

Valuation of the Family Home: Why Feminist Theory Supports the Exclusive Use of Appraisers as Experts When the Wife Wants to Keep the Home

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Family law regulates marriage and divorce; it delineates the reciprocal rights and duties of family members; it apportions power and responsibility among husbands and wives, parents and children, the infirm and the able. . . . Family law gains its greatest power over relationships when they break down, through death or divorce.¹

Introduction

FAMILY LAW HAS A TREMENDOUS PRESENCE in the lives of California families, most prominently among couples seeking a divorce—an occurrence that is becoming more and more common. Approximately one-half of all marriages end in divorce.² Furthermore, divorces are some of the most contentious legal proceedings. As divorce procedures developed, “[i]t would be fair to say that procedure in divorce cases was not only generally adversarial but more adversarial than in other litigation.”³ “Perhaps the most striking aspect of divorce procedure is the unwillingness of courts to follow the generally applicable principle that the parties themselves decide whether and how they will conduct a legal dispute.”⁴ This unwillingness on the part of courts, coupled with the adversarial nature of divorce proceedings,

* Class of 2008. B.A., University of California, Berkeley, 2005. I would like to thank my incredible fiancé, Tim, and my family for their unending patience and encouragement throughout my legal education. I would also like to thank my editor, Cynthia Der, for her insight and diligent work in bringing this piece to publication. Finally, I would like to thank the professors and practitioners who provided me with valuable feedback throughout the writing and editing process.

1. JUDITH A. BAER, *WOMEN IN AMERICAN LAW: THE STRUGGLE TOWARD EQUALITY FROM THE NEW DEAL TO THE PRESENT* 123–24 (1991).

2. See LESLIE JOAN HARRIS ET AL., *FAMILY LAW* 289 (3d ed. 2005).

3. *Id.* at 306.

4. *Id.*

can require the court to play a more active and central role in overseeing the marital dissolution⁵ process. One of the court's duties upon dissolution of the marriage is to divide the marital property between the spouses, and the "problem of property division upon divorce" remains "a controversial area of family law."⁶ There are three basic steps in dividing marital property at dissolution: (1) determination of which property is subject to division by the court; (2) valuation and allocation of the property between the spouses according to state law; and (3) entry of the final order and provision for division of any specific assets.⁷

Valuation of real property is most often completed through expert testimony.⁸ The family home is "likely to be one of the most valuable marital assets available for disposition."⁹ Disparities among different property values proposed by experts in a marital dissolution can present a formidable problem for the court because the value chosen directly relates to the ultimate distribution of property. Currently, both real estate salespersons and appraisers¹⁰ testify as valuation experts in marital dissolutions.¹¹ Vast inconsistencies between the

5. Divorce proceedings are now referred to as marital dissolutions. "The 1970s and 1980s brought drastic changes in divorce law. First, in most states it is no longer divorce, but dissolution." BAER, *supra* note 1, at 134.

6. Martha L. Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, 23 FAM. L.Q. 279, 281 (1989).

7. See HARRIS ET AL., *supra* note 2, at 398.

8. See STATE BAR OF CAL., CONTINUING EDUC. OF THE BAR, FUNDAMENTALS OF HANDLING MARITAL DISSOLUTIONS § 5.45 (2003). Establishing the value of marital property through expert testimony can be a complicated and expensive proposition for any person undergoing a divorce. See Harriet N. Cohen & Patricia Hennessey, *Valuation of Property in Marital Dissolutions*, 23 FAM. L.Q. 339, 340 (1989).

9. Gary C. Randall, *What to Do with the Family Home—Before and After the Divorce*, 30 FAM. L.Q. 23, 23 (1996).

10. A real estate salesperson is a person who is employed, for compensation or in expectation of compensation, by a licensed real estate broker to "sell[] or offer[] to sell, buy[] or offer to buy, solicit[] prospective sellers or purchasers of, solicit[] or obtain[] listing of, or negotiate[] the purchase, sale or exchange of real property . . ." See CAL. BUS. & PROF. CODE § 10132 (West 1987 & Supp. 2007); *id.* § 10131 (West 1987). An appraiser is a person retained to complete an appraisal, defined as "a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion . . . as to the market value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information." *Id.* § 11302. This statutory definition of real estate salesperson focuses on the salesperson's role in the sale and purchase of real estate, while the statutory definition of appraiser (and appraisal) focuses on the appraiser's capacity to value real estate.

11. See *infra* note 66 and accompanying text.

values identified by the appraiser and salesperson may force the court to choose between two incompatible values.¹²

A hypothetical example best illustrates this problem of inconsistent values. Consider the marital dissolution of Alice and Bob.¹³ Alice and Bob file for dissolution in California after fifteen years of marriage.¹⁴ Alice and Bob possess fairly substantial assets accumulated during their marriage, and they are unable to come to an amicable resolution of the division of their property due to a dispute regarding the value of the family home.¹⁵ The parties proceed to trial, and Alice retains a licensed California real estate appraiser as her expert. The appraiser testifies that in his opinion, the fair market value of the family home is \$770,000. Bob retains a licensed California real estate salesperson as his expert. The salesperson testifies that in her opinion, the home is worth \$1,000,000, the figure at which she would list the property on the market.¹⁶ The difference between the two values proposed by the experts is \$230,000—a gap likely to cause concern for the court

12. "Sellers shouldn't be too surprised if a real estate agent's opinion about their house's worth on the open market differs substantially from that of an appraiser. In theory, the two opinions should match, but in reality, they rarely do." Lew Sichelman, *Agent, Appraiser Differ on Worth*, CHI. TRIB., July 24, 1993, § 1, at 21. Whether, and how dramatically, the opinions of value of appraisers and real estate salespersons differ in general real estate practice is beyond the scope of this paper, which is limited to expert opinions in marital dissolutions when the wife desires to keep the family home. Additionally, this Comment will not discuss marital dissolutions in which the family home will be sold, where valuation is not as critical to the property distribution because the proceeds can be easily split between the parties. In this situation, a real estate salesperson should logically be involved in the selling process. This Comment also presumes a relatively stable real estate market. In extreme markets that are rapidly rising or falling, a real estate salesperson may be able to react more quickly to changing market conditions than an appraiser. Finally, this Comment will not explore the possibility of a court appointing its own neutral expert to resolve the home valuation issue.

13. The essential facts of this hypothetical scenario are based on a real marital dissolution. The figures were modified, but the ratios between the values were preserved for illustrative purposes. To protect confidentiality, party names, detailed facts, and actual values have been changed.

14. This Comment will focus solely on a discussion of California law.

15. The parties' financial net worth in this hypothetical is not intended to be representative of all marital dissolutions. However, the significance of the family home, where the parties own one, is common even among marriages that end without significant marital property. "Few marriages end with significant accumulations of property, and, in those marriages with some property, it consists overwhelmingly of the family home." June R. Carbone, *A Feminist Perspective on Divorce*, 4 FUTURE OF CHILDREN, Spring 1994, at 183, 190, available at http://www.futureofchildren.org/usr_doc/vol4no1entire_journal.pdf.

16. A real estate salesperson's opinion of value, based on a Comparative Market Analysis ("CMA"), is used to help a seller set a list price for the property. See Nat'l Ass'n of Realtors, *Set Your List Price*, <http://www.realtor.com/Basics/Sell/SetPrice/ListPrice.asp?gate=realtor&poe=realtor> (last visited Apr. 6, 2007).

in choosing between the two and considerably impact the amount of property each spouse receives.¹⁷ To further complicate this hypothetical, Alice desires to remain in the family home post-dissolution with the couple's children. The \$230,000 gap can not only impact the amount of property Alice receives, but may also ultimately determine whether she is able to keep the family home.

In marital dissolutions such as the above hypothetical, where the wife wants to keep the home and a potential gap in values will dramatically impact her ability to do so, expert testimony on the fair market value of the family home should be limited to licensed California appraisers. Appraisers are more technically competent, likely to be more accurate in their valuations, and do not face the same inherent conflicts of interest as real estate salespersons. Appraisers are also exclusively used by courts and lending institutions in analogous valuation settings. The exclusive use of appraisers as experts, who are competent to give an opinion of fair market value, will better promote uniformity and fairness in the home valuation process.

Limiting expert testimony on the fair market value of the family home to appraisers will not only improve the marital dissolution process and California family law, but can also affect the economic disposition of women after divorce. The valuation process has important economic implications for women trying to keep their homes, and this Comment will use feminist legal theory as a lens to examine how the use of real estate salespersons as experts might systematically affect women.¹⁸ Real estate salespersons, who are trained to obtain the maximum sale price for their clients and not to accurately determine the fair market value of the property, are more likely than appraisers to overvalue the family home. Overvaluation can substantially impact the ultimate distribution of marital property at dissolution. The spouse who wants to keep the home fares worse with overvaluation because the inflated value limits the spouse's share of other marital assets.¹⁹ Women, who generally retain primary responsibility for the care of

17. The court must choose a value supported by the evidence; it cannot simply "split-the-difference" by adding the values together and dividing by two. *In re Marriage of Hargrave*, 209 Cal. Rptr. 764, 768-69 (Ct. App. 1985).

18. Feminist legal theory is an appropriate lens for the expert qualification analysis, given the gendered nature of marriage and dissolution. See generally NANCY E. DOWD, *IN DEFENSE OF SINGLE-PARENT FAMILIES* 60-69 (1997) (discussing gendered patterns of caretaking and gender differences in the economic dispositions of men and women after dissolution).

19. The author hopes that this Comment will initiate further empirical study of the overvaluation of the family home and its effect on women trying to keep it, especially given the current lack of empirical study on this issue.

children after dissolution,²⁰ are more likely to desire to remain in the family home with their children if feasible. Potential overvaluation of the family home by real estate salespersons thus tends to work systematically to the detriment of women trying to keep the home.

Part I of this Comment will explain the importance of valuing the family home in marital dissolution, introduce the feminist legal theory lens, and provide a statutory framework regarding the current use of experts in family home valuation. Part II will discuss why the courts should limit expert testimony on the fair market value of the family home when the wife is trying to keep it to licensed California appraisers. A comparative analysis of the competency and conflicts of appraisers and real estate salespersons will support this conclusion. Part III will identify how potential overvaluation of the family home can negatively impact the wife's share of the marital property, and reveal how women trying to remain in the family home may be routinely disadvantaged by this practice.

I. Background

A. The Family Home and Its Chosen Value Are Central to the Division of Marital Property

Since the family home is likely to be one of the most significant pieces of marital property to be valued and allocated between the spouses,²¹ the value assigned to the home by the court is central to the ultimate division of property. Notably, the division of property at the time of dissolution is a final determination that cannot be modified.²² For a spouse trying to keep the family home, the value assigned to the property will determine whether the couple's remaining assets are enough to offset the award of the home to one party.²³ In addition to its financial significance, the family home also retains emotional value for the couple. Property allocation can have important psychological impacts on spouses as "the final accounting of their contributions to

20. See DOWD, *supra* note 18, at 62 ("The caretaking patterns [post-dissolution] are [similarly] gendered. Sole or primary custody is overwhelmingly granted to mothers." (internal citations omitted)).

21. Randall, *supra* note 9, at 23.

22. MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 39 (1991).

23. See generally LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 79 (1985) (describing how an award of the family home to one spouse can be offset by awarding "an asset of equal value" to the other). For the majority of couples who do not possess significant financial assets other than the family home, this offset resolution will not be possible. See *id.* at 79-80.

marriage—a concrete measure of their relative worth.”²⁴ The family home is uniquely significant to the property division process not only as one of the couple’s most valuable assets, but also as a tangible symbol of the family life they built together during their marriage.

As a community property state, California requires fifty-fifty distribution of co-owned property acquired during marriage.²⁵ The California Family Code leaves the specific details of the division of the marital estate to the court, with the general requirement that it be divided equally between the spouses, except as otherwise agreed by the parties.²⁶ Equal division requires the court to distribute the community property so that the net value (assets minus liabilities) of property awarded to each party is equal.²⁷ As the family home cannot be literally split in half, equal division is usually accomplished by one of two methods: (1) asset distribution or cash out,²⁸ or (2) sale and division of proceeds.²⁹ By implication, the value chosen for the family

24. FINEMAN, *supra* note 22, at 40.

25. See William A. Reppy, Jr., *Major Events in the Evolution of American Community Property Law and Their Import to Equitable Distribution States*, 23 FAM. L.Q. 163, 164 & n.3 (1989). Separate property, in contrast, is not divisible and is awarded to the spouse who owns it. See *id.* at 164 n.3; HARRIS ET AL., *supra* note 2, at 398. Community property is defined by California statute as “all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state.” CAL. FAM. CODE § 760 (West 2004). Separate property includes all property “owned by the person before marriage,” all property “acquired by the person after marriage by gift, bequest, devise, or descent,” and the “rents, issues, and profits of the [separate] property.” *Id.* § 770. California law has created a community property presumption, under which property acquired during marriage in joint form is presumed to be community property. *Id.* § 2581.

26. See CAL. FAM. CODE § 2550. The trial court has “broad discretion to determine the manner in which marital property is divided in order to accomplish an equal division.” *In re Marriage of Cream*, 16 Cal. Rptr. 2d 575, 579 (Ct. App. 1993). Unlike an equitable distribution system, which gives the judge the discretion to divide either all the property (pure equitable distribution) or only community property (equitable distribution of community property) as “just and proper,” California mandates equal division of community property, with separate property awarded to the spouse who owned it during the marriage. See HARRIS ET AL., *supra* note 2, at 398–99.

27. See *In re Marriage of Olson*, 612 P.2d 910, 914 (Cal. 1980); *In re Marriage of Fink*, 603 P.2d 881, 885 (Cal. 1979).

28. “The asset distribution or cash out method involves distributing one or more community assets to one spouse and other community assets of equal value (which may include an equalizing promissory note) to the other.” *Cream*, 16 Cal. Rptr. 2d at 579; see also *Fink*, 603 P.2d at 885–86 (discussing and approving of the trial court’s use of the asset distribution method to divide the community estate).

29. See generally *Cream*, 16 Cal. Rptr. 2d at 579 (identifying four methods of division available to accomplish an equal division of marital property: “(1) in kind, (2) asset distribution or cash out, (3) sale and division of proceeds, or (4) conversion to tenancy in common where the sale of the family home is deferred”). Under in-kind division, “[e]ach party takes one-half of the fungible assets such as bank accounts, stock in a corporation, etc.” *Id.* at 582. Unless the sale of the family home is deferred, the only two methods of

home is vital to the ultimate distribution of marital property, especially when one of the spouses desires to keep it.

For example, suppose the hypothetical court assigns a value of \$1,000,000 to Alice and Bob's family home, in accordance with the testimony of Bob's real estate salesperson.³⁰ If Alice and Bob have an outstanding loan for \$300,000, they have \$700,000 in equity in accordance with that assigned value.³¹ The rest of the couple's community assets are liquid (cash and other investment accounts) and valued at \$700,000. If the court awards the home to Alice, she is not entitled to any other community assets to effect an equal property division.³² However, if the court assigns a value of \$770,000 to the family home instead, thereby adopting the appraiser's opinion of value, the equity in the home would only be \$470,000.³³ If the court awards the family home to Alice in that case, Alice would be entitled to an equalizing award of \$115,000.³⁴ Alice would thus receive a greater share of the liquid community assets if the value assigned to the family home is \$770,000. This simplified hypothetical illustrates that if the court assigns an inflated value to the family home, resulting in a reduced equalizing payment, or none at all, the spouse awarded the home may not have sufficient financial resources post-dissolution to pay the mortgage and other expenses associated with home ownership, including property taxes and upkeep.³⁵ Although the equity in the home is a potential asset that Alice could utilize in the future through an equity line of credit or if she sells the home, her short-term financial situation is better if she is awarded the house at the appraiser's opinion of value with an equalizing payment.

division available are asset distribution or cash out, and sale and division of proceeds, because in-kind division of tangible property is impossible.

30. For a visual reference of the property division calculations, see *infra* app. at Part A.

31. See generally *In re Marriage of Marx*, 159 Cal. Rptr. 215, 217 (Ct. App. 1979) (discussing the trial court's valuation of community property, and specifically the calculation of the equity in the family home as the assigned value less the outstanding loan).

32. In *Marx*, the trial court awarded the family home to the wife "because economically and environmentally it was best for her and the children. To offset her equity in the home the court thus had the right to assign other assets to the husband and not divide them in kind." *Id.* at 220.

33. For a visual reference of the property division calculations, see *infra* app. at Part B.

34. An equalizing award is used to "offset the difference in the net value of community property distributed." *In re Marriage of Fink*, 603 P.2d 881, 883 (Cal. 1979).

35. See generally HARRIS ET AL., *supra* note 2, at 430 (noting that "if the spouse who receives the home does not have enough income to pay the mortgage, taxes, and upkeep, the home will have to be sold anyway"). While many of the costs of home ownership are fixed and will be known prior to dissolution, the spouse who receives the home may not have enough money to make these payments if the home is the only asset he or she receives.

B. Feminist Legal Theory is the Most Appropriate Lens for Analysis of Expert Qualification to Value the Family Home

As illustrated in the above hypothetical, the value assigned by the court to the family home can determine the ability of one spouse to keep it. Overvaluation of the family home by one party's expert, and the court's adoption of this inflated value, can detrimentally impact the financial picture for the party trying to remain in the home. Continuing with the hypothetical example, suppose Alice has determined that she would like to remain in the family home, provided the court is able to offset the award of the home to her with the couple's other assets. Alice's desire to remain in the family home is typical of many women, who, as primary caretakers and custodians of children post-dissolution,³⁶ want to remain in the family home if feasible.³⁷ The implication of the overvaluation of the family home on the economic situation of Alice, and other women, following dissolution calls for use of a feminist legal theory lens to analyze the qualifications of appraisers and salespersons as experts.

In contrast with "nonfeminist gender-oriented scholarship [which] often simply describes gender differences or traces the impact of law on subgroups of men and women,"³⁸ feminist legal theory takes a more critical approach. "Feminist legal scholarship is more oppositional; it assumes there is a problem and is suspicious of current arrangements, whether they take the form of different standards for men and women or purportedly neutral, uniform standards that nevertheless work to women's disadvantage."³⁹ The use of the word "theory" in feminist legal theory "does not mean that only abstract scholarship is valued."⁴⁰ On the contrary, feminist legal theory is "apt to emphasize the importance of concrete changes in society and to stress the interaction between theory and practice."⁴¹ This Comment

36. See Dowd, *supra* note 18, at 62.

37. See *In re Marriage of Duke*, 161 Cal. Rptr. 444, 447 (Ct. App. 1980) (citing *Fink*, 603 P.2d at 886) (identifying "[a] wife's emotional attachment to a family residence of long-time residence" as "a cognizable factor in determining disposition of property on dissolution"). In addition to their own emotional attachment, mothers are also likely to desire to remain in the family home for the benefit of keeping their children in familiar surroundings. See Martha F. Davis, Comment, *The Marital Home: Equal or Equitable Distribution?*, 50 U. CHI. L. REV. 1089, 1089 (1983).

38. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 1 (2d ed. 2003).

39. *Id.*

40. *Id.* at 3.

41. *Id.* at 3–4. For further reading on feminist legal scholarship as applied to the economic position of women, see *id.* at 173–217. Feminist legal theory has been used as a

proposes a “concrete change” in the valuation of the family home when the wife wishes to keep it by limiting expert testimony to licensed California appraisers.

“[F]eminist legal methodology focuses on the tools of how to practice feminist legal thinking and the ways of documenting the experiences of gender.”⁴² Specifically, this Comment will use “the woman question,” which is “designed to identify the gender implications of rules and practices which might otherwise appear to be neutral or objective.”⁴³ The woman question inquires into “the gender implications of a social practice or rule” by “examining how the law fails to take into account the experiences and values that seem more typical of women than of men . . . or how existing legal standards and concepts might disadvantage women.”⁴⁴ Asking the woman question in the context of family home valuation requires analyzing how the use of real estate salespersons as experts might systematically disadvantage women trying to remain in the family home. The first step in understanding how the use of salespersons as experts may work to the economic detriment of women is to examine the current legal framework and the court’s broad discretion in qualifying experts.

C. Under the Current Legal Framework, the Court Maintains Broad Discretion to Determine the Value of the Family Home and Qualify Experts

Before an equal division of community property can take place, the court must assign values to all marital assets brought before it.⁴⁵ The court has broad discretion in determining the value of the marital property, provided the value assigned coincides with the evidence presented.⁴⁶ The court’s objective in determining value is to deter-

lens to evaluate numerous economic legal regimes, including the tax code. *See generally id.* at 207–17 (discussing the work of several scholars on “implicit gender bias in the tax code”).

42. NANCY LEVIT & ROBERT R. M. VERCHICK, *FEMINIST LEGAL THEORY: A PRIMER* 45 (2006).

43. Katharine T. Bartlett, *Feminist Legal Methods*, 103 *HARV. L. REV.* 829, 837 (1990).

44. *Id.*

45. *In re Marriage of Hewitson*, 191 Cal. Rptr. 392, 398 (Ct. App. 1983). The trial court is not required to value assets that will be divided equally in kind, i.e., split in half. *Id.* The court usually values the spouses’ assets and liabilities as near as possible to the time of trial. *See CAL. FAM. CODE* § 2552(a) (West 2004).

46. *See In re Marriage of Cream*, 16 Cal. Rptr. 2d 575, 579 (Ct. App. 1993). “The trial court’s determination of the value of a particular asset is a factual one and, if there is substantial evidence to support it in the record, the determination must be upheld on appeal.” *Hewitson*, 191 Cal. Rptr. at 399.

mine a fair market value for the property in question.⁴⁷ Fair market value is defined as:

[T]he highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.⁴⁸

This legal definition of fair market value contains several implicit assumptions, namely: (1) buyer and seller are typically motivated; (2) both parties are well informed and acting in their own best interests; (3) the property is allowed a reasonable time on the open market; (4) payment is made in cash or comparable financial arrangements; and (5) the price is not affected by special or creative financing or sales concessions granted by anyone associated with the sale.⁴⁹ Determining the fair market value of the family home in a marital dissolution is especially challenging because valuation occurs before division. The court may therefore be choosing a value for a home that will not be sold—a non-transactional valuation context. Non-transactional valuations of real estate are “inherently more difficult than transactional ones.”⁵⁰ Non-transactional valuations are also more contentious because they often arise in the context of a dispute.⁵¹ If no transaction ultimately follows the valuation, there is no “irrefutable market evi-

47. See Monroe L. Inker, *An Overview of Evidence Issues in the Use of Valuation Experts*, 21 FAM. L.Q. 273, 275 (1987).

48. CAL. CIV. PROC. CODE § 1263.320(a) (West 2007). Although this definition of fair market value was adopted specifically in the context of takings and eminent domain, its application through the California Evidence Code makes it pertinent “to any action in which the value of property is to be ascertained.” CAL. EVID. CODE § 810(a) (West 1995). A modification of this definition has been used by the California Court of Appeal:

[T]he fair market value of a marketable asset in marital dissolution cases is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no obligation or urgent necessity to do so, and a buyer, being ready, willing and able to buy but under no particular necessity for so doing.

Cream, 16 Cal. Rptr. 2d at 579 & n.4.

49. See APPRAISAL FOUND., UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE AND ADVISORY OPINIONS 194 (2006).

50. David A. Smith, *Valuation of Real Estate Partnership Interests for Non-Transactional Purposes*, 12 J. AM. ACADEMY MATRIMONIAL LAW. 175 (1994). In transactional valuations, “events in the marketplace will prove the [expert] right or wrong: the property is sold or refinanced, and the price can be compared with the [expert’s] value.” *Id.*

51. *Id.* at 175–76. “Scrutiny, challenge, and potential harm all increase when the assets involved are valuable.” *Id.* at 176.

dence” to substantiate the value given.⁵² Thus, “non-transactional valuations of illiquid interests such as real estate . . . are crucial documents that should be prepared to the highest and most thorough standards.”⁵³

When the court’s determination of value is based on expert opinion, the opinion must comport with the standards of admissibility set forth in the California Evidence Code (the “Code”).⁵⁴ Under the Code, the value of real property may be shown by opinion testimony of (1) a court-qualified expert, or (2) the owner or owner’s spouse.⁵⁵ The witness’s opinion of value, whether the witness is an expert or the property owner,⁵⁶ must be based on personal knowledge that may be reasonably relied upon by an expert in forming an opinion as to a property’s value.⁵⁷ This personal knowledge includes, but is not limited to, comparable sales,⁵⁸ capitalization of income,⁵⁹ or reproduction cost⁶⁰ methods.⁶¹

Whether a witness is qualified to testify as an expert is within the trial court’s discretion.⁶² Under the Code, “a person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject

52. *Id.* at 175. Additionally, the transaction may occur at a time “so far in the future that the results will be irrelevant to the valuation question.” *Id.*

53. *Id.* at 176.

54. *See In re Marriage of Hewitson*, 191 Cal. Rptr. 392, 399 (Ct. App. 1983).

55. *See CAL. EVID. CODE* § 813(a) (West 1995). California statutory provisions on evidence of the market value of property apply to “any action,” including marital dissolutions, “in which the value of property is to be ascertained.” *Id.* § 810(a).

56. Testimony of the husband and wife, as owners of the property, is beyond the scope of this Comment, which is limited to a discussion of expert testimony on the value of the family home.

57. *Id.* § 814.

58. A comparable sale is “the price and other terms and circumstances of any sale or contract to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation.” *Id.* § 816.

59. Under the capitalization of income approach to valuation, “a witness may take into account . . . the capitalized value of the reasonable net rental value attributable to the land and existing improvements thereon.” *Id.* § 819.

60. Reproduction cost is “the value of the land together with the cost of replacing or reproducing the existing improvements thereon, if the improvements enhance the value of the property or property interest for its highest and best use, less whatever depreciation or obsolescence the improvements have suffered.” *Id.* § 820.

61. *See id.* §§ 814, 816, 819, 820. The three approaches are also used by appraisers in determining the value of a property. *See FANNIE MAE, UNIFORM RESIDENTIAL APPRAISAL REPORT 2* (2005) [hereinafter *UNIFORM RESIDENTIAL APPRAISAL REPORT*], available at <https://www.efanniemae.com/sf/formsdocs/forms/pdf/sellingtrans/1004.pdf>. A Uniform Residential Appraisal Report is also referred to as “Fannie Mae Form 1004.” *See id.* at 1.

62. *Douglas v. Ostermeier*, 2 Cal. Rptr. 2d 594, 598 (Ct. App. 1991).

to which his testimony relates.”⁶³ Upon qualification by the court, an expert can testify as to his or her opinion of value, as well as the basis of, i.e., method used to formulate, that opinion.⁶⁴ An expert may not base his or her opinion on “the price at which the property or interest was optioned, offered, or listed for sale or lease.”⁶⁵ Under these broad statutory guidelines, both a real estate salesperson and a real estate appraiser could potentially qualify as experts and give their opinions on the value of the family home. Although a real estate salesperson would be testifying to a proposed list price, this number is not precluded under the Code if the home has not been listed at the time of valuation. In fact, California appellate courts have approved the qualification of real estate salespersons to provide expert testimony on the value of real property.⁶⁶

II. Expert Testimony on the Fair Market Value of the Family Home When the Wife Desires to Keep It Should Be Limited to Licensed California Appraisers

Through a comparative analysis of appraisers and real estate salespersons, this section will illustrate why courts should limit expert testimony on the fair market value of the family home in marital dissolutions, when the wife wants to keep the home, to licensed California appraisers. Under current law, trial courts maintain broad discretion to determine both the value of marital property and whether a witness is qualified to testify as an expert regarding value.⁶⁷ The courts should use this discretion to exclude real estate salespersons from expert qualification. Although the battle of the experts will continue to play a role in the most contentious marital dissolutions, courts should limit this battle to licensed appraisers.

While cross-examination is arguably an effective tool in exposing the weaknesses of an opposing party’s expert, it does not provide a sufficient check on the use of real estate salespersons as experts when the wife desires to remain in the family home. Real estate salespersons should not meet even the minimum threshold for expert qualification

63. CAL. EVID. CODE § 720(a).

64. See Inker, *supra* note 47, at 275.

65. CAL. EVID. CODE § 822(a)(2) (West 1995 & Supp. 2007). California Evidence Code section 822(b) applies the enumerated prohibitions to non- eminent domain proceedings. See *id.* § 822(b).

66. See *In re Marriage of Hokanson*, 80 Cal. Rptr. 2d 699, 703 (Ct. App. 1998); *Douglas*, 2 Cal. Rptr. 2d at 598.

67. See *supra* Part I.C.

because they do not possess “special knowledge, skill, experience, training, or education”⁶⁸ applicable in this particular dissolution context. Although salespersons have knowledge and experience to price and sell a property, this Comment will demonstrate that salespersons are not equipped to value the family home at the same level of competency as appraisers.

Cross-examination of expert appraisers, however, will continue to serve an important function for the court. Reasonable appraisers may differ in their opinions of value for the family home, although to a lesser extent than an appraiser and a salesperson, because appraisers use the same standardized method in their valuations; cross-examination will enable the court to determine which value to assign. An appraisal, like any document prepared in an adversarial setting, “is nothing unless it can survive hostile challenge and remain sufficiently credible to persuade a disinterested party that it is a better expression of value than the views put forth by the opposing advocate’s appraiser.”⁶⁹ After establishing an opinion of value for the property, the appraiser must defend that opinion against challenges by the opposing party and the opposing party’s expert.⁷⁰ Ultimately, the judge will either adopt or reject the opinion of value stated in the appraisal.⁷¹ A categorical prohibition on the use of salespersons as experts when the wife wants to keep the family home is necessary to maintain the integrity and fairness of the valuation process.

A. Appraisers Are More Technically Competent in Valuation than Real Estate Salespersons

Appraisers are more competent than real estate salespersons in the evaluation of the fair market value of real property due to the relevant education and substantial experience requirements necessary to obtain an appraisal license. California appraisers are subject to a rigorous, four-tiered licensing scheme set out by the state’s Office of Real Estate Appraisers⁷² (“OREA”), containing education, experience,

68. CAL. EVID. CODE § 720(a).

69. Smith, *supra* note 50, at 178.

70. *See id.* The most important factors in surviving this challenge are the “credibility of the appraiser and the thoroughness and objectivity of his or her report.” *Id.*

71. *See id.*

72. OREA was created in compliance with Title XI of the federal Financial Institutions Reform, Recovery and Enforcement Act (“FIRREA”), 12 U.S.C. §§ 3331–3351 (2000), which requires “all states to license real estate appraisers who appraise real property in federally related transactions.” *See* CAL. OFFICE OF REAL ESTATE APPRAISERS, LICENSING REQUIREMENTS HANDBOOK 1 (2007), available at http://www.orea.ca.gov/pdf/Lic_Hdbk.pdf.

and examination requirements.⁷³ These three requirements allow “every applicant for a real estate appraiser license to . . . establish his or her . . . competence.”⁷⁴ Trainee, the lowest license level, requires ninety hours of education and no experience, but is limited to property appraisal under a supervising appraiser.⁷⁵ At the Residential level, which requires ninety hours of education and 2000 hours of experience (over the course of at least twelve months), the licensee may appraise any non-complex one- to four-family property with a transaction value up to \$1,000,000.⁷⁶ A Certified Residential appraiser must have 120 hours of education and 2500 hours of experience (over the course of at least thirty months), and can appraise any one- to four-family property without regard to transaction value or complexity.⁷⁷ A Certified General appraiser, the highest licensing level, requires 180 hours of education and 3000 hours of experience (over the course of at least thirty months), and can appraise all real estate without regard to transaction value or complexity.⁷⁸

OREA requires two types of education, tailored to property valuation, to meet its licensing requirements: basic education to qualify for a license and continuing education to renew a license.⁷⁹ Basic educational topics, geared toward knowledge in the valuation and appraisal of property, include: influences on real estate value, legal considerations in appraisal, types of value, real estate markets and analysis, valuation process, and appraisal statistical concepts.⁸⁰ A fifteen hour Uniform Standards of Professional Appraisal Practice⁸¹ (“USPAP”) course, or its equivalent, is also required for applicants to each license

A federally related transaction is any real estate related financial transaction that involves a federal financial institutions regulatory agency, such as the Federal Deposit Insurance Corporation, and requires the services of an appraiser. 12 U.S.C. § 3350(4)(A). OREA’s mission is “[t]o protect public safety by ensuring the competency and integrity of licensed real estate appraisers.” CAL. OFFICE OF REAL ESTATE APPRAISERS, *supra*, at 1.

73. CAL. OFFICE OF REAL ESTATE APPRAISERS, *supra* note 72, at 1–2. Licensing requirements for commercial appraisal are beyond the scope of this Comment; discussion will be limited to requirements relating to residential appraisal.

74. *Id.* at 4.

75. *Id.* at 2. A trainee cannot sign-off on an appraisal independently. See UNIFORM RESIDENTIAL APPRAISAL REPORT, *supra* note 61, at 6.

76. CAL. OFFICE OF REAL ESTATE APPRAISERS, *supra* note 72, at 2.

77. *Id.*

78. *Id.*

79. *Id.* at 9.

80. *Id.* at 23 app.

81. Title XI and OREA require compliance with the USPAP. See Cal. Code Regs. tit. 10, § 3701 (2007); Appraisal Found., USPAP/Standards, <http://www.appraisalfoundation.org> (follow “USPAP/Standards” hyperlink) (last visited Dec. 15, 2007).

level.⁸² Changes in the licensing criteria, increasing the number of education hours required for each of the four levels, will take effect January 1, 2008.⁸³ Upon meeting the minimum requirements, applicants must pass the examination required for the license level for which they have applied.⁸⁴ California real estate appraiser licenses are valid for two years.⁸⁵ Appraisers applying for a license renewal must complete fifty-six hours of continuing education, including a seven-hour USPAP Update Course.⁸⁶

Unlike appraisers, real estate salespersons may take the required licensing examination with no experience, and the education requirements are not directly related to the valuation of property.⁸⁷ An applicant must complete three college-level courses, equivalent to approximately 135 hours, to become a real estate salesperson, including (1) real estate principles, (2) real estate practice, and (3) one course selected from an approved list.⁸⁸ In contrast to an appraiser, a real estate salesperson's education focuses on buying and selling property—not on valuing it. Although a salesperson who is not employed under the supervision of a California licensed real estate broker may not engage in any acts requiring a real estate license, the salesperson license consists of only one level, and does not contain the apprenticeship structure of the appraiser licensing scheme.⁸⁹ California real estate licenses, including those of salespersons, are valid for four years.⁹⁰ Salespersons renewing their licenses for the first time must complete twelve hours of continuing education courses, consisting of four

82. CAL. OFFICE OF REAL ESTATE APPRAISERS, *supra* note 72, at 2, 23.

83. *See id.* at 3 (increasing the education requirements as follows: Trainee to 150 hours, Residential to 150 hours, Certified Residential to 200 hours, and Certified General to 300 hours). The structure of the educational requirements will also be changed to modules with specific subtopics. *See id.* at 24 app., 27 app.

84. *Id.* at 18.

85. *Id.* at 10.

86. *Id.* Proof of completion of the USPAP Update Course is due every two years; proof of completion of the remaining forty-nine hours is required every four years. *Id.*

87. *See* Cal. Dep't of Real Estate, Real Estate Salesperson License, <http://www.dre.ca.gov/saleslic.htm> (last visited Aug. 22, 2007).

88. *Id.* The three courses must be three semester units each, or approximately forty-five hours per class. *Id.* The list of courses that satisfy the third requirement include real estate appraisal, property management, real estate finance, real estate economics, legal aspects of real estate, real estate office administration, general accounting, business law, escrows, mortgage loan brokering and lending, computer applications in real estate, and common interest developments. *Id.* Although real estate appraisal is included in this list, real estate salespersons are not required to take this course. *Id.*

89. *Id.*

90. Cal. Dep't of Real Estate, FAQs: Real Estate Licenses, http://www.dre.cahwnet.gov/faqs_lic.htm (last visited Aug. 26, 2007).

three-hour continuing education courses in ethics, agency, trust fund handling, and fair housing.⁹¹ Salespersons renewing after this first time must complete forty-five hours of continuing education courses including one six-hour survey course that covers the four required subjects above, eighteen hours of consumer protection courses, and twenty-one hours of consumer service or consumer protection courses.⁹² None of these continuing education requirements relate to the valuation of property.

In addition to the education and experience requirements to obtain an appraisal license, the USPAP Competency Rule provides a check on the competency of an individual appraiser to perform a particular appraisal,⁹³ by “requir[ing] an appraiser to have both the knowledge and the experience required to perform a specific appraisal service competently.”⁹⁴ Under this rule, an appraiser, prior to accepting an assignment, “must properly identify the problem to be addressed and have the knowledge and experience to complete the assignment competently.”⁹⁵ If the appraiser does not possess the appropriate knowledge or experience, he or she must:

1. disclose the lack of knowledge and/or experience to the client before accepting the assignment; 2. take all steps necessary or appropriate to complete the assignment competently; and 3. describe the lack of knowledge and/or experience and the steps taken to complete the assignment competently in the report.⁹⁶

The Competency Rule thus functions to ensure the competency of appraisers in individual valuations, and to protect clients from any gaps in the appraiser’s knowledge or experience.

In contrast, real estate salespersons are not subject to any type of parallel competency provision. Although a diligent salesperson should disclose a lack of knowledge or experience with a given type of property transaction, the salesperson is under no obligation to do so. Appraisers are therefore more competent in assessing the fair market value of real property than real estate salespersons, whose primary focus is on marketing property to home buyers and sellers.

91. Cal. Dep’t of Real Estate, Continuing Education Requirements, <http://www.dre.ca.gov/cerqmts.htm> (last visited Aug. 26, 2007).

92. *Id.* Effective July 1, 2007, licensees will also be required to complete a three-hour risk management course as part of their continuing education requirements. *Id.*

93. See APPRAISAL FOUND., *supra* note 49, at 11. Competency applies to factors including, but not limited to, “an appraiser’s familiarity with a specific type of property, a market, a geographic area, or an analytical method.” *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

B. Appraisers Are Likely to Be More Accurate in Their Valuations Due to the Rigorous Appraisal Process

Appraisers are likely to be more accurate in their valuations due to the structure of the appraisal report, the methods used to calculate the value of the property, and the built-in accountability for the quality of the appraisal. An appraisal is succinctly defined as “an opinion of value.”⁹⁷ An appraisal report contains two major components: (1) an opinion of value and (2) an analysis and argument supporting that value.⁹⁸ In the context of a marital dissolution and ensuing litigation regarding the valuation of the family home, “[t]he appraisal report itself becomes a significant document and piece of evidence in the case.”⁹⁹

An appraisal report’s rigorous requirements regarding inspection and evaluation of the property ensure that the appraiser uses a thorough and detailed analysis to reach this opinion of value. The standardized appraisal report form, called a Uniform Residential Appraisal Report (“URAR”), is federally required for an appraisal of single-family residential property and must be completed in compliance with the USPAP.¹⁰⁰ The URAR’s stated purpose “is to provide the lender/client with an accurate, and adequately supported, opinion of the market value of the subject property.”¹⁰¹ The structure of the re-

97. *Id.* at 1. “An appraisal must be numerically expressed as a specific amount, as a range of numbers, or as a relationship . . . to a previous value opinion or numerical benchmark” *Id.* An appraiser’s opinion of value is defined by the type of value to be achieved, e.g., market value, liquidation value, or investment value. *See id.* at 5 (explaining that in appraisal practice, the type of value must be identified). In the context of family home valuation, the appraiser’s opinion of value would be the fair market value of the property.

98. Smith, *supra* note 50, at 178.

99. *Id.* at 179. For use in court, the appraiser is likely to complete a Self-Contained Appraisal Report, which includes “maps, photographs, charts and plot plans” in addition to the standard report. CAL. DEP’T OF REAL ESTATE, REFERENCE BOOK 315 (2000). *See generally* APPRAISAL FOUND., *supra* note 49, at 23–26 (discussing the minimum requirements for a Self-Contained Appraisal Report). The report generally prepared for lending institutions in real property transactions is a Summary Appraisal Report, which “varies from two to eight pages in length and includes the pertinent data about the property, with photos, maps, plats and sketches.” CAL. DEP’T OF REAL ESTATE, *supra*, at 314. *See generally* APPRAISAL FOUND., *supra* note 49, at 23, 26–28 (discussing the minimum requirements for a Summary Appraisal Report). “The appropriate reporting option and the level of information necessary in the report are dependent on the intended use and the intended users.” *Id.* at 23.

100. *See generally* UNIFORM RESIDENTIAL APPRAISAL REPORT, *supra* note 61, at 4–5 (noting that the “report form [provided by Fannie Mae] is designed to report an appraisal of a one-unit property or a one-unit property with an accessory unit”; and requiring the appraiser to certify that he or she “performed this appraisal in accordance with the requirements of the Uniform Standards of Professional Appraisal Practice”).

101. *Id.* at 1.

port contains sections for a description of the subject property, the neighborhood, the property site, and any physical improvements.¹⁰² These categories require the appraiser to thoroughly examine both the inside and outside of the property, and conduct independent research on the property as well.¹⁰³ The URAR mandates that the appraiser, at a minimum:

- (1) perform a complete visual inspection of the interior and exterior areas of the subject property, (2) inspect the neighborhood, (3) inspect each of the comparable sales from at least the street, (4) research, verify, and analyze data from reliable public and/or private sources, and (5) report his or her analysis, opinions, and conclusions in [the] appraisal report.¹⁰⁴

The appraisal report “is a conclusion which results from the process of research and analysis of factual and relevant data.”¹⁰⁵ The appraiser’s primary conclusion, or opinion of value, is the property’s fair market value, arrived at through comprehensive inspection, research, and analysis. The URAR defines market value, based on the definition contained in the USPAP,¹⁰⁶ as:

The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby: (1) buyer and seller are typically motivated; (2) both parties are well informed or well advised, and each acting in what he or she considers his or her own best interest; (3) a reasonable time is allowed for exposure in the open market; (4) payment is made in terms of cash in U. S. dollars or in terms of financial arrangements comparable thereto; and (5) the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions[] granted by anyone associated with the sale.¹⁰⁷

102. *Id.*

103. See FANNIE MAE, REVISED APPRAISAL AND PROPERTY REPORT FORMS—FAQS 2 (2005), available at <https://www.efanniemae.com/sf/formsdocs/forms/pdf/sellingtrans/appraisal/faqs.pdf> (“Fannie Mae’s expectation of the appraiser’s property inspection for an appraisal based on an interior and exterior inspection is a complete visual inspection of the accessible areas of the property. The appraiser is responsible for noting in his or her report any adverse conditions . . . that were apparent during the inspection of the property or that he or she became aware of during the research involved in performing the appraisal.”).

104. UNIFORM RESIDENTIAL APPRAISAL REPORT, *supra* note 61, at 4.

105. CAL. DEP’T OF REAL ESTATE, *supra* note 99, at 311.

106. See APPRAISAL FOUND., *supra* note 49, at 194.

107. UNIFORM RESIDENTIAL APPRAISAL REPORT, *supra* note 61, at 4.

This definition of fair market value comports with the definition provided in the California Code of Civil Procedure, and it contains the same assumptions regarding the motivations and knowledge of the buyer and seller, reasonable time on the market, and a price unaffected by creative financing or concessions.¹⁰⁸ The URAR does not permit any modifications to the definition of market value, thereby ensuring that the appraiser completes the appraisal in compliance with this definition.¹⁰⁹ The URAR contains three different approaches for determining value: the sales comparison approach, the (reproduction) cost approach, and the (capitalization of) income approach.¹¹⁰ Each approach provides a separate indication of value, but the three approaches “are all interrelated and all use market comparison techniques.”¹¹¹ After completing the valuation using the appropriate method(s),¹¹² the appraiser reconciles his or her findings and gives his or her opinion of the property’s value.¹¹³ Through this reconciliation “by means of logic and reasoning,” the appraiser arrives at “one *value conclusion* for the property.”¹¹⁴

108. See *supra* notes 48–49 and accompanying text.

109. See UNIFORM RESIDENTIAL APPRAISAL REPORT, *supra* note 61, at 4.

110. See *id.* at 2. These three approaches are recognized and defined by the California Evidence Code as acceptable bases for an expert’s opinion as to the value of the property. See *supra* notes 58–61 and accompanying text.

111. CAL. DEP’T OF REAL ESTATE, *supra* note 99, at 312.

112. “All three approaches are considered in each complete assignment. However, all three are not always employed, depending upon the property type and the process and report type agreed to by the client and appraiser.” *Id.* Exclusion of any of the three approaches must be explained in a Self-Contained Appraisal Report or Summary Appraisal Report. See APPRAISAL FOUND., *supra* note 49, at 25, 28. Fannie Mae only requires use of the sales comparison approach, but the appraiser must have considered the cost and income approaches even if they are not developed. See UNIFORM RESIDENTIAL APPRAISAL REPORT, *supra* note 61, at 5.

113. See UNIFORM RESIDENTIAL APPRAISAL REPORT, *supra* note 61, at 2 (“Based on a complete visual inspection of the interior and exterior areas of the subject property, defined scope of work, statement of assumptions and limiting conditions, and appraiser’s certification, my (our) opinion of the market value, as defined, of the real property that is the subject of this report is \$ ____, as of ____, which is the date of inspection and the effective date of this appraisal.”); APPRAISAL FOUND., *supra* note 49, at 22 (“In developing a real property appraisal, an appraiser must: (a) reconcile the quality and quantity of data available and analyzed with the approaches used; and (b) reconcile the applicability or suitability of the approaches used to arrive at the value conclusion(s).”).

114. CAL. DEP’T OF REAL ESTATE, *supra* note 99, at 314.

In most appraisals, all three approach methods will ordinarily have something to contribute. Each approach method is used independently to reach an estimated value. Then, as a final step, by applying to each separate value a weight proportionate to its merits in that particular instance, conclusions are reached as to one appropriate value.

Id. at 341.

An appraiser “has a heavy personal and professional responsibility to be correct and accurate” in giving an opinion of value.¹¹⁵ Every appraisal must contain a certification signed by the appraiser, holding the appraiser accountable for the opinion of value and supporting analysis conducted.¹¹⁶ In completing a URAR, an appraiser affirms his or her agreement with twenty-five certification conditions by signing the bottom of the form.¹¹⁷ The appraiser must certify that he or she performed a complete visual inspection of the exterior and interior of the property and conducted the appraisal in accordance with USPAP requirements.¹¹⁸ The appraiser must affirm that he or she has knowledge and experience in appraising the same type of property and market area as the subject property.¹¹⁹ The appraiser is required to verify, through a disinterested source, all information provided by anyone with a financial interest in the sale or financing of the subject property.¹²⁰ The appraiser also certifies that he or she does not have any interest in the subject property or the transaction’s participants, and that compensation for the appraisal was not conditioned on any agreement to report a predetermined value.¹²¹ Finally, the appraiser agrees that any intentional or negligent misrepresentations may result in civil liability or criminal penalties, including fine, imprisonment, or both.¹²²

In addition to the signed certification, an appraiser “must prepare a workfile for each appraisal.”¹²³ The workfile enables the appraiser to remain accountable for the appraisal even after it is completed, and requires the appraiser to compile all documentation needed to support the appraiser’s conclusion of value. The workfile must include: (1) the name of the client and any other intended

115. *Id.* at 313.

116. See APPRAISAL FOUND., *supra* note 49, at 30.

Every appraisal report subject to the Uniform Standards of Professional Appraisal Practice upon final completion shall bear the signature and license number of the appraiser and of the supervising appraiser, if appropriate. The affixing of such signature and number constitute the acceptance by the appraiser and supervising appraiser of full and personal responsibility for the accuracy, content, and integrity of the appraisal under Standards Rules 1 and 2 of USPAP.

CAL. CODE REGS. tit. 10, § 3705(a) (2007).

117. See UNIFORM RESIDENTIAL APPRAISAL REPORT, *supra* note 61, at 5–6.

118. See *id.* at 5.

119. See *id.*

120. See *id.*

121. See *id.*

122. See *id.* at 6.

123. See APPRAISAL FOUND., *supra* note 49, at 9. The workfile is defined as “documentation necessary to support an appraiser’s analyses, opinions, and conclusions.” *Id.* at 5.

users; (2) copies of any written reports; (3) summaries of any oral reports or testimony, including the signed and dated certification; and (4) all other data, information, or documentation necessary to support the appraiser's opinion of value and conclusions, and to show compliance with the USPAP.¹²⁴ The workfile requirement ensures that the appraiser "preserves evidence of the appraiser's consideration of all applicable data and statements required by USPAP and other information as may be required to support the appraiser's opinions, conclusions, and recommendations."¹²⁵

A real estate salesperson's opinion of value, based on a Comparative Market Analysis ("CMA"), is used to help a seller set a proper list price for the property.¹²⁶ Unlike an appraisal, a CMA is essentially a sales tool.¹²⁷ A CMA is offered to a prospective seller, free of charge, as a way for the salesperson "to market [his or her] services to home sellers."¹²⁸ The value suggested by the salesperson in the CMA depends substantially on the salesperson's level of experience, which can vary widely because real estate salesperson licensing does not require any experience.¹²⁹ The CMA utilizes the same basic approach as the sales comparison approach used in an appraisal to achieve an opinion of value based on comparable sales.¹³⁰ Unlike the method used in an appraisal, however, a salesperson's CMA may include like properties that are currently listed or pending sale, meaning that the open market has not reliably established the value of these properties.¹³¹

124. See *id.* at 9. The appraiser must have custody of the workfile (or make appropriate arrangements for storage) and retain the workfile for at least five years after preparation of the appraisal or at least two years after final disposition of any judicial proceedings at which the appraiser testified, whichever period of time is longer. See *id.*

125. *Id.*

126. See Nat'l Ass'n of Realtors, *supra* note 16 (explaining that the CMA contains a list of comparable sales identified by the salesperson as well as data about other houses in the same neighborhood currently on the market).

127. See Liz Provo, *Why NOT to Ask a Real Estate Agent's Opinion of Value When Pricing Your Home*, EZINEARTICLES.COM, Nov. 22, 2006, <http://ezinearticles.com/?Why-NOT-To-Ask-A-Real-Estate-Agents-Opinion-of-Value-When-Pricing-Your-Home&id=366780>; see also Sichelman, *supra* note 12 ("[S]ellers shouldn't lose sight of the purpose of the agent's comparative market analysis, or CMA: To determine the most likely sales prices and create a marketing strategy to obtain that price.").

128. Provo, *supra* note 127.

129. See *id.*; Cal. Dept. of Real Estate, *supra* note 87 and accompanying text.

130. See UNIFORM RESIDENTIAL APPRAISAL REPORT, *supra* note 61, at 2; Nat'l Ass'n of Realtors, *supra* note 16.

131. See UNIFORM RESIDENTIAL APPRAISAL REPORT, *supra* note 61, at 2; Nat'l Ass'n of Realtors, *supra* note 16. By including properties currently listed or pending sale, the salesperson may be comparing list prices instead of actual sales.

In using the sales comparison approach, the appraiser must certify that the comparables used were adequate to develop a reliable approach.¹³² To ensure reliability of the comparable sales data, the appraiser must have researched, verified, analyzed, and reported on any prior sales of the comparable sales for a minimum of one year prior to the sale date of the comparable sale.¹³³ The comparable sales must be the most similar to the subject property's location and physical and functional characteristics.¹³⁴ The appraiser is also required to report adjustment to the comparable sales that reflect market differences between the subject property and the comparables.¹³⁵ In contrast, a real estate salesperson can include any property he or she believes is comparable to the subject property, with no limitations or certifications. A CMA, as a sales tool, is not structured to function as a significant piece of evidence in the same way as an appraisal.

Additionally, the CMA has limited use in determining value because it only utilizes comparable sales, unlike an appraisal which uses three methods of valuation. The appraiser reconciles the value indicated by the sales comparison approach with the other two methods in coming to a final conclusion of value for the property.¹³⁶ Unlike an appraisal, a CMA has no standardized format or analogous signed certification.¹³⁷ The primary purpose of the CMA is "[t]o help in estimating a possible sales price for [a] house,"¹³⁸ not to "provide . . . an accurate, and adequately supported, opinion of the market value of the subject property."¹³⁹ The motivations behind an appraisal and a CMA are completely different and can potentially affect their accuracy. A salesperson generally has an agenda in providing the CMA because it is a sales tool and a way for the salesperson to market his or her services—if the seller is satisfied with the salesperson's opinion of value and suggested list price, the seller will hire the salesperson to list the property.¹⁴⁰ In preparing an appraisal, the appraiser provides an

132. See UNIFORM RESIDENTIAL APPRAISAL REPORT, *supra* note 61, at 5.

133. See *id.*

134. See *id.*

135. See *id.*

136. See *id.* at 2.

137. See Nat'l Ass'n of Realtors, *supra* note 16 (providing no information regarding a standardized CMA format or any requirement for a certification of its accuracy).

138. *Id.*

139. UNIFORM RESIDENTIAL APPRAISAL REPORT, *supra* note 61, at 1.

140. See Provo, *supra* note 127; see also Marshall Loeb, *Price Your Home Right to Help Speed a Sale*, REAL ESTATE JOURNAL.COM, May 19, 2006, <http://www.realestatejournal.com/buysell/tactics/20060519-loeb.html> (noting that "brokers want to earn your listing and can

objective and disinterested opinion of the property's value that "reflect[s] only the forces affecting value."¹⁴¹

C. Appraisers Do Not Face the Same Inherent Conflicts of Interest as Real Estate Salespersons

A real estate salesperson providing expert testimony in a marital dissolution faces an inherent conflict of interest between his or her occupation as a salesperson and the ability to provide an impartial and objective opinion of value. Sales commissions, which are dependent upon word-of-mouth referral, comprise the entirety of a salesperson's income.¹⁴² Appraisers, who are not in the sales profession, do not face this same inherent conflict of interest. In a marital dissolution where a value will be assigned to the family home before the court determines whether it will ultimately be sold, a salesperson giving an opinion of value may face a conflict of interest between being truly objective and trying to impress the representative party as a potential client. The salesperson provides a CMA for free with the presumption that the salesperson will retain the prospective seller's business.¹⁴³ In the Alice and Bob hypothetical, Bob's salesperson may view the occasion as an opportunity to obtain Bob's business if the home is later listed and ordered sold by the court. On the one hand, Bob's salesperson is obligated to give a fair and objective opinion of value. However, she may also feel conflicting pressure to please Bob and potentially earn his business with a satisfactory suggested value on the other. Beyond proposing a value for the home in the context of the marital dissolution proceeding, Bob's salesperson may be inclined to propose a price high enough to obtain his business if and when the home is ultimately sold.

Competition for business among real estate salespersons has been fierce in recent years, and has been described as a "dog-eat-dog business."¹⁴⁴ As of August 2006, there were 2.6 million licensed real estate

be tempted to paint an overly rosy picture of how your home will sell," quoting William J. Doka, Appraiser).

141. CAL. DEP'T OF REAL ESTATE, *supra* note 99, at 313.

142. See James Hagerty & Anjali Athavaley, *Amid Slump, Real-Estate Agents Hang up Their Blazers*, REAL ESTATE JOURNAL.COM, Feb. 8, 2007, <http://www.realestatejournal.com/buysell/agentsandbrokers/20070208-athavaley.html>.

143. See Provo, *supra* note 127.

144. Hagerty & Athavaley, *supra* note 142.

salespersons competing for business in the United States.¹⁴⁵ In California, by fiscal-year end 2005 the real estate licensee population totaled 449,107, including 321,928 salespersons.¹⁴⁶ A successful salesperson is always looking for business; the relationship between the salesperson and the party he or she is testifying on behalf of extends beyond just that single proceeding. At all times, salespersons are selling themselves and their services, regardless of the setting. Prohibiting a salesperson from representing a party for whom he or she has testified would not remedy this inherent conflict of interest. If the party is pleased with the salesperson's opinion of value, the party could recommend or refer the salesperson to someone else.

The real estate sales profession does not maintain a code of ethics sufficient to address these conflicts of interest faced by real estate salespersons. The National Association of Realtors ("NAR") has promulgated a Code of Ethics for its members to address potential conflicts and other issues;¹⁴⁷ however, the Code of Ethics applies only to Realtors¹⁴⁸ who agree to follow its tenets, not to all salespersons. NAR's Code of Ethics encourages Realtors to preserve the sanctity of the title of Realtor, which "has come to connote competency, fairness, and high integrity resulting from adherence to a lofty ideal of moral conduct in business relations."¹⁴⁹ NAR cautions that "[n]o inducement of profit and no instruction from clients ever can justify depar-

145. Amy Hoak, *Selecting a Real-Estate Agent in a Cooling Housing Market*, REAL ESTATE JOURNAL.COM, Aug. 29, 2006, <http://www.realestatejournal.com/buysell/agentsandbrokers/20060829-hoak.html>.

146. Cal. Dep't of Real Estate, *Examination and Licensing Program Update*, REAL ESTATE BULL., Winter 2005, at 2, available at http://www.dre.cahwnet.gov/pdf_docs/rebwin05.pdf. By fall 2006, the number of real estate licensees totaled approximately 511,000, a twelve-percent increase from the previous year. Cal. Dep't of Real Estate, *Licensing Annual Report—Fall 2006*, REAL ESTATE BULL., Fall 2006, at 10, available at http://www.dre.cahwnet.gov/pdf_docs/rebfall06.pdf.

147. See NAT'L ASS'N OF REALTORS, CODE OF ETHICS AND STANDARDS OF PRACTICE OF THE NATIONAL ASSOCIATION OF REALTORS (2007), available at [http://www.realtor.org/mempolweb.nsf/214c1520b27c9ee286256b2600557d81/3232c1847235fbc2862572340079aaec/\\$FILE/EnglishCode2007.pdf](http://www.realtor.org/mempolweb.nsf/214c1520b27c9ee286256b2600557d81/3232c1847235fbc2862572340079aaec/$FILE/EnglishCode2007.pdf).

148. A real estate salesperson can be called a Realtor if he or she is a member of NAR and voluntarily agrees to abide by the Code of Ethics. Nat'l Ass'n of Realtors, About NAR: When Is a Real Estate Agent a Realtor? (Dec. 14, 2006), <http://www.realtor.org/realtor.org.nsf/pages/whoisarealtor>. As of December 2006, NAR claimed over one million members. *Id.* Before becoming a Realtor, a salesperson must first join his or her local real estate board, which then qualifies the salesperson for membership in the state and national associations. See Nat'l Ass'n of Realtors, How to Join NAR (Dec. 14, 2006), <http://www.realtor.org/realtororg.nsf/pages/HowtoJoin?OpenDocument>.

149. NAT'L ASS'N OF REALTORS, *supra* note 147, at Preamble.

ture from this ideal.”¹⁵⁰ NAR’s Code of Ethics also recognizes the potential for a Realtor, in attempting to secure future business, to mislead a property owner by suggesting a list price that is higher than what the salesperson believes the home can sell for: “Realtors, in attempting to secure a listing, shall not deliberately mislead the owner as to market value.”¹⁵¹ Although the NAR’s Code of Ethics provides Realtors with a set of standards to follow in the course of conducting business, on its face the Code of Ethics has no teeth. Violations of the NAR Code of Ethics, if reported to NAR, are investigated by the Member Board.¹⁵² The Code of Ethics itself, however, does not provide any information about penalties for violations, nor does the Code of Ethics indicate whether NAR conducts periodic investigations of its members or waits for violations to be reported.¹⁵³

Conflicts faced by appraisers are not equivalent to the inherent conflicts of interest faced by real estate salespersons. Unlike a real estate salesperson, an appraiser does not stand to gain directly from providing a value that is satisfactory to the representative party. Unlike real estate salespersons, appraisers do not work on commission and do not maintain the same dependence on referrals to stay in business.¹⁵⁴ Appraisers also play a different role in the real estate profession and are “responsible for furnishing clients with an objective third party opinion of value, arrived at without pressures or prejudices from the parties involved with the property, such as an owner or lender.”¹⁵⁵ In

150. *Id.*

151. *Id.* at art. 1, Standard of Practice 1-3.

152. *See id.* at art. 14. The Member Board, specific to the individual Realtor’s geographic location, consists of local boards (local real estate boards or associations of realtors) and state associations. *See* Nat’l Ass’n of Realtors, FAQ: What Different Types of Membership Are There?, <http://www.realtor.org/referral.nsf/pages/Whatdifferenttypesofmembership> (last visited Apr. 22, 2007).

153. *See generally* NAT’L ASS’N OF REALTORS, *supra* note 147 (providing no specific information regarding penalties for violations or how investigations are conducted).

154. *See* Carol Lloyd, *In Tough Real Estate Market, Appraisers Under Pressure*, S.F. CHRON., Mar. 18, 2007, at D2.

155. CAL. DEP’T OF REAL ESTATE, *supra* note 99, at 312. Despite their objective, third-party role in sales transactions, appraisers “are concerned that on occasion, attempts are made to pressure them into performing appraisals for a minimum value specified by a broker in a transaction.” Cal. Dept’t of Real Estate, *Licensing Annual Report—Fall 2006*, REAL ESTATE BULL., Fall 2006, at 1–2, available at http://www.dre.cahwnet.gov/pdf_docs/rebfall06.pdf. Real Estate Commissioner Jeff Davi cautioned real estate licensees that “[a]lthough the broker may not intend to create a problem for the appraiser, he or she may be unaware that just by accepting the assignment under those conditions, the appraiser is at risk for disciplinary action against his or her license.” *Id.* While “[m]any appraisers feel that they must comply with these minimum value requests from brokers or face the prospect of receiving no additional work in the future,” appraisers are placing

the marital dissolution context, appraisers will receive compensation in the form of a flat fee for the preparation of the appraisal report, and likely an hourly rate for time spent testifying in court. Although a real estate salesperson could charge an hourly rate for providing testimony, the salesperson generally supplies a CMA to any prospective client for free. The free CMA illustrates the salesperson's interest in recouping the time and effort spent in its preparation by securing the client's business or recommendation to another person.

Although the risk of client or attorney pressure to reach a desired result may persist,¹⁵⁶ all experts hired to testify in court face some sort of pressure to provide testimony beneficial to the parties they represent. An appraiser, like any other expert witness, "must not let himself be seduced or intimidated into changing his opinion solely to suit the client's convenience or wishes."¹⁵⁷ Realistically, an appraiser may feel pressure to alter his or her opinion of value based on which spouse hired the appraiser, such as by reporting a lower opinion of value for a spouse trying to stay in the family home. Appraisers can prevent undue client influence by properly limiting the amount of client interaction and refusing to review any other concurrent appraisals of the asset in question until after the appraiser has reached an independent, unbiased determination of value.¹⁵⁸ Additionally, adherence to professional standards enables the appraiser to address potential conflicts that may arise.¹⁵⁹

Appraisers are subject to stricter regulation than real estate salespersons, and potentially face serious consequences for violations of professional standards.¹⁶⁰ The USPAP specifically and directly addresses the possibility of a party soliciting an appraisal based upon a

their licenses in jeopardy, prompting Commissioner Davi to encourage real estate licensees to "make every effort to help real estate appraisers remain in compliance with their governing laws" by not providing appraisers with a predetermined value needed for financing to go through. *Id.* California has addressed the pressures faced by appraisers in appraisal practice with its own legislative response. See S.B. 223, 2007–08 Leg., Reg. Sess. (Cal. 2007). Outside California, appraisers have also experienced pressure from lenders in some cases to inflate home values. See Vikas Bajaj, *New York Says Appraiser Inflated Values of Homes*, N.Y. TIMES, Nov. 2, 2007, at C3.

156. See Smith, *supra* note 50, at 182.

157. *Id.*

158. See *id.* Smith suggests that most appraisers "are comfortable with receiving and reviewing information the client thinks relevant, talking with the client about the asset's history, asking specific follow-up questions as issues are identified, and providing drafts of the appraisal report." *Id.*

159. See *id.* at 181–82.

160. Under the USPAP, an appraiser "must perform assignments ethically and competently, in accordance with the USPAP" and "must perform assignments with impartiality,

predetermined value for the family home: "It is unethical for an appraiser to accept an assignment, or to have a compensation arrangement for an assignment that is contingent on . . . the reporting of a predetermined result (e.g., the opinion of value)" or "a direction in assignment results that favors the cause of the client."¹⁶¹ The strength of the USPAP's Ethics Rule is enhanced by its enforcement in California.¹⁶² In addition to its Licensing Unit, OREA also maintains an Enforcement Unit to investigate alleged violations of the USPAP and applicable state laws and regulations.¹⁶³ Citations for unprofessional conduct in violation of a statute, regulation, or the USPAP may include license suspension, revocation, or restriction, and a fine of up to \$10,000 per incident.¹⁶⁴ Although appraisers may face the same pressures put on any expert witness to provide testimony beneficial to a client, the ethical standards of the USPAP, and consequences for violating them, require unbiased appraisal practice.

D. Use of Appraisers Is Required in Other Analogous Valuation Settings

In other valuation settings where competence, fairness, and reliability are essential, courts and financial institutions insist upon the use of appraisers. Eminent domain and lending provide examples of situations analogous to valuation in marital dissolutions, and support the exclusive use of appraisers in family home valuations where the wife wants to keep the home.¹⁶⁵ In eminent domain, the public entity seek-

objectivity, and independence, and without accommodation of personal interests." APPRAISAL FOUND., *supra* note 49, at 7.

161. *Id.* at 8.

162. Licensed California appraisers are subject to the ethics and standards of the USPAP. *See* CAL. BUS. & PROF. CODE § 11314 (West 2007); CAL. CODE REGS. tit. 10, § 3701 (2007).

163. CAL. OFFICE OF REAL ESTATE APPRAISERS, *supra* note 72, at 1. Complaints of unlawful or unprofessional conduct by licensed appraisers are investigated by OREA. *See* CAL. CODE REGS. tit. 10, § 3703. The Director of OREA may "issue a citation, order of abatement, assess a fine or private or public reproof, suspend or revoke any license, and/or may deny the issuance or renewal of a license" for violation of the USPAP. *Id.* § 3721(a)(6).

164. *See id.* § 3724(a)-(b).

165. *See generally* DENNIS L. GREENWALD & MICHAEL ASIMOW, CALIFORNIA PRACTICE GUIDE: REAL PROPERTY TRANSACTIONS §§ 6:656-6:657 (2005) (citing to eminent domain proceedings and lending as two examples of the "fundamental purposes for an appraisal"). Eminent domain involves the "right to take private property for public use," requiring that the property owner receive just compensation for the value of the property taken. HARRY D. MILLER & MARVIN B. STARR, MILLER AND STARR CALIFORNIA REAL ESTATE § 30A:1 (3d ed. 2004). Regarding lending,

In California, the instrument most commonly used to secure a promissory note given for a real property loan is a deed of trust. It effectively gives the creditor

ing to acquire the real property must have it appraised prior to initiating negotiations with the property owner.¹⁶⁶ The entity's offer of just compensation for the property must be no less than the fair market value of the property,¹⁶⁷ as stated in the appraisal.¹⁶⁸ Additionally, the public entity must provide the property owner with a written statement and summary of the basis for the amount established as just compensation.¹⁶⁹ When the property involved is residential owner-occupied, the homeowner is allowed upon request to review a copy of the appraisal upon which the entity's offer is based.¹⁷⁰ Appraisers are used in eminent domain actions because "it is important that properties under condemnation be evaluated at market value to properly estimate purchase price, benefits, and damages to the property being affected."¹⁷¹

Real property sales transactions involving loans from financial institutions also require appraisals. Lenders require an appraisal to determine the market value "of the property to be pledged as security for a mortgage loan."¹⁷² Under the California Business and Professions Code, a real estate broker negotiating a loan with a financial institution must prepare a statement for the lender that includes the fair market value of the property, as determined by an appraisal, and provide a copy of the appraisal to the lender.¹⁷³ An appraisal is an integral part of any real estate transaction, and the appraiser certifies his or her accountability not only to the lender, but also to "[t]he borrower, another lender at request of the borrower, the mortgagee or its successors and assigns, mortgage insurers, government sponsored enterprises, and other secondary market participants."¹⁷⁴ Use of

(lender) a lien on the secured property (also referred to as the collateral) to satisfy the obligation under the note if it is not paid.

GREENWALD & ASIMOW, *supra*, § 6:336.

166. CAL. GOV'T CODE § 7267.1(b) (West 1995). The owner is also entitled to accompany the appraiser during the property inspection. *Id.*

167. "Fair market value" is defined in California Civil Procedure Code § 1263.320(a) (West 2007).

168. CAL. GOV'T CODE § 7267.2(a) (West 1995 & Supp. 2007).

169. *Id.* § 7267.2(b).

170. *Id.* § 7267.2(c). The public entity can satisfy the written statement and summary requirements by providing to the owner a copy of the appraisal upon which the offer is based. *Id.*

171. CAL. DEP'T OF REAL ESTATE, *supra* note 99, at 315-16.

172. *Id.* at 315.

173. CAL. BUS. & PROF. CODE § 10232.5(a)(2) (West 1987 & Supp. 2007). If the lender decides to waive the independent written appraisal requirement, the broker must provide "the broker's written estimate of fair market value of the securing property, which shall include the objective data upon which the broker's estimate is based." *Id.*

174. UNIFORM RESIDENTIAL APPRAISAL REPORT, *supra* note 61, at 6.

appraisers in the high-stakes valuation settings of eminent domain and lending should extend to family home valuation in marital dissolutions—where the outcome can dramatically affect the ultimate allocation of property between the spouses and the ability of the wife to keep the family home.

III. Asking the Woman Question: Could Potential Overvaluation of the Family Home by Real Estate Salespersons Have a Systematic Effect on Women?

Potential overvaluation of the family home can have serious consequences on the ultimate distribution of marital property at dissolution. As illustrated with the Alice and Bob hypothetical, the spouse who wants to keep the home fares worse with overvaluation.¹⁷⁵ Women, as primary caretakers and custodians of children post-dissolution, tend to desire to remain in the family home if feasible.¹⁷⁶ Asking the woman question in this section involves an analysis of how the use of real estate salespersons as experts to value the family home can work systematically to the detriment of women trying to keep it.

A. Real Estate Salespersons Are More Likely than Appraisers to Overvalue the Family Home

Competition for business among real estate salespersons can induce a salesperson to overvalue the property. A salesperson “who feels some competition may be prone to overvaluing a property, thereby flattering the home seller into thinking that he [or she] can get top dollar.”¹⁷⁷ A seller will logically want to receive the highest price possible for his or her property and sell it in the shortest amount of time.¹⁷⁸ If competition among salespersons for the particular listing is fierce, it can create an incentive for the salesperson to present an overly optimistic picture of the price he or she believes a potential

175. See *supra* Part I.A.

176. See *supra* notes 36–37 and accompanying text.

177. Provo, *supra* note 127; see also Sichelman, *supra* note 12 (noting that “a lot of agents are still engaged in what’s known in the trade as ‘buying listings.’ That is, they tell sellers they can obtain a much higher price for their houses than the competition. Then, after the house languishes on the market unsold for 45 or 60 days, they persuade the seller to reduce the price back to where it should have been listed in the first place, or maybe even lower”).

178. G. STACY SIRMANS & DAVID A. MACHPERSON, THE COMPOSITION OF HEDONIC PRICING MODELS: A REVIEW OF THE LITERATURE 7 (2003), available at <http://www.realtor.org/ncrer.nsf/files/fullrptsirmansmacpherson1.pdf>; \$FILE/fullrptsirmansmacpherson1.pdf.

buyer will be willing to pay for the property.¹⁷⁹ Real estate salespersons work on commission, receiving a certain percentage of the selling price of a home.¹⁸⁰ The home seller pays the commission, often six percent, which is then split between the buyer's salesperson and the seller's salesperson.¹⁸¹ The sale price of a property thus directly impacts the amount of money the salesperson receives—the higher the listing and ultimately the selling price, the higher the commission the salesperson collects. This creates an incentive for salespersons to list a house as high as feasible to ensure maximum profit for both their clients and themselves.

Appraisers, in contrast with salespersons, are paid regardless of the property value or the ultimate outcome of the transaction.¹⁸² Appraisers are paid for the work they complete by the job, receiving a flat fee for completing the valuation.¹⁸³ Thus “[u]nlike real estate agents, brokers and lenders, all of whom get paid on commission, appraisers are just about the only ones who have no vested interest in the deal going through.”¹⁸⁴ Appraisers also provide an important checking function on the ultimate value of the property: “Banks never lend money based upon [a salesperson's] opinion of value—they hire a professional independent appraiser. The appraiser's report will tell the lender whether [the property is] overpriced. If so, [the seller] may very well lose [the] buyer.”¹⁸⁵ Although a particular property might be exceptionally valuable to a buyer who is willing to pay cash for the difference between the sale price and the appraised fair market value, i.e., the remaining amount of money needed for purchase beyond what the lender approves for the loan, the buyer would need quite extraordinary financial resources to do so. The goal of valuation, both

179. Setting a list price also involves careful consideration of the amount of time the property may spend on the market: “A listing price that is too high may have the effect of both lengthening the selling time and limiting the pool of potential buyers.” *Id.*

180. *See* Hoak, *supra* note 145.

181. *Id.* A six percent commission is not “set in stone”; a seller can often negotiate the commission with the salesperson, especially for a high-end home or one that is expected to sell quickly. *Id.* If the salesperson represents both the buyer and seller in a given transaction, the salesperson can potentially collect a six percent commission from the home seller. *See id.*

182. *See* Lloyd, *supra* note 154.

183. *See id.* Lloyd cites fees for appraisals as “usually between \$100 and \$500, but sometimes as much as \$2,000 for a massive rural estate.” *Id.*

184. *Id.*

185. Provo, *supra* note 127; *see also* Sichelman, *supra* note 12 (“[I]t's the appraiser who . . . decides what the house is really worth If he says the price isn't worth as much as your buyer is willing to pay for it, . . . financing won't go through unless the buyer ponies up more cash out of his own pocket.”).

in the marital dissolution context and in real estate transactions, is to provide an objective opinion of the fair market value of the property.¹⁸⁶ If a home is particularly valuable to a buyer, that buyer does not meet the statutory definition of buyer—one who is “ready, willing, and able to buy but under no particular necessity for so doing”—used to determine fair market value.¹⁸⁷

Salespersons have also been involved in transactions that have resulted in “fishing for appraisers” or “dialing for appraisals.”¹⁸⁸ When a salesperson sells a property, a mortgage broker may work with the buyer to secure a mortgage loan.¹⁸⁹ Appraisers have reported receiving calls from mortgage brokers who are “fishing” for an appraiser who can match the number needed to secure the loan.¹⁹⁰ Since the appraised value serves as the basis of the loan from the financial institution,¹⁹¹ this can result in pressure on the appraiser to value the home at a figure high enough to meet an overvalued sale price. As one appraiser described the situation:

Sometimes [mortgage brokers] tell me what value they need to make their loan go through The appraiser is not supposed to be made aware of the owner’s estimate of value, or the value that is needed to make the loan, so as not to be influenced or have a predetermined number prior to the inspection.¹⁹²

If the selling price of a property were not overly inflated, it would be unnecessary to fish for an appraiser to value the real estate at the right number. The fact that these fishing expeditions occur suggests that, in some cases, the property is overvalued by the real estate salesperson who set the list price for the property. A recent survey of the national appraisal industry conducted by October Research Corporation reported that “90 percent of appraisers feel pressure to inflate the value of homes to meet expectations—be it a purchase price or an

186. See CAL. CIV. PROC. CODE § 1263.320(a) (West 2007); UNIFORM RESIDENTIAL APPRAISAL REPORT, *supra* note 61, at 1.

187. CAL. CIV. PROC. CODE § 1263.320(a).

188. Lloyd, *supra* note 154.

189. See CAL. BUS. & PROF. CODE § 10131(d) (West 1987) (defining a real estate broker as a person who “[s]olicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity”); CAL. DEP’T OF REAL ESTATE, *supra* note 99, at 287, available at <http://www.dre.ca.gov/refoc.htm> (follow “Ch. 15 Mortgage Loans” hyperlink) (“Mortgage brokers may negotiate loans for property owners who are unable to obtain financing from more conventional sources. A broker negotiates such a loan through a private lender.”).

190. See Lloyd, *supra* note 154.

191. See CAL. DEP’T OF REAL ESTATE, *supra* note 99, at 313, 315.

192. Lloyd, *supra* note 154 (quoting John Philipp, Appraiser).

estimated value for a refinance.”¹⁹³ An appraiser who feels pressure to inflate the value of a home to meet a purchase price may be dealing with a property that has been overvalued by a real estate salesperson.

B. The Spouse Who Wants to Keep the Home Fares Worse with Overvaluation

An inflated home value can negatively impact the ultimate share of the property division received by the spouse who wants to keep the home, as illustrated by the Alice and Bob hypothetical. Upon dissolution of their marriage, Alice determines that she wants to stay in the family home with the couple’s two children. If the court values the home at \$1,000,000, the real estate salesperson’s opinion of value, and awards the home to Alice, Alice will not receive any other community assets from the property division.¹⁹⁴ If the court values the home at \$770,000, the appraiser’s opinion of value, and awards the home to Alice, she will receive an equalizing award of \$115,000 to effect an equal division of community property.¹⁹⁵ As the spouse who wants to keep the family home, Alice fares worse if the home is overvalued. Additionally, without this equalizing award, Alice may not have sufficient financial resources to pay expenses associated with keeping the home, including the mortgage, property taxes, and upkeep.¹⁹⁶ The overvaluation of the family home, through the use of Bob’s salesperson, will dramatically impact both Alice’s share of the marital property settlement, as well as her ultimate ability to afford to maintain the home if it is awarded to her.

C. As the Primary Caretakers of Children Post-Dissolution, Women Are More Likely to Desire to Remain in the Family Home—Thus Overvaluation of the Family Home Works to the Detriment of Women

Due to the recognized benefits of keeping the children in the family home,¹⁹⁷ and the woman’s continued role as the primary care-

193. *Id.* Copies of the study can be purchased from October Research Corporation by accessing their website at <http://www.octoberresearch.com/studies/nas2007/index.cfm>.

194. *See supra* Part I.A; *infra* app. at Part A.

195. *See supra* Part I.A; *infra* app. at Part B.

196. *See supra* note 35 and accompanying text.

197. *See* William A. Galston, *Divorce American Style*, 124 PUB. INT. 12, 24 (1996) (identifying “the goal of allowing children to remain in their homes during the period of greatest vulnerability” after divorce in order to “minimize disruption of vital social ties”); *see generally* *In re Marriage of Duke*, 161 Cal. Rptr. 444, 446 (Ct. App. 1980) (discussing the desire

taker of children after dissolution,¹⁹⁸ the wife is more likely to desire to remain in the family home. Regarding the disposition of the family home, courts increasingly give consideration to the potential benefits of awarding the home to the spouse with primary custody of the children.¹⁹⁹ Allowing children to remain in the family home when possible can be beneficial to their development: "A child's best interests are often served by remaining in the marital home, near friends and school, rather than by moving to unfamiliar surroundings."²⁰⁰ The spouse who provides primary care for the children post-dissolution is therefore inclined to remain in the family home with the children if financially feasible.²⁰¹

Women are more often the primary custodians and caretakers of children after marital dissolution.²⁰² A woman's role as the primary caretaker of her children after divorce is a continuation of her caretaking role during the marriage.²⁰³ Mothers are awarded sole physi-

of the couple's children to remain in the home and recognizing the trauma that can result to children from moving them out of the family home).

The value of a family home to its occupants cannot be measured solely by its value in the marketplace. The longer the occupancy, the more important these noneconomic factors become and the more traumatic and disruptive a move to a new environment is to children whose roots have become firmly entwined in the school and social milieu of their neighborhood.

Id. at 446.

198. See DOWD, *supra* note 18, at 62 (noting that "the caretaking patterns [post-dissolution] are [similarly] gendered" and that "[s]ole or primary custody is overwhelmingly granted to mothers" (internal citations omitted)).

199. See FINEMAN, *supra* note 22, at 41.

200. Davis, *supra* note 37, at 1089.

201. The financial feasibility of awarding the home to one spouse depends upon the availability of other community assets to offset the home award. See WEITZMAN, *supra* note 23, at 79 ("One way of maintaining the family home for the children is to award the home to the custodial spouse, and to award an asset of equal value, such as the husband's retirement pension or a vacation home, to him.").

202. See Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 59 (1995) ("After divorce, most children will live solely or primarily with their mothers, and be cared for nearly exclusively by them."); Barbara Stark, *Guys and Dolls: Remedial Nurturing Skills in Post-Divorce Practice, Feminist Theory, and Family Law Doctrine*, 26 HOFSTRA L. REV. 293, 306-07 (1997) ("After divorce, most children continue to live with their mothers, who continue to make a home for them. Caregiving remains women's work even though it is not doctrinally mandated.").

203. See Stark, *supra* note 202, at 312. "[M]others handle the bulk of responsibilities associated with [children's] physical care: doctors' appointments, nursing and chauffeuring duties, preparing them for school and helping them with homework. Mothers still have the lion's share of housekeeping chores . . ." Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, 183 (2000) (quoting Whirlpool Corp., *Report Card on the New Providers: Kids and Moms Speak* (1998), available at <http://www.WhirlpoolCorp.com/whr/ics/foundation/part3.html>).

cal²⁰⁴ and legal²⁰⁵ custody of their children in ninety percent of divorces nationwide.²⁰⁶ Even in California, where joint custody is favored, mothers still typically remain the primary caretakers of children.²⁰⁷ A study of 933 California families found that “[m]others plainly remain the primary custodians of children following divorce: they receive sole physical custody of the children in two out of three cases, while fathers have sole physical custody less than 10 percent of the time.”²⁰⁸ The authors reported that despite joint legal custody in approximately eighty percent of the cases, mothers received sole physical custody in about half of those cases; and in two-thirds of cases with joint physical custody, children stayed overnight more frequently with their mothers.²⁰⁹ Although men can, and do, provide primary care for children, “men are not primary caretakers in almost all families.”²¹⁰ Further, it is unlikely that a father who was not a primary caretaker during the marriage will take on this role after dissolution.²¹¹ A father who obtains custody of his children upon dissolution “is likely to have a wife, or mother, who acts as the primary caretaker.”²¹²

Returning to the Alice and Bob hypothetical, as the primary caretaker of the couple’s two children, Alice intends to continue to live in the family home with her son and daughter. Christopher, age ten, and Danielle, age five, have resided in the family home since birth. Alice and Bob fear that moving the children out of their home will result in unnecessary emotional trauma, in addition to the distress already caused by the dissolution. Alice reduced her work schedule to part-

204. Physical custody “means the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody.” *Taylor v. Taylor*, 508 A.2d 964, 967 (Md. 1986).

205. Legal custody “carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child’s life and welfare.” *Id.*

206. Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2256 (1994).

207. *Id.*

208. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD* 112, 113 fig. 5.3 (1992). For a visual reference of the statistics cited, see *id.* at 113 fig. 5.3. The authors studied approximately 1100 California couples who filed for divorce in either San Mateo or Santa Clara County between September 1984 and April 1985. *Id.* at 13.

209. *Id.* at 112, 269 (“Even in these dual-residential families, the division of child-rearing responsibilities was not typically 50-50.”).

210. Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN’S STUD. 133, 158 (1992).

211. *Id.* at 206.

212. *Id.* at 158.

time after the children were born,²¹³ allowing her to spend more time with Christopher and Danielle at home and fulfill daily caretaking activities such as picking them up from school, driving them to sports practices, helping them complete their homework, and making dinner. Under the current custody agreement, Alice and Bob share joint legal custody. Alice has sole physical custody of the children, who stay with her approximately seventy percent of the time, while Bob maintains substantial visitation.²¹⁴ Alice and Bob possess sufficient financial assets to allow Alice to remain in the family home with the children; as their primary caretaker for seventy percent of the time, Alice plans to continue to reside in the family home with Christopher and Danielle.

In Alice's situation, if the court values the home at \$1,000,000, and awards the home to her, Alice is not entitled to any other community assets from the property division.²¹⁵ This hypothetical is representative of the majority of dissolutions where women, as primary caretakers, want to stay in the family home with their children if feasible. In the same study of California families,²¹⁶ 411 families owned a home and provided information about its disposition.²¹⁷ The mother was awarded the home in thirty-seven percent of the cases, while the father kept the home in twenty-six percent, and the home was ordered sold, with the proceeds divided between the spouses, in the remaining thirty-seven percent.²¹⁸ The authors of the study also found a strong correlation between the physical custody decree and disposition of the family home—when the mother received sole physical custody of the children, forty-five percent of mothers were awarded the home, versus nineteen percent of fathers.²¹⁹

213. See generally Dowd, *supra* note 18, at 57 ("Women are far more likely to accommodate work to family, by their choice of job, by their choice of flexible hours, or by limiting their wage to work part time.").

214. In this hypothetical scenario, Bob has the children one school day per week and every other weekend. See generally Joan B. Kelly, *The Determination of Child Custody*, 4 FUTURE OF CHILDREN 121, 124 (1994), available at http://www.futureofchildren.org/usr_doc/vol4no1entire_journal.pdf ("Regional studies suggest that joint legal and sole maternal physical custody is today the most common legal custody arrangement in the United States.").

215. See *supra* Part I.A; *infra* app. at Part A.

216. See MACCOBY & MNOOKIN, *supra* note 208, at 13.

217. *Id.* at 124.

218. *Id.* at 124–25. Notably, the duration of the marriage played a significant role—cases in which the father kept the home involved shorter marriages on average than couples in the other two groups. *Id.* at 125.

219. *Id.* In cases of joint custody (114 of the 411 families), the spouses were virtually equally likely to keep the home (twenty-nine percent of mothers versus twenty-six percent of fathers awarded home), but the home was more often sold than awarded to either parent (forty-five percent). *Id.* at 125–26. The study also found that "when children actually

Although more contemporary study regarding the frequency of the wife receiving the family home in California is required to fully comprehend the impact on women, the logical desire for caretaking women to remain in the family home suggests that the overvaluation of the family home tends to work systematically to their economic detriment. "Justice for divorced wives and their children will not necessarily require changes in the texts of existing laws, but it does require new applications of these laws to individual cases."²²⁰ Limiting expert testimony on the fair market value of the family home to appraisers when the wife wants to keep the home presents the sort of new legal application that can improve the economic situations of women and their children after marital dissolution.

Conclusion

The exclusive use of appraisers as experts to value the family home in marital dissolutions where the wife desires to remain in the home will improve the dissolution process and potentially level the economic situations of divorced spouses. Limiting expert testimony on the fair market of the family home to appraisers will promote the use of more competent experts, who are likely to be more accurate in their valuations and do not face inherent conflicts of interest. Using appraisers will promote fairness and uniformity in the valuation process, and potentially help to streamline contentious litigation by reducing any inconsistencies between the values identified by the parties' respective experts.

Through the use of the woman question, this Comment identifies a specific practice in California family law that can work to the disadvantage of women. The woman question provides a useful tool not only in feminist legal scholarship, but also for practicing lawyers and the judiciary:

Asking the woman question does not require a decision in favor of a woman. Rather, the method requires the decisionmaker to search for gender bias and to reach a decision in the case that is defensible in light of that bias. It demands, in other words, special attention to a set of interests and concerns that otherwise may be . . . overlooked.²²¹

reside in both households, the parents are less likely to sell the home than if they merely have a joint physical custody decree." *Id.* at 125.

220. BAER, *supra* note 1, at 139.

221. Bartlett, *supra* note 43, at 846.

In qualifying experts to testify on the fair market value of the family home, use of the woman question encourages the court to pay “special attention” to how the overvaluation of the family home can work to the detriment of women trying to keep it. “‘Doing law’ as a feminist means . . . recognizing that the woman question always has potential relevance and that ‘tight’ legal analysis never assumes gender neutrality.”²²²

This Comment raises the issue of how the potential for overvaluation of the family home can work systematically to the economic detriment of women who desire to remain in the family home. More empirical study on the overvaluation of the family home, and its effect on women, is needed to fully comprehend how the use of salespersons as experts impacts women. “Asking the woman question is in part an empirical assessment—using data to reveal how seemingly neutral laws contain gender bias.”²²³ This Comment calls for further empirical study on the potential overvaluation of the family home by real estate salespersons, as well as the financial impact on women, through an evaluation of marital property settlements and how the value of the family home impacted the ultimate distribution. In the meantime, questioning the fairness of the current valuation process and advocating for the exclusive use of appraisers as experts can address the effects that overvaluation of the family home may have on wives and mothers trying to keep it.

222. *Id.* at 843.

223. LEVIT & VERCHICK, *supra* note 42, at 46.

Appendix

A. Property Division Scenario A: Family Home Valued at \$1,000,000

	Alice	Bob
Family Home Equity \$700,000*	\$700,000	0
Liquid Assets \$700,000	0	\$700,000
	\$700,000	\$700,000

* \$1,000,000 (value) - \$300,000 (loan) = \$700,000 (equity)

B. Property Division Scenario B: Family Home Valued at \$770,000

	Alice	Bob
Family Home Equity \$470,000*	\$470,000	0
Liquid Assets \$700,000	0	\$700,000
Equalizing Award to A from B	\$115,000	(\$115,000)
	\$585,000	\$585,000

* \$770,000 (value) - \$300,000 (loan) = \$470,000 (equity)