare until age 65. And because of the nature of their estate, it would not be beneficial for either of them to go through a divorce while she was in that situation.

So we did a post-marital agreement. We put forth in the post-marital agreement what each party was entitled to in terms of bank accounts, retirement accounts, and what they were going to do with their house and all of that. We did a post-marital agreement where we essentially agreed that they were going to operate under that agreement for a period of number of years, so if the divorce still happened it wouldn't have to happen until after age 65. Then at that point, you've already agreed to what your property division is, so there's really nothing to litigate from a point of community property issues.

What happens in a case where one of the spouses inherits a substantial amount of money during the marriage? How is that divided when they go through a divorce?

Loughmiller: Well, inheritance is a separate property item. Even if you inherit during the marriage, the other spouse is really not entitled to any of that inheritance.

The difficulty, especially in long-term marriages, is going back and tracing what happened with that inheritance funds. Because, ultimately, you only retain your separate property interests if you can prove at the time that you are getting divorced that that money is still there. People get inheritance and put it in a joint bank account, they use it to buy other things, and now you have this issue where the other spouse is coming in and saying, well, we don't have that inheritance anymore or it was co-mingled with community funds and you can't identify it.

It really becomes more of a tracing issue to prove the separate property inheritance and, if you can do that, you are going to receive 100% of it. But it's not always as easy as people would like to think.

What happens in a case where there is a business or property owned by the couple and one of the spouses has no involvement in the financial affairs? How do they make sure they get their fair share when they go through a divorce?

Loughmiller: Well, you know it's very important, especially in a situation where a spouse has not been involved in the operation of the business or the acquisition of assets.

It’s important that they first make sure they are comfortable that they have all the information as to what they have. We do a lot of discovery, request for production of documents, we will hire forensic accountants, we will hire business appraisers, and other experts that can come in and take a look at the operation of the family business.

In a lot of cases, it is literally hiring somebody to go to that business, sit down with the other side, and have them explain how the business operates, look at the profit law statements, look at their tax returns, look at their cash flow, their receivables, and their cash payables.

And even though you are hired as a divorce attorney, a lot of the time you are really on the job of assessing how somebody runs a business, and whether or not they are in fact running it where that it is easy to ascertain value. The other thing you have to do is to make sure that you understand what you’re trying to get. Realistically, if you have a spouse that has not been very involved in the business, then they are not going to be very involved in the business post-divorce. You’re not going to get them a percentage of ownership in the business, you’re typically going to get them some value or even other assets or get them cashed out. And that becomes somewhat difficult.

I just finished a case within the last couple of weeks where we had multiple entities involved because of the business that the parties were involved in. I had that very situation where my client had never really been involved in the accounting practices of these multiple entities and she was going to be faced with the situation where she would have to maintain a partnership interest and several limited partnerships, even though she didn’t have that knowledge.

One of the things that we had to do was make sure that the other side would agree to effectively bring another party in that was going to operate and manage the accounting of those businesses. Because we wouldn’t let him to do it anymore, just from a trust standpoint.

So, you end up in a situation where you’re not only doing a divorce decree, you may have to do a new partnership agreement. You may have to go in and change by-laws in a corporate document because they’re incorporated.

You may have businesses that are all through trust, you may have to go in and change trust documents, and in those cases a lot of times we are bringing in other attorneys that have expertise in those areas that can help us with reorganization of the business as part of the divorce process.

And I suspect that it is even more complex if you are dealing with businesses or properties that are in other states or other countries. Do you have experience doing that type of work as well?

Loughmiller: Yeah, yeah. I’ve had several cases involving property located outside of Texas and it is an interesting issue. Because when you are in court discussing those issues, you have a situation where the judge has jurisdiction over the person that is in front of them but they really don’t have jurisdiction over the property that is located in other states.

So, what they can do is order a division of the property. They can order a person to go sell the property or they can award a percentage of property to the other spouse. But you sometimes run into enforcement issues, because if it is an issue where the property has to be sold and anything happens where one side is trying to block the sale, then you may have to go hire an attorney in that other state to go ask for a receiver to be appointed over the property to get it sold.

That's one of the areas where being part of the American Academy has helped me, because I've had situations where I had to contact an attorney in Florida or an attorney in New York to get assistance on an enforcement issue.

Likewise, I've had calls where attorneys in other states have had jurisdictional issues in Texas and they have called and asked me to handle the jurisdictional issue here. It's good to have that contact. The division is easy; it's enforcement of the order that becomes the difficult issue.

Okay. Let's just talk for a moment about alimony. Can you tell us the difference between spousal maintenance and a contractual alimony agreement?

Loughmiller: Sure. Spousal maintenance in Texas family code is somewhat new over the last several years. But, essentially, the main difference is in what happens after you get divorced. In a spousal maintenance situation, the court does have a right to modify the amount of the payment depending on a change in circumstances.

For instance, if you have the person that is receiving spousal maintenance and they get a job where they are making more money than they were making at the time of the divorce, then the person paying can file a motion to modify and ask that payment be reduced or even eliminated.

Likewise, if the person paying suddenly lost their job or had something happen where they can no longer afford to pay, they can still file that motion and the court has the right to look at that during the time period that the spousal maintenance is paid.

In an alimony situation, you are contractually agreeing to pay some amount of money and in those cases you are looking to get the tax benefit that is associated with being able to pay an alimony payment as opposed to giving up property.

And those contracts cannot be modified by court order unless the parties just simply agree to modify it on their own. So, there are benefits to the alimony contract that have more to do with tax benefits and protection.

I see. Regarding retirement plans and investment accounts, can you tell us what a QDRO is and how is that divided in a divorce case?

Loughmiller: Sure. A QDRO is a qualified domestic relations order.

If you work for a company that has a retirement plan and it is being divided in a divorce case, in addition to the divorce decree, you will have to get a qualified domestic relations order signed by the judge.

More importantly, not only does it have to be signed by the judge, it has to be approved by the company. I've had cases where attorneys have done the division and the divorce

decree done. They do a QDRO out of a form book and they get it signed by a judge, but then they don't follow up to see if the company's actually accepted it as a qualified order.

A lot of companies these days have their own forms, especially if you are dealing with large corporations, such as a JC Penny or a Frito Lay or Blue Cross. They want you to use their form, so you need to make sure that you receive confirmation that the company has accepted it.

Then once they do that, accept the order from court, they will segregate the funds for the non-participating spouse into their own account, and then that becomes their account and they can either leave it there or they can roll it into a different retirement plan that they might have.

But if you don't do the Qualified Domestic Relations Order, that money will sit in the account of the spouse that works there, until the QDRO is approved.

I've seen cases where, many years later, a person is trying to get their funds out of their former spouse's business and they find out that the QDRO wasn't approved. They have to end up going back to court to try and get that accomplished. And it becomes a little bit more difficult at that point.

Are spouses always entitled to a share of the other spouse's pension plan?

Loughmiller: Generally speaking, yes. It is a community asset.

There are formulas you can look to in terms of determining what the community interest is of that retirement plan.

There are rules that pertain to certain types of pension plans that make it somewhat more cumbersome. For instance, if your spouse is in the military, there are specific rules that apply to division of military retirement. And that becomes a complicated issue because, while the state law would allow of that military retirement plan, there are specific rules of whether or not you can get direct payment from the military. You have to meet certain requirements, and if you don't, then you don't get the direct payment and you have to go about it in a different manner.

So, the simple answer is yes, it is divisible. And the complex answer is that it depends who they work for, and if there are there any rules that come into play about how they ultimately access the funds.

We spoke earlier about dividing the assets of the couple and so, sometimes, it would make sense that one of the spouses would get a higher percentage of the pension plan. When you look at the overall financial picture of the couple, is that true?

Loughmiller: That's true, especially in larger estate type cases, where there are a number of different assets. Often, you look at the spreadsheet and look at the client's estate to determine if there are assets that are not retirement plans, and if they would get a larger percent of the liquid assets in exchange for giving up a percentage of the spouse's retirement fund. I see this a lot in cases where I have a client who is working for a corporation and they are in their forties or fifties and the spouse is not going to

immediately access a 401(k) or a simplified plan without some substantial penalty or tax consequence.

So, I look to see if there are other assets, maybe a house that is going to be sold. Or if they have other bank accounts, or other stock accounts that don't have the same tax consequences as what's in the retirement accounts.

One mistake that attorneys make when they are looking at pension plans, 401(k)s, or stock accounts is that they don't look at the type of asset that the account's invested in. They don't try to determine what the basis of the account is, and if you don't do that, you could end up giving your client an asset that has higher tax consequence than the asset that the other side is getting. You have to take it all into consideration.

Often, we will consult with financial planners and CPAs. We will have them look at the breakdown of the investment and determine if, hypothetically, a client would have to liquidate a portion of their stock account for the next two years, what is the potential capital gain, what taxes are they going to have to pay associated with that liquidation versus getting some other asset?

For people who own businesses, I'm assuming that the businesses need to be valued. Is there a difference between valuing a business for the purpose of a divorce case versus evaluation if you were selling the business?

Loughmiller: Absolutely, there is. And that's an area where you have to be very careful because selling a business to a third party involves a lot of variables.

Oftentimes, there would be the requirement of a non-compete for the owner of the company for a period of time. And that non-compete has value. In a divorce case, you have to value a business as if the spouse has the ability to literally walk across the street and open up the same business under a different name.

In companies where it appears there is a lot of value, you are going to see discounts from an evaluation standpoint for marketability. You may see a discount for a situation where they deal primarily with one or two customers. Because those customers in theory are going to leave the business and go with the divorcing spouse if they open up another business. So there's a significant difference there from an evaluation standpoint.

In Texas, personal goodwill is not a community asset. And oftentimes, especially in smaller businesses, the argument you are going to make is that the value of this business is based on the personal goodwill of the owner.

If that's the case, then it has little value. You have to find a business appraiser who can separate the commercial goodwill from the personal goodwill. By commercial goodwill I simply mean will this company still have clients, customers, employees, capital, and continue to operate even without that party being part of that business? And there are a lot of companies that will.

When you have a professional practice, like a doctor, a dentist, or a lawyer, is it the same process for valuing the business? Would the distinction between the goodwill and corporate value be different in that situation?

Loughmiller: Yeah, it's the same process. That's where you run into that issue specifically, because oftentimes I've handled divorce cases involving medical practices and doctors. And within those medical practices, and the first thing they will tell you is that, well, if I'm not the doctor, the patients that come here are going to go some place else.

So, it is the same issue. A lot of the times you are looking to see if they are in a professional association, would that association be able to take on any of those patients? If so, then it would still have value interest and a professional association would still have value.

If you are a fellow practitioner, it's going to be very difficult to find value in that practice, especially in the medical or legal field. If you're a sole practitioner in a law firm and you're not operating that law firm, there's not going to be much value at all.

At that point, you really focus on things like whether they own other property within the business. Did they buy a building? Do they have equipment? What value is that equipment? You look at their cash flow and maybe your analysis goes from purely to a capitalization of their income.

So, based on their four or five years of income, can you determine that there is a value even with that being the sole practice? It becomes more complicated, but it is basically the same process. Our starting point generally is to hire a business appraiser that has testified before in court, that has worked and appraised that type of business, and that's something you have to be careful of as well. You have to make sure that whoever you are talking to understands what your business is and whatever expert they are going to use has experience with that business.

Because there are people out there that say they can appraise any type of business but maybe they have never appraised a landscaping business, for example. And yet, you are dealing with a landscaping business where there is a lot of cash that's paid and there are many employees that are not working full-time all year round, and that's going to have a different impact on value than say a CPA firm with six CPA's that are working every day of the week.

So, you need to make sure you have somebody that understands, not just the accounting principles, but also the business that you are dealing with.