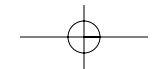
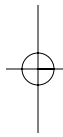
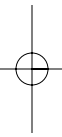
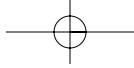


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**I**

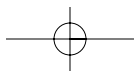
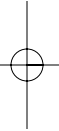
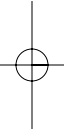
# **FINANCIAL ASPECTS OF DIVORCE**

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## CHAPTER

## 1

# Introduction

The devastating truth hits one Monday afternoon when you are served with divorce papers. Whether it comes as a surprise or not, the reality that you are about to go through a divorce has now hit. We now rush to defend. The feelings of anger, hurt, getting even, and winning begin to go through one's mind. The problem is we begin to think from the heart and not the head. It is not uncommon to feel lost, scared, empty, and uncertain. What will the future bring? What will this cost me? How can I survive? What is my attorney doing? These are all feelings and questions that both men and women have. Many battles would not need to be fought if we only knew the financial consequences.

## Knowledge Is Power

The question "Is my attorney really being creative and understanding of my financial consequences?" is often met with a blank stare. The key to a successful divorce and the ability to negotiate on an equal footing with your spouse is knowledge. Knowledge is power. The reason most cases can not be mediated is the lack of knowledge by one party or both. The more knowledge the parties have, the more likely a case is to be settled and the easier they will feel with the final settlement. This book will provide that knowledge in the area of tax and financial matters that affect divorce. Various areas of divorce will be covered with the use of checklists and easy to read discussions of the topics, laid out in a direct format. The book is broken down into three sections: Section I—Financial Aspects of

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Divorce, Section II—The Tax Side of Divorce, and Section III—The Valuation Process.

The book is designed not only as a technical resource but as a guide to assist you in raising the issues or questions to ask your attorney or soon to be ex-spouse. It is also designed for those who have not filed for divorce but wish to familiarize themselves with the multitude of issues that will need to be addressed and in effect do some pre-divorce planning. Interestingly enough, for many, this will be the first time that they get a true understanding of their personal financial situation. I have had many clients, married for 20, 25, and 35 years, who never even knew what their total family assets, or even their living expenses, were. In many cases, neither spouse really know what the other spouse earned. There is often a false understanding of what life should be and what it really is. Again, this may be the first time that both parties get a true picture of their expenses and earnings. Though, at times I refer specifically to men or maybe women, my comments are truly gender neutral. I have had many sophisticated clients who did not have any true idea of the details of their spending and the makeup of their assets. For those who do not have major estates and huge incomes, the simple knowledge of the basic tax and financial issues can lead the parties to accept the reality and work out a proper settlement. Knowing, understanding, and accepting what you have as a marital estate can take you a long way from what you think you deserve, which may be totally warranted, to what is equitable based on the marital estate.

### Finding and Selecting the Right Divorce Attorney

Putting a professional team together to complete your divorce in a successful and cost efficient manner is an important first step. Many people will run out to hire a big name attorney in an effort to scare their spouse. Wrong! Again, it goes back to using one's head and not heart when interviewing lawyers and understanding their strengths and weaknesses and the type of cases that they deal with. It is very important to find out how much work they do in divorce. I believe that the practice of matrimonial law is one of the most difficult areas because the divorce lawyer not only needs to understand the law, but play psychologist, understand tax issues and financial matters, have a business acumen, ability to negotiate, and understand real estate and business valuations. Thus, finding a lawyer who practices in this area full time is a critical element in the selection process. Figure 1.1 provides a checklist to use when interviewing a prospective attorney. Using the checklist in your discussions will enable you to compare the candidates and make an informed decision.

It is also important to understand the type of case that you have: Is child custody an issue? Do you have a significant estate? Do you have sophisticated invest-

**FIGURE 1.1** Checklist for Selecting an Attorney

<b>Question to ask or information to obtain</b>	<b>Response</b>
Do you charge a consultation fee for an initial consultation?	
Do you provide a written memorandum on the consultation and the advice given?	
What is the complete name of the law firm?	
What is the name of the lead attorney assigned to your case?	
Is he or she a partner in the firm?	
Who is the associate to be assigned to your case, if any?	
How much time will the associate be assigned to your case as opposed to your lead attorney?	
For each attorney obtain their resume and ask about their experience.	
How many years has the attorney been practicing as a divorce attorney?	
Does the attorney handle divorces on a full time basis?	
What are their strengths? Do they specialize in litigation, child custody matters, financial matters, etc.?	
What is the name of any paralegal that would be assigned to your case? (Remember, that the use of paralegals in a simple asset and income case can lead to significant savings).	

*(continued)*

**6 FINANCIAL ASPECTS OF DIVORCE****FIGURE 1.1** Continued

<b>Question to ask or information to obtain</b>	<b>Response</b>
What is the name of the lawyer's secretary or administrative assistant?	
What is the fee arrangement that the lawyer will charge and how does he or she charge?	
What is the amount of the retainer?	
How will the attorney get paid and when? Will you be required to pay monthly or will the attorney wait until the case is settled to get paid?	
What is the lawyer's policy on returning phone calls? When should you expect to have your phone calls returned?	
Does the attorney believe in and support mediation as a form of settling a case?	
Is the lawyer(s) who will be on your case a member of the American Academy of Matrimonial Lawyers?	
Is the attorney listed in the book, Best Lawyers in America? (This book lists the top lawyers in the nation in their various fields of specialization.)	
Who do you think are the best matrimonial lawyers and how do you compare to them?	

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ments?, etc. It is important for you to ask yourself these questions honestly so that you can select the right attorney for your case. Each attorney may have a particular expertise or strength in a specific area, such as child custody or financial matters.

The first question I hear is always, where do I start in finding the right lawyer? If you already have located a good certified divorce planner or financial expert, that person should be able to assist you in your search. Some people find a divorce lawyer through recommendations from professionals such as clergy, therapists, and marriage counselors. Other lawyers that you may know are often also a good referral source for a divorce lawyer. With any referral source, you can always ask "Would you send your brother, mother, or sister to them?"

The local Bar Association can also provide you with names of experienced matrimonial lawyers. In this case, always ask for a couple of names so you will have a few to interview. Calling the local chapter of the American Academy of Matrimonial Lawyers is also a good source of qualified matrimonial attorneys. If you go to the library you can probably look in the Martindale-Hubbell Law Directory or The Best Lawyers in America. Given today's technology, the Internet is another source to begin your search. Lastly, if all else fails, you can always turn to the yellow pages. Many states do not allow lawyers to state a specialty, however, they usually will allow them to state that their practice is "concentrated in" or "limited to" an area of law, such as matrimonial.

In the end, one of the most important factors to consider when selecting an attorney is their reputation. Ask other matrimonial lawyers what they think of a particular attorney. The responses may shock you.

During your initial interview, besides just asking the questions in Figure 1.1, start to get a feel for whether or not you and the lawyer will be compatible. Remember you will be spending a lot of time with this attorney and your future financial well-being may be tied to his or her performance as well as personal needs and desires from the case. Make sure that you can share your most confidential matters with the lawyer without you feeling that the lawyer is being condescending or judgmental. It is very important that there is good chemistry between the lawyer and yourself. The problem with this area is that most of it will be based on your gut feeling and how you feel when you come away from the interview. Remember to write down your feelings so you can go back to your notes later on in the selection process.

A number of people going through divorce, especially when there are not a lot of assets involved and the people are civil, will ask whether the lawyer they find can represent both parties in an effort to save costs. Since attorneys are advocates for their clients, this is a difficult situation for an attorney. I do not

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know many that would handle it and I would not recommend it. If you have an issue or a question that may be advantageous to you, it will probably be disadvantageous to your spouse. In essence, both you and your spouse should have your own representation. Having said this, this does not stop you from representing yourself. Representing yourself in court without the assistance of an attorney is called *pro se*. But remember the old saying, "A person who represents himself, has a fool for a lawyer".

### Gathering of the Assets

The first step is to gather and understand what the marital estate is. Many couples live like kings with very few assets to show for it. They may be living a million-dollar lifestyle only to find out they are in debt with very few real assets. So where can I turn to find out what my assets are? First pull together the obvious assets that you are aware of:

- *The personal residence.* Pull the insurance policy. There may be a rider attached detailing personal property and jewelry and its appraised value. Obtain a copy of any recent appraisals that you may have. (If you recently refinanced your mortgage, there would have been an appraisal. Go to your local real estate agents and ask them to pull the recent sales from the multiple listings to get an idea of the current fair market value. Then you can go on the Internet to find a preliminary value of your house. Take pictures of your house.
- *Obtain a copy of the most recent mortgage statement.* If you know who is servicing your mortgage, you can call and get a history of the payments made and the current balance outstanding and if there is an escrow account maintained. Many times real estate taxes are escrowed and paid by the mortgage company. Any excess escrow amount would be an asset of the marital estate.
- *Listing of all bank accounts.* Include those that are checking, savings, and money market accounts. A simple review of schedule B of your joint federal individual income tax return will assist you.
- *Investment accounts.* This includes all brokerage accounts, mutual funds, and CDs. Even if you and your spouse trade on-line, there will be an account and a listing of investments. This should also include stock options from your employer including those that are vested and non-vested. Given the environment of the dot.com companies, a large portion of management

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and even staff's compensation may be in some form of a stock option. What a stock option is, how it is valued, taxed, and handled for purposes of the divorce is important. The issue of stock options in divorce and how to handle them is still developing and a basic overview of this subject is summarized in Appendix A.

- *Retirement Accounts.* This will include not only both spouses' individual retirement accounts (IRAs) but also all employer-sponsored plans: Defined Contribution Plans (profit sharing and 401(k) plans); Defined Benefit Plans (pension plans); Nonqualified plans (Stock Appreciation Rights); and Employee Stock Option Plans (ESOPs). Defined Contribution and Defined Benefit plans are discussed in Chapter 6. Normally, employer-sponsored plans will have a handbook describing the plan and its benefits. It is also not uncommon for the employer to provide a summary of benefits.
- *Business Interests.* This would include all closely held businesses that you or your spouse owns. These can be ones that you are active in, such as a business which you own and work at or investments made from a passive investment perspective such as an investment in a real estate limited partnership. The key here will be the determination of the fair market value of these business interests. In Section III we provide a straightforward overview of this process and basic terminology used by appraisers. Again, a review of one's federal tax return can provide information on one's pass-through investments.
- *Life Insurance.* When listing the various life insurance policies, it is important not only to know the amount of coverage, but also the cash surrender value. Obtain details such as: policy number; beneficiary; insured; cash value; policy holder loans; and owner of the policy.
- *List of personal property.* Don't be afraid to photograph or video tape the contents of your residence. You can also hire an expert to inventory and value your personal property.
- *Automobiles.* List the make, model, and year of each vehicle. Make a distinction between those that are owned and leased. The values can be determined easily through the Internet from one of the auto sites that price out used vehicles.
- *Other miscellaneous items.* Include items such as boats, artwork, jewelry, coin or stamp collections, and airline mileage. (This becomes tricky as most airlines will not allow the transfer of miles, thus forcing one spouse to cash in tickets to be used over the next year.)

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- *Liabilities.* Don't forget to list all of the liabilities such as: credit cards, personal loans, and judgments. It is important that any loans between family members be documented to show intent as a loan as opposed to a gift.

These items can be put into a marital balance sheet which will summarize the assets and liabilities. Additionally, the spreadsheet can be used to allocate assets and determine the overall allocation of the marital estate. Figure 1.2 provides an example of a marital balance sheet worksheet. You will notice that the worksheet not only lists the individual assets but also categorizes them between marital and non-marital and provides an area to show how the allocation of the assets for settlement may be structured. For those states that are not community property states, usually the assets are allocated on an equitable basis. It is important to note that equitable does not necessarily mean equal. This concept is further discussed later in this section. However, the beauty of this worksheet prepared in Excel, is that it provides a complete picture of the parties' assets and how their allocation will provide each on an individual basis and as a percentage of the total marital estate. A worksheet such as this one gives a good picture of the proposed or negotiated settlement. The next step would be to use this worksheet to analyze the individual assets allocated and the income that they will generate for purposes of assistance with one's annual cash flow needs. The worksheet can also be used to look at those assets that will grow in the future and use it as a starting point to see how each party's net worth will grow or decrease over time. This can assist in determining whether a proposed allocation is equitable. Obtaining an equitable distribution of the marital estate requires understanding of the business assets, tax implications, pension rules, etc. Thus, the marital balance sheet worksheet is the best place to start in determining what type of discovery will need to be done, what experts will be needed, and what other issues will need to be resolved. Although in Section II we deal with the tax issues of divorce, it is important to mention here that though each state may handle tax implications differently, in general it is important that your attorney understands how the tax issues impact the equality of the assets allocated and get this into evidence. In most states, if your attorney does not get the tax implications into evidence, the judge may not be bound to consider its implications. However, in a few states, the courts will not speculate as to the future impact of the tax that may or may not arise in the future and will only consider situations where the tax is imminent. Remember that not only are you and your spouse interested in the tax impact of your divorce, but so is the IRS. I have seen many a case that has been settled due to the fact that going to trial could generate serious problems with the IRS. There is a saying to remember, even if you are bitter with your soon-to-be ex, "Don't kill the goose that lays the gold eggs."

**FIGURE 1.2** Marital Balance Sheet

**IN RE MARRIAGE OF BOATMAN  
NOAH and DEZ BOATMAN  
SUMMARY OF MARITAL ASSETS AND LIABILITIES**

Asset No.	Asset Category/Description	Account Number	Owner	Date Valued	VALUE	MARITAL ASSETS	NON-MARITAL ASSETS	Ref.	ALLOCATION OF MARITAL ASSETS	
									NOAH	DEZ
<b>ASSETS</b>										
I	RESIDENCE									
1	17 Boat Lane, Boatville, MA			8/31/01				A		
	Current Value	\$ 700,000.00								
	Less:									
	Mortgage Value—Fleet Mortgage	(187,142.16)		8/21/01				B		
	NETEQUITY				512,857.84	\$ 512,857.84		C		\$ 512,857.84
2	Residential Lot in the new Boatville development			7/15/01						
	Current Value—Land	150,000.00								
	Less:									
	Mortgage Value	(50,000.00)						D		
	NETEQUITY				100,000.00	\$ 100,000.00			\$ 100,000.00	
	Total Residence				\$ 612,857.84	\$ 612,857.84			\$ 100,000.00	\$ 512,857.84
<b>CASH AND CASH EQUIVALENTS</b>										
II	1	First Bank of Boatville	12-245-665	7/15/01	\$ 55,000.00		\$ 55,000.00	E		\$ -
	2	First Bank of Boatville	35-5684-558	8/15/01	3,500.00			F		3,500.00
	3	First Bank of Boatville	0254-58-9985	8/15/01	25,000.00			G		25,000.00
	7	Boatville Savings National Bank	226548	8/31/01	36,759.13			H		36,759.13
	8	Boatville Savings National Bank	435895	8/31/01	95,534.23			I		25,400.00
	14	Cash—held in safe at home by Noah		8/31/01	52,000.00			J		70,134.23
		Total Cash & Cash Equivalents			\$ 267,793.36	\$ 212,793.36	\$ 55,000.00		\$ 114,159.13	\$ 98,634.23

(continued)

FIGURE 1.2 Continued

Asset No.	Asset Category/Description	Account Number	Owner	Date Valued	VALUE	MARITAL ASSETS	NON-MARITAL ASSETS	Ref.	ALLOCATION OF MARITAL ASSETS	
									NOAH	DEZ
<b>III INVESTMENT ACCOUNTS</b>										
1	Goldman Sachs stocks	6589-548774	H	8/12/01	\$ 625,000.00		\$ 625,000.00	K		\$ -
2	Morgan Stanley stocks	56-5059842	H	8/31/01	210,000.00	210,000.00		L	210,000.00	
3	Boatville Investments stocks	652899	H	8/10/01	52,500.00	52,500.00		M	52,500.00	
4	Merrill Lynch stocks	54H-564815	H	8/31/01	1,173,500.00	1,173,500.00		N		1,173,500.00
	Total Investment Accounts				\$ 2,061,000.00	\$ 1,436,000.00	\$ 625,000.00		\$ 262,500.00	\$ 1,173,500.00
<b>IV RETIREMENT ACCOUNTS</b>										
1	Individual Retirement Accounts (IRA)—Noah Boatville Investments	1369052	H	8/31/01	\$ 535,460.00	\$ 535,460.00		O	\$ 535,460.00	
2	Individual Retirement Accounts (IRA)—Dez Morgan Stanley	5689-56-R	W	8/20/01	123,600.00	123,600.00		P		\$ 123,600.00
3	Profit Sharing Plan—Noah's from Boatmake, Inc. Profit Sharing Plan		H	8/31/01	\$ 896,425.00	896,425.00		Q	448,212.50	448,212.50
	Total Retirement Accounts				\$ 1,555,485.00	\$ 1,555,485.00	\$ -		\$ 983,672.50	\$ 571,812.50
<b>V REAL ESTATE:</b>										
1	15 Boat Street, Boatville, MA									
	Current Value:	\$ 325,000.00								
	Less: Mortgage Value:	(168,000.00)								
	Total Real Estate				\$ 157,000.00	\$ 157,000.00		R		157,000.00
					\$ 157,000.00	\$ 157,000.00	\$ -		\$ -	\$ 157,000.00



**FIGURE 1.2 Continued**

Asset No.	Asset Category/ Description	Account Number	Owner	Date Valued	VALUE	MARITAL ASSETS	NON-MARITAL ASSETS	Ref.	ALLOCATION OF MARITAL ASSETS	
									NOAH	DEZ
X	MISCELLANEOUS									
1	Jewelry		W	8/17/01	\$ 186,000.00	\$ 186,000.00		Y		186,000.00
2	Airline Mileage	1.5 million miles on United	H	8/31/01	18,750.00	18,750.00		Z	18,750.00	
3	Base Ball Card Collection		H	8/26/01	38,000.00		38,000.00	AA		
4	Doll Collection		W	8/10/01	19,250.00		19,250.00	AB		
	Total Miscellaneous				\$ 262,000.00	\$ 204,750.00	\$ 57,250.00		\$ 18,750.00	\$ 186,000.00
	TOTAL ASSETS				\$ 6,329,386.20	\$ 5,452,136.20	\$ 877,250.00		\$ 2,555,831.63	\$ 2,896,304.57
XI	LIABILITIES									
	Credit Cards		W	8/21/01	9,750.00	9,750.00		AC	9,750	
	Master Card	2159-8486-84	H	8/21/01	3,750.00	3,750.00		AC	3,750	
	Visa	254-55895-879541								
	Total Credit Cards				\$ 13,500.00	\$ 13,500.00	\$ -		\$ 13,500.00	\$ -
XII	Other Debt									
	Taxes due on 2000 Income tax liability				\$ -	\$ 34,500.00	\$ 34,500.00			\$ 34,500.00
	Note due to the Business—Boatmake, Inc.					132,000.00	132,000.00			132,000.00
	Loan to Mother				6,990.00	6,000.00			6,000.00	
	Total Liabilities				\$ 172,500.00	\$ 172,500.00	\$ -		\$ 172,500.00	\$ -
	NET WORTH				\$ 186,000.00	\$ 186,000.00	\$ -		\$ 186,000.00	\$ -
					\$ 6,143,386.20	\$ 5,226,136.20	\$ 877,250.00		\$ 2,369,831.63	\$ 2,896,304.57
	OVERALL ALLOCATION PERCENTAGE OF MARITAL ESTATE								45.00%	55.00%
	OVERALL ALLOCATION PERCENTAGE OF MARITAL ESTATE AND									
	AFTER CONSIDERING EACH PERSON'S NON-MARITAL PROPERTY								39.19%	60.81%
	OVERALL ALLOCATION PERCENTAGES									

## FOOTNOTES:

## (A) Owner Abbreviations

JT = Joint Ownership  
 H = Owned by Husband  
 W = Owned by Wife

## (B) Sources of Value

- A Appraisal done by Real Estate Realty Group as of August 31, 2001  
 B Mortgage statement dated 8/31/01  
 C Since this was just purchased on June 30, 2001, the purchase price was used.  
 D Mortgage taken from Boatville Mortgage Company.  
 E Per monthly statement dated 7/16/01  
 F Per monthly statement dated 8/15/01  
 G Per monthly statement dated 8/15/01  
 H Per monthly statement dated 8/31/01  
 I Per monthly statement dated 8/31/01  
 J Per monthly statement dated 8/31/01  
 K Per printout of statement from online service  
 L Per faxed statement from Morgan Stanley as of 8/31/01  
 M Per monthly statement dated 8/10/01  
 N Per monthly statement dated 8/31/01  
 O Per monthly statement dated 8/31/01  
 P Per computer printout from A.J. Broker on 8/20/01  
 Q Monthly brokerage statement for 8/31/01  
 R Appraisal done by Real Estate Realty Group on as of August 31, 2001 and mortgage statement from Mortgage are Us, Inc.  
 S Per statement of benefits from Noah's agent from Boatville Insurance Group  
 T Valuation by The Investigative Valuation Group, LLC as prepared as of August 31, 2001. The IV Group was appointed by the Court as the independent evaluator.  
 U Kelley Blue Book value as of 8/31/2001, assumed 35,000 miles per year  
 V Kelley Blue Book value as of 8/31/2001, assumed 15,000 miles per year  
 W Valued by Mia Johnston, ASA a certified personal property expert with MI Furniture sellers.  
 X Valued by Mrs. Jane Knowing, a certified gemologist as of 8/31/01  
 Y Per Noah's monthly mileage statement dated 8/31/01. Assumed 20,000 needed per ticket with an assumed value of \$250 per ticket.  
 Z Per Noah's monthly mileage statement dated 8/31/01. Assumed 20,000 needed per ticket with an assumed value of \$250 per ticket.  
 AA Appraised by the Baseball Collectors Group from Cooperstown, NY on June 30, 2001. This was originally done for the insurance coverage on the collection.  
 BB Appraised by an expert from the Insurance company which appraised it for insurance coverage on May 17, 2001  
 CC Per 8/31/01 monthly credit card statement.

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### Discovery

In order to obtain the complete list of assets, both parties will need to make a full disclosure of the assets that they have. However, just because the assets are not disclosed by one spouse does not necessarily mean that other assets don't exist. This is where the phase of the divorce process called discovery comes in. In this phase research and investigation is important. A proper laid out plan for discovery is key and the participants of the divorce can play a key role in working with their attorney in getting this done, but like anything else there is a cost versus benefit to everything and the discovery phase is no exception. Sitting down and being realistic and having your lawyer be realistic with you is important. I have seen parties spend thousands of dollars in the discovery phase only to find no more in assets than had been previously disclosed, but one spouse was on a mission or witch hunt to satisfy personal feelings and beliefs. Remember the old saying, "I know he has millions hidden away," even though he has worked for a company as a laborer making only \$50,000 a year and supporting a family of five for the last ten years. The discovery phase is important but it has to be handled wisely and cost effectively.

In the discovery process, as well as throughout the divorce process, a Certified Divorce Planner or forensic accountant who has a specialty in divorce can be a great asset. By giving advice and working with the attorney, the forensic accountant can be a key member of the divorce team. The earlier the financial expert is involved, the better. It is important that the financial expert meets with the client early as this is an important tool in creating the framework and being able to address the issues specific to the individual. These professionals, who are usually accountants or CPAs by background, are trained to read and interpret financial data. They have the ability to take the information obtained through discovery, analyze it, and organize it into a useful and understandable form. The forensic accountant well-versed in matrimonial matters can: The key is having a financial advisor or forensic accountant who is a specialist in divorce matters. It takes a person who has direct experience to add value to your team. My advice is don't settle for Uncle Joe who is the family CPA.

- Identify the issues of the case at the initial stage of the divorce, provide direction, and avoid being too late at the end.
- Assist the attorney in the discovery process by ensuring that the necessary documents are identified and ultimately requested. Financial experts are trained to locate, read, and interpret financial data and put it in a format that is useful and easy to follow for the attorney and client.

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- Show best case and worst case scenarios and add some reality to the decision-making process by giving an independent view of the situation. Remember, a good independent financial expert is an advocate of his or her own opinion, as opposed to the personal feelings of the client.
- Assist in structuring a divorce settlement by clearly showing the financial impact of the various offers that are present and providing creative and alternative settlement ideas.
- Review and address all of the tax consequences of the divorce settlement. So many times this is overlooked in the settlement and the drafting of the settlement agreement and only found when it is too late to correct.
- Provide valuation of the various business interests that the parties may have. Though discussed later, many of the good forensic accountants in divorce are well-trained in the area of business valuations. Again, this goes into reviewing the qualifications of your financial expert and his or her experience in divorce situations.
- Assist in preparation of the attorney for the opposing financial expert's deposition and examination at trial.
- Provide testimony at trial if the case is not settled with regards to the financial matters. The financial expert may also be called to explain difficult and technical matters to both sides to assist in the settling of a case.

As you can see, a good financial expert, well-versed in matrimonial and valuation matters, can be a key asset to any divorce team. However, the seasoned financial expert does not replace the lawyer or the legal skills that the lawyer brings to the table. He or she supplements and enhances the attorney's skills which is why finding the right expert is key. There are many who would like to be in this area of practice as opposed to actually being in this area. Family law has its own unique issues and concepts and it is important to select a financial expert who is adept and knowledgeable of family law and its many concepts in order to avoid the many pitfalls that can occur in this area. Like selecting an attorney, this is a difficult process because it is not something one is involved with every day. The key elements to consider are:

- Look for referrals. Usually this can come from the attorney you are using or interviewing. (The expert you hire can also assist in selecting the right attorney for your case.)

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- Ask for a curriculum vitae (CV), which should provide details of the consultant's experience and qualifications.
- Find out what percentage of the consultant's business is in the area of family law because just like in the attorney selection process, you want someone who is well-seasoned in this area, not a part-time practitioner.
- Look on the Internet under divorce.
- Attend seminars where forensic accountants and financial experts in matrimonial matters will be speaking. This gives you a chance to see their skills and technical abilities in understanding the key issues.
- Call the various professional societies, such as the American Institute of Certified Public Accountants (they have a society in every state); American Academy of Matrimonial Attorneys; Society of Certified Divorce Planners; National Association of Certified Valuation Analysts. You can also search the various web sites under divorce and financial advisors.

Additionally, be active in your case. Not only can you be a great source of information, depending on your skills, your involvement may reduce the attorney's and accountant's fees and costs by doing some of the work that may have been done by them. Additionally, being involved keeps you updated on the status of your case and the strategies being implemented.

As previously mentioned, the key to getting information is through the process of discovery. The attorney can obtain information and documents by such source as:

- *A notice to produce.* A formal legal request of specific documents submitted by your attorney to the opposing counsel
- *Subpoena.* A formal legal request directly to the source of the documents, such as a subpoena to the credit card company for copies of the husband's monthly credit card statements for the past five years
- *Written interrogatories.* Formal written legal request to have the other side answer specific questions in writing
- *Deposition.* A formal legal setting where individuals will be asked specific questions by your attorney while they are under oath. The proceedings are recorded by a court reporter who will produce a transcript of the session. As mentioned previously, the financial expert can be of great help in preparing the attorney when deposing other financial experts and developing questions for obtaining financial information.

The information obtained through a notice to produce can be used for many phases of the divorce in addition to determining the assets of the marital estate, such as in developing the couple's lifestyle and the valuation of any closely held business. It is important in today's electronic age that the information you request is all inclusive, consisting of not only originals and hard copies, but to include all information maintained on a computer disk, computer hard drives, back-up disks, and so on. An example of the documents requested in a general notice to produce is shown in Figure 1.3.

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**FIGURE 1.3** General Financial Document Request—Notice To Produce

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Unless otherwise stated this document request is for documents covering the period of 1998 through 2001.

- A. **Individual Tax Returns:** Federal and state income tax returns (see Figure 1.4, the Request for Copy or Transcript of Tax Form 4506), including all schedules and W-2 statements, for the years 1998 through the present, filed by you, or filed by anyone on your behalf, or filed by another or others holding an interest in the below described property, whether jointly or solely, including any of the entities listed below:
- a. Business entities in which you own or owned during the years stated. This includes sole proprietorships, partnerships, joint ventures, and corporations;
  - b. Trusts in which you have or had during the years listed above a beneficial interest.
  - c. Trusts in which you act or acted during the years listed above as a trustee.
- B. **Documents Supporting Tax Returns:** The following documents relating to all returns produced pursuant to item number 1 above, including:
1. Amended returns;
  2. Estimated returns and vouchers;
  3. All schedules filed with the return;
  4. All worksheets used in preparing the return, whether the worksheets were prepared by you or by an agent acting on your behalf;

*(continued)*

**20 FINANCIAL ASPECTS OF DIVORCE****FIGURE 1.3** Continued

5. All documents used to support any deductions being claimed;
  6. All W-2 forms, 1099 forms, and any other verifications of income received;
  7. All notices, correspondence, and documents relating to audit or review of your return.
- C. Paycheck Stubs and Documents Reflecting Income:**
1. Your paycheck stubs for the last \_\_\_\_\_ pay periods prior to the date of this notice.
  2. All other documents indicating salaries, commissions, overtime, bonuses, and compensation from \_\_\_\_\_ to date.
  3. All documents reflecting payment for or reimbursement to you for automobile, travel, entertainment, meals, personal living expenses, and all other benefits provided to you by your employer or from any source.
- D. Financial Statements:** Copies of all financial statements and records containing financial information, net worth, or loan statements, which have been submitted by you to a bank or lending institution, or in connection with applications for credit, for the last \_\_\_\_\_ months.
- E. Employment Contracts, Employee Manuals, etc:** Written employment contracts which you have entered into since \_\_\_\_\_. Any other documents, letters, manuals, etc. memorializing or otherwise setting forth the terms of your employment, your pay structure, your employee benefits, etc.
- F. Partnership Agreements and Tax Returns:**
1. Any written partnership or joint venture agreements which you have entered into within the past \_\_\_\_\_ months.
  2. Tax returns for any partnership or joint venture in which you have been involved for the past \_\_\_\_\_ years.
- G. Life Insurance:** All policies of life insurance owned by you, whether on your life, or the life of anyone else, including any such policies which have been canceled, or otherwise terminated for any reason, since \_\_\_\_\_. Documents shall include: a) statement of beneficiaries and changes of beneficiaries; b) all statements of cash surrender values; and c) all statements indicating loans taken against the cash surrender value and verification of payment of premiums.

FIGURE 1.3 Continued

- H. **Health Insurance:** All policies of health insurance (medical/hospital) certificates for such policies and any written materials setting forth the benefits of such policies, which policies are owned by you, or supplied to you by your employer.
- I. **Savings, Checking, and Other Accounts:** All bank statements, passbooks, canceled checks, check registers and withdrawal and deposit slips for all checking accounts, savings accounts, NOW accounts, credit union accounts, certificates of deposit, or any other type of bank account or form of deposit, in your name individually, or jointly with any other person or entity, in the name of another individual on your behalf, in your name as trustee, guardian, or custodian. Provide all such documents for any such accounts, whether open or closed from \_\_\_\_\_, to date. For all such accounts for whose records you keep in any computerized financial accounting or planning program such as Quicken, Money, etc., provide copies of the computer data on disk, together with all printed reports and information identifying the program for the past \_\_\_\_\_ years.
- J. **Monies Owed to You:** All accounts receivable now due to you, or any other documentation of monies now due to you, including, but not limited to, any written contract or agreement by virtue of which money is due to you, mortgages, trust deeds, and promissory notes.
- K. **Stock, Mutual Funds, Bonds, etc.:** All documents relating to stocks, securities, mutual funds, bonds, and money market accounts—owned by you, whether jointly or solely, standing in your name as trustee, guardian, or custodian for another or held by a trust in which you were the beneficiary—at any time from \_\_\_\_\_ to present.
- L. **Brokerage Account:** Brokerage account documents shall include:
1. Monthly statements detailing all transactions and balances in accounts including margin accounts;
  2. Confirmations, receipts, and cancelled checks for each security transaction;
  3. Bills for commissions and receipts or canceled checks indicating such payment.
  4. Copies of all brokerage account statements for any brokerage account in which you had an interest for the past \_\_\_\_\_ months.

(continued)

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FIGURE 1.3 Continued

- M. **Other:** Stocks or securities acquired by any means other than a brokerage account, the documents shall include:
1. The certificates, bonds or security;
  2. Bills, receipts, and cancelled checks showing the purchase or sales of stocks or securities;
  3. All documents evidencing acquisition by gift, inheritance, exchange, stock split, or any other means.
- N. **Stock Options:** Copies of all savings, stock purchases, and stock option plans in which you participate through your employer or which are available to you through your employer or otherwise. Include all statements indicating amounts being held in such plans for your benefit, all transactions affecting such plans, and any projections regarding future value.
- O. **Estate Documents:** All records and documents you have in your possession relating to the estate of \_\_\_\_\_, deceased. Such documents include the will and any codicils to the will; all inventories and accountings filed with the court, all correspondence with the executor/administrator, the court and other beneficiaries and all pleadings relating to any litigation which involves the estate.
- P. **Retirement Benefits and Loan Documents Through Employer:**
1. All documents evidencing any interest you have in deferred income plans, including but not limited to, pension plans, retirement plans, annuities, employee stock option plans, thrift plans, etc., including the following: the summary plan description (often called the plan booklet), all plan documents, all statements from the plan since \_\_\_\_\_ to date, and written plan procedures which are used by any plan in order to determine if a domestic relations order is qualified.
  2. All documents and statements indicating any loans from your employer or otherwise, whether directly from credit union or taken out using amounts in pension, profit sharing, retirement, savings, stock purchase, or stock options plans as collateral.
  3. Written reports or opinions of any expert (*including, but not limited to, actuary, accountant, business consultant*) regarding any profit sharing, pension, retirement, or other deferred payment plan of either of the parties.

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**FIGURE 1.3** Continued

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- Q. Real Estate Documents:** All documents relating to real estate in which you have an interest currently or had an interest from \_\_\_\_\_ to the present, whether as sole or joint owner, beneficiary of a trust, holder of an option to purchase of mortgagee. Such documents shall include:
1. Deeds, policies of title insurance, and closing statements.
  2. Trust agreements and certificates of beneficial interest;
  3. Mortgages and notes and documents relating to payments of the mortgage or note;
  4. The most recent real estate tax bill and receipt for payment of such bill;
  5. Appraisals, market analyses, or written opinions of value;
  6. Leases relating to the use of the real estate and records relating to any rental income received and expenses paid;
  7. Documents indicating the source of all funds used in purchasing the property;
  8. Homeowners and all other insurance covering the real estate and contents of the real estate.
- R. Rented Property:** A copy of your current lease for any premises being rented by you, whether solely or with another or for any premises at which you currently reside.
- S. Debts:** All documents evidencing your current debts including:
1. All existing notes, installment notes, and contracts to purchase; and
  2. The latest available monthly statements on all outstanding installment credit accounts including, but not limited to, the latest statement of all credit card accounts.
  3. **Other Credit Card and Charge Card Documents:** All records relating to credit cards and charge accounts to which you have the right to charge, whether held by you or by another, together with all statements received by you in connection with the use of such credit cards and charge accounts, and all credit applications whether or not such credit was approved.

*(continued)*

**24 FINANCIAL ASPECTS OF DIVORCE****FIGURE 1.3** Continued

- T. Personal Property or Assets:** All documents reflecting the acquisition, whether by purchase or otherwise or the disposal, whether by sale or otherwise from \_\_\_\_\_ to the present of any of the following:
1. Automobiles, boats, airplanes;
  2. Stocks, bonds, securities, or stock options;
  3. Commodities contracts;
  4. Gold, silver, or any other precious metals;
  5. Gas, oil, or mineral rights or leases;
  6. Artwork worth \$500 or more;
  7. Jewelry worth \$1,000 or more;
  8. Antiques, oriental rugs, any item of personal furnishings worth \$500 or more;
  9. Fur coats;
  10. Coins, stamps, and other collections, if the collection is worth more than \$500; Foreign currencies;
  11. Other items of personal property worth in excess of \$500.
- U. Value re Personal Property or Valuation of Other Assets:** All appraisals, opinions of value, and policies of insurance covering all of the items listed in paragraph T, immediately above.
- V. Safety Deposit Boxes or Rental/Storage Space:** All documents relating to the rental and use of a safe deposit box and rental storage space, whether rented by you jointly or solely, by you as trustee, guardian, or custodian for another; or by another who has given you a right of access, from \_\_\_\_\_ to the present. Documents shall include:
1. Rental agreements;
  2. Records relating to changes in names of persons allowed access to the box or storage facility;
  3. Records relating to entities in the box or facility; and
  4. Inventories of all contents.

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**FIGURE 1.3** Continued

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- W. **Intellectual Property Rights:** All documents concerning all intellectual property rights, including but not limited to patents or copyrights in which you have an interest or for which you have filed or plan to file an application, as well as the status of each patent and the registration number(s).
- X. **Club Memberships**—All documents concerning any club membership of yours, including but not limited to, membership documents and documents evidencing the value of membership, purchase price, mandatory spending requirements, suggested contribution, and transfer price.
- 

You should also request that your spouse produce an affidavit stating whether or not the production they submit is complete.

Additionally, when issuing subpoenas to either your spouse's accountant or their company's accountant make sure to include a request for their complete correspondence file as they may have been planning the divorce or other transactions with their accountant and this could lead to hidden assets. After obtaining information directly from the spouse through the means previously listed, look to other sources that have information about you, your spouse, and your family's finances. Some of these are:

- *Employers.* Valuable information can be obtained from your spouse's employer, and if your spouse owns the business, the review of corporate documents will be even more important. Additional information to be obtained from the employer beside the Federal Form W-2 include benefits that your spouse receives as an employee: health and medical coverage; life insurance; disability insurance; portable telephone (The detailed monthly billing can provide important information on your spouse's activities and acquaintances.); retirement plan information; company care and/or auto allowance; profit sharing; and liberal expense accounts to name a few. Depending on your state, employment benefits may have value to the marital estate. Obtaining your spouse's personnel file may also provide unknown information about a pending promotion; issuance of stock options; pending ownership; potential bonuses and pending raises, as well as other benefits. You may also discover the amount of control your spouse has over the amount of his/her compensation, the timing of it and how he/she receives it. If your spouse is the owner of a closely held

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### FIGURE 1.4 Request for Copy or Transcript of Tax Form

Form <b>4506</b> (Rev. May 1997) Department of the Treasury Internal Revenue Service	<h3 style="margin: 0;">Request for Copy or Transcript of Tax Form</h3> <p style="margin: 0;">▶ <b>Read instructions before completing this form.</b></p> <p style="margin: 0;">▶ <b>Type or print clearly. Request may be rejected if the form is incomplete or illegible.</b></p>	OMB No. 1545-0429
<p><b>Note: Do not use this form to get tax account information. Instead, see instructions below.</b></p>		
<b>1a</b> Name shown on tax form. If a joint return, enter the name shown first.	<b>1b</b> First social security number on tax form or employer identification number (see instructions)	
<b>2a</b> If a joint return, spouse's name shown on tax form	<b>2b</b> Second social security number on tax form	
<b>3</b> Current name, address (including apt., room, or suite no.), city, state, and ZIP code		
<b>4</b> Address, (including apt., room, or suite no.), city, state, and ZIP code shown on the last return filed if different from line 3		
<b>5</b> If copy of form or a tax return transcript is to be mailed to someone else, enter the third party's name and address		
<b>6</b> If we cannot find a record of your tax form and you want the payment refunded to the third party, check here <input type="checkbox"/>		
<b>7</b> If name in third party's records differs from line 1a above, enter that name here (see instructions) ▶		
<b>8</b> Check only one box to show what you want. There is <b>no charge</b> for items 8a, b, and c: a <input type="checkbox"/> Tax return transcript of Form 1040 series filed during the <b>current calendar year</b> and the <b>3 prior calendar years</b> (see instructions). b <input type="checkbox"/> Verification of nonfiling. c <input type="checkbox"/> Form(s) W-2 information (see instructions). d <input type="checkbox"/> Copy of tax form and all attachments (including Form(s) W-2, schedules, or other forms). <b>The charge is \$23 for each period requested.</b> <b>Note: If these copies must be certified for court or administrative proceedings, see instructions and check here</b> ▶ <input type="checkbox"/>		
<b>9</b> If this request is to meet a requirement of one of the following, check all boxes that apply. <input type="checkbox"/> Small Business Administration <input type="checkbox"/> Department of Education <input type="checkbox"/> Department of Veterans Affairs <input type="checkbox"/> Financial institution		
<b>10</b> Tax form number (Form 1040, 1040A, 941, etc.)	<b>12</b> Complete only if line 8d is checked. Amount due: a Cost for each period . . . . . \$ <b>23.00</b> b Number of tax periods requested on line 11 c Total cost. Multiply line 12a by line 12b. . . \$ _____ <b>Full payment must accompany your request. Make check or money order payable to "Internal Revenue Service."</b>	
<b>11</b> Tax period(s) (year or period ended date). If more than four, see instructions.		
<p><b>Caution: Before signing, make sure all items are complete and the form is dated.</b></p> <p>I declare that I am either the taxpayer whose name is shown on line 1a or 2a, or a person authorized to obtain the tax information requested. I am aware that based upon this form, the IRS will release the tax information requested to any party shown on line 5. The IRS has no control over what that party does with the information.</p>		
Signature. See instructions. If other than taxpayer, attach authorization document.		Telephone number of requester ( ) _____ Best time to call _____
Title (if line 1a above is a corporation, partnership, estate, or trust)		<b>TRY A TAX RETURN TRANSCRIPT</b> (see line 8a instructions)
Spouse's signature		Date
<h3>Instructions</h3> <p><i>Section references are to the Internal Revenue Code.</i></p> <p><b>TIP:</b> If you had your tax form filled in by a paid preparer, check first to see if you can get a copy from the preparer. This may save you both time and money.</p> <p><b>Purpose of Form.</b>—Use Form 4506 to get a tax return transcript, verification that you did not file a Federal tax return, Form W-2 information, or a copy of a tax form. Allow 6 weeks after you file a tax form before you request a copy of it or a transcript. For W-2 information, wait 13 months after the end of the year in which the wages were earned. For example, wait until Feb. 1999 to request W-2 information for wages earned in 1997.</p> <p><b>Do not use</b> this form to request Forms 1099 or tax account information. See this page for details on how to get these items.</p> <p><b>Note:</b> <i>Form 4506 must be received by the IRS within 60 calendar days after the date you signed and dated the request.</i></p> <p><b>How Long Will It Take?</b>—You can get a tax return transcript or verification of nonfiling within 7 to 10 workdays after the IRS receives your request. It can take up to 60 calendar days to get a copy of a tax form or W-2 information. To avoid any delay, be sure to furnish all the information asked for on Form 4506.</p> <p><b>Forms 1099.</b>—If you need a copy of a Form 1099, contact the payer. If the payer cannot help you, call or visit the IRS to get Form 1099 information.</p> <p><b>Tax Account Information.</b>—If you need a statement of your tax account showing any later changes that you or the IRS made to the original return, request tax account information. Tax account information lists</p> <p style="text-align: right;"><i>(Continued on back)</i></p>		
<p><b>For Privacy Act and Paperwork Reduction Act Notice, see back of form.</b>      Cat. No. 41721E      Form <b>4506</b> (Rev. 5-97)</p>		

company, a whole other issue arises: what is your spouse's true economic income? This issue and the discussion of Recently Acquired Income Deficiency Syndrome (RAIDS) as well as personal assets hidden inside the company are discussed in detail later in this chapter.

- *Banking institutions and credit reports.* Banking institutions will have all sorts of information on you and your spouse. If there are any loans or credit cards there will be credit applications that can have valuable information. They may also have a credit report which will show you and your spouse's credit history. Many people are surprised to find what is on their credit report. I recommend that you pull your own credit report which can be obtained from any number of credit reporting agencies. They can also be obtained through the Internet. The information such as a list of current credit cards, credit available, and reported income and other financial information can be used in comparing what your spouse has produced in individual disclosures. Typically, a bank that handles the corporation will have the loan or account officer prepare a relationship summary which gives an overview of the entity. If there is bank financing involved, look at their notes for the reason for approving the financing and the support provided for it. You may find out about a direction the company is going that is different from what your spouse is presenting to you, either directly or through an attorney or valuation expert. You will want to look at what security the bank has taken collateral for any financing provided. You may find assets that you were not aware of as well as values that again are quite different than what has been presented to you by your spouse or his experts. Additionally, it is not uncommon that the bank files may have cash flow projections with regard to the business. They may also have other due diligence records about the company or your spouse individually.
- *Personal and/or corporate accountant.* The accountant's work papers can be a wonderful source of information. The key is to make sure that you get the accountant's notes and correspondence file. Include in your request to obtain anything that they maintain on their computer or on disk to see if there has been any planning and changes in corporate assets or the accounting of things to disguise personal usage. Additionally, obtain any and all of the following documents from the accountant: engagement letters; engagement planning memorandums; tax planning worksheets; in addition to the current workpapers, ask for the permanent file as well; representation letters; management letters; attorney letters; the accountant's billing file which contains all invoices and time records, and any summaries describing the

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services performed and who performed them. You should also ask for copies of any letters on internal control that the accountant may have issued.

- *Investment broker or advisor.* When opening an account there are numerous forms that need to be completed. Included in these forms are all sorts of information regarding net worth and income. The advisor may also have a file on your spouse containing notes from planning meetings as well as a list of accounts that have been opened by your spouse or on their behalf.
- *Insurance agent.* The insurance agent's file will contain applications for all life insurance and will provide any information on changes to beneficiaries. Also, you may be able to find insurance coverage on hidden assets or assets being used by parties outside of the marriage. For example, I have pulled an auto insurance package that the insurance agent put together only to find that the premiums covered more than just the two cars that were driven by the husband and his wife. Needless to say, the other auto covered was not one driven by any of their children. In other cases, it not uncommon to find an umbrella policy or an extension to the home owners policy which covers jewelry or other valuables. This can provide a good list of assets to look for and a first attempt at their current values.
- *Social Security.* The government provides a summary of an individual's social security benefits. Don't forget a copy of this report. Remember, if you have been married for 10 years, you may be entitled to a piece of your spouse's benefits. This statement also shows a summary of reported earnings.

### **The Concept of Marital versus Nonmarital (Separate) Property**

Become familiar with the law in your state regarding property. You may have heard the terms community property or marital property. What are these terms and how will they affect your divorce? A minority of states are community property states including Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. A community property state assumes that all property acquired during a marriage belongs to both spouses equally. However, only three of the community property states, California, Louisiana, and New Mexico require that community property be divided equally upon divorce. The other states are called marital property states. If you live in such a state, all property acquired during the marriage is presumed to be marital property, subject to several exceptions. The most common exceptions include property acquired by gift or through an inheritance.

In some states, there is a presumption that either marital property or community property will be divided equally. In those states the starting place for the lawyers and the court is an equal property division. The property can be divided unequally but the person seeking an unequal division has to prove that he or she is entitled to more than half the property.

In most states there is no presumption that the marital or community property should be divided equally. Instead, the law provides that this property is to be divided equitably or fairly. Equitable does not necessarily mean 50/50. For example, suppose that a woman has been a homemaker for the entire length of her 25 year marriage and gave up a career to support her husband's career. The husband has climbed the corporate ladder and will have the ability to replace his assets. In order to maintain her lifestyle it maybe necessary for her to obtain a greater share of the assets. The unequal allocation of the assets in this situation would probably be considered equitable. Again, as discussed earlier, to be truly equitable the tax consequences on the ultimate property and support settlement will need to be considered. Though each state will have its own guidelines, there are some common factors that the court uses in dividing such property fairly. These factors include: the length of the marriage; the contribution made to the other spouse's education; the non-economic contribution of the children's custodian to the marriage; the health of the parties, and so on.

Having discussed this distinction in community property states, a more general rule in defining what non-marital property (also called separate property) may be as follows: generally all property acquired during the marriage is marital property, subject to certain exceptions. The common exceptions are:

- In all marital property states, inheritances are considered separate (non-marital) property.
- In most states gifts from third parties are the separate property of the acquiring spouse, even if they were received during the marriage. However, this does not affect gifts made to both parties jointly. Therefore, consider whether any substantial gift was made to one of the parties or jointly to the parties. Often evidence of such gifts may include the submission of gift tax returns, the manner in which the funds were paid, and so on. States are divided in terms of treatment of gifts from one spouse to another made during a marriage. Some states consider gifts such as birthday gifts, to be gifts while other states presume that such gifts are marital in character. Thus estate planning by an individual's parents should be reviewed very carefully, and the consequences of divorce should be considered in their drafting.

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- Property acquired in exchange for separate property remains separate property, even if acquired during the marriage. If the parties going through a divorce do not agree at the time of a divorce on whether the asset was acquired in exchange for separate property, determining its character may require tracing the source of funds used to acquire the property. In most states, when this tracing exercise provides an ambiguous result, the property is presumed to be marital. Again, the use of the financial expert with divorce experience can prove to be invaluable.
- In some states property acquired during the marriage is defined as meaning after the parties are married but before the service of a petition for divorce (assuming the petition ultimately results in a decree of divorce), unless the court specifically sets forth written findings of fact establishing that the use of other dates (such as the date of the divorce) is necessary to avoid a substantial injustice.
- Generally, all property acquired before the marriage is considered as separate property. In some states, the courts will occasionally treat property acquired in anticipation of the marriage such as a marital home purchased shortly before the marriage as marital property if certain conditions are met. Other states reject such claims entirely.

One of the jobs that a financial expert with expertise in divorce can assist in is the tracing of marital and non-marital assets. This becomes very complicated when non-marital assets are sold and utilized in the acquisition of another asset. When non-marital assets are sold, the acquired property must retain its separate identity and either you or your financial expert must be able to trace back to the exchanged property. When doing a tracing of marital versus non-marital assets the use of charts and flowcharts is extremely helpful for the courts.

#### **How Does One Handle the Personal Efforts that the Spouse Puts into the Non-marital Business' Appreciation?**

Issues of marital and non-marital become more complex when working with closely held businesses. Determining whether the marital estate should be reimbursed because of the efforts expended by an owner spouse during the marriage on a marital or non-marital business can be difficult, especially in complex business valuation contexts where the marital efforts of the owner spouse are used to enhance the value of the non-marital business. States have generally relied upon two traditional approaches: the *Pereira* approach and the *Van Camp* approach. The *Van Camp* approach focuses on the value of a spouse's efforts expended to improve non-marital property. In *Van Camp v. Van Camp*, 199 P. 885, 890-891

(Cal. 1921), the court heard evidence as to the value of services rendered by the spouse to the business and determined whether the value of these services had already been paid to the spouse in the form of salary (or otherwise) or whether such services had been unpaid. The value of the unpaid services would be deemed marital property and subtracted from the earnings and increased value of the business. The remainder would be deemed the owner spouse's separate property. The holding in *Van Camp* emphasized the fact that the husband had been adequately paid by the corporation for his services and that the balance of the profits derived from the business were accredited to the use of the capital previously invested (his premarital property). Thus, under *Van Camp* the focus is on the reasonableness or adequacy of the compensation.

On the other hand, the *Pereira* approach relies upon the assumption that the non-marital property owner is entitled to a reasonable rate of return on his or her separate property. The *Pereira* approach provides:

[W]hen one spouse owns separate property at the time of the marriage and devotes significant time and effort to the care and management of that property over and above the minimum amount needed to preserve the assets, the community will be credited with an increase in value of the separate estate over and above the ordinary return on a long-term secured investment.

The focus under *Pereira* is the reasonable rate of return. Using the *Pereira* approach may result in a more generous award to the non-business owning spouse because the burden is on the owner spouse to prove that an amount less than the reasonable rate of return should be applied. Thus, if the business is not profitable or actual capital return is less than the reasonable rate the difference weighs in favor of the non-owning spouse if the owning spouse cannot carry his burden to show otherwise. (*Pereira v. Pereira*, 103 P. 488 (Cal. 1909)).

Parties will need to review their individual state law, but this issue should be raised with your attorney if a non-marital closely held business is part of the estate and you were involved in creating the increase in value during the marriage. For example, under the Illinois Marriage and Dissolution of Marriage Act (IMDMA) the marital estate may be entitled to reimbursement for marital energies (personal efforts) to a non-marital business if "the effort is significant and results in substantial appreciation of the non-marital property." Illinois has adopted an approach which follows a reasonable compensation inquiry. When the appellate courts in Illinois reviewed the issue of whether the marital estate was entitled to reimbursement from the non-marital business because of the contribution of the personal efforts of the husband, the court has found that the marital estate was not entitled to reimbursement if the salary was found to be

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reasonable compensation for services rendered. Accordingly, for there to be reimbursement for the marital estate due to the marital energies of a spouse with respect to a non-marital business, it must be shown that: 1) the compensation received during the marriage was not reasonable; 2) the efforts by the business owner spouse are significant; and 3) it is a result of these efforts that the business has substantially increased in value. Thus, in business valuation matters, an expert may be needed to testify as to the elements necessary for a reimbursement claim to succeed, including an analysis of the reasonableness of the compensation. In addition to the issue of personal efforts, another issue is whether the assets of a premarital business acquired after the marriage may be determined to be marital. Understanding how and when the assets were acquired becomes very important. A review of your individual state law will be important, but the facts of your case should be brought to the attention of your attorney. In another Illinois case (*In re Marriage of Kennedy*, 94 Ill.App.3d 537, 418 N.E.2d 947, 49 Ill.Dec. 927 (1st Dist. 1981)), which involved the acquisition of specific assets, during the marriage, from nonmarital property. In *Kennedy*, the husband owned four music stores before marriage. During the marriage more stores were acquired. The trial court awarded the entire music store business to the husband. The appellate court held that the stores acquired before the marriage were clearly nonmarital property. With respect to the stores acquired after the marriage, they were classified as new and distinguishable property and were marital property even though the new stores were bought primarily on the credit of the ongoing nonmarital business of the husband. Each case needs to be looked at on the merits of its own case. So the tracing of the acquisition of assets during the marriage is important and the facts need to be brought to the attention of your attorney. Whenever an asset is purchased during the marriage a closer look needs to be taken to determine its character.

### **Understanding Your Spouse's True Economic Income**

In most divorce cases in which maintenance or child support is involved, the issue of the spouse's true income becomes important. This is usually even more of an issue when the spouse is an owner of his own business in which his salary as reported on his W-2 is not necessarily his true income. It is not uncommon that, when faced with a divorce, one's income and value of the business becomes troubled and reduced. A divorce attorney friend of mine gave me a good term for this phenomenon: RAIDS (Recently Acquired Income Deficiency Syndrome). This is most common for those spouses who are the owners of their own businesses. Businesses that were very profitable suddenly go into the toilet during the divorce. There is often an amazing correlation between the

date of divorce and the decline of the business as represented in Figure 1.5. So what can be done?<sup>1</sup>

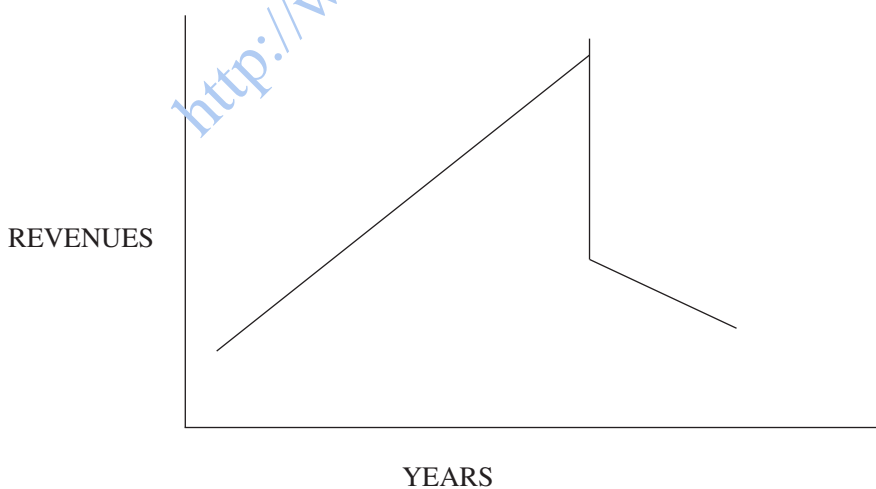
A business valuator who also has the skills of a forensic accountant can be a valuable member of the divorce team in situations like this. They are used to having to dig into the depths of the corporate books to develop the normalized earnings of the business that they are valuing. In these cases the business valuator serves two purposes: to value the business and to develop the economic benefits that the owner(s) receive from the business. A valuation expert will also need to work closely with the attorney in developing proper discovery requests, assist in depositions, and interpret financial records that are produced. Additionally, the expert should be prepared to assist the attorney in discovering what drives the value of the business and the controls the owner spouse has over the business.

The spouse's annual W-2 is only the beginning. I will attempt to provide you with samples of places to look and items to address in the never-ending saga of the true income of the owner of a privately held business. The following discussion will give you an understanding of the issues and a sample of the things to look for. It is not exhaustive and each case will have its own specific issues to address.

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**FIGURE 1.5** Graph Representing RAIDS

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### Net Worth Analysis

One analysis that can sometimes indicate an individual's missing income is a net worth analysis. This may be a good place to start especially if your available budget for the divorce, as well as needed records are limited. In this analysis, the net worth of the spouse is compared at two specific periods of time. Remember that the assets need to be valued at cost. Basically, compare the change in net worth (determined by looking at the net worth of the estate at cost at the beginning of the selected period and comparing it to the net worth at cost at the current period) and then add living expenses for each year and subtract known income for each of those years. The concept is summarized as follows:

Start with: Change in the spouse's net worth  
Plus: Total expenses paid out or incurred  
Subtract: Sources of Income  
The net amount will indicate the amount of unknown income

If the change in the net worth is greater than the income which is reported on the spouse's affidavit, the difference may represent unreported income. The IRS also uses this net worth method to reconstruct income for tax payers who are suspected of fraud or just underreporting of income. The sources of information can come from the federal income tax returns, loan applications, and the expense affidavit filed in your case. Under this analysis, the expense affidavits play an important part, especially when your spouse has signed under oath that the income and expense disclosure is true and accurate. Lying or misrepresenting facts on your income and expense affidavit can come back to bite you under this analysis. For example, if your spouse is downplaying the lifestyle, it will come to light in an unexplained variance in the use of the family's income or a possible claim of dissipation. Another similar analysis is to compare the expense affidavits to the income being reported. It is amazing how one can have twice as much in expenses as the income they are generating without reducing one's net assets.

#### Documentation

Information to begin the process will come from your discovery process and the valuator's site visit and interview with management or through deposition. You will want to obtain credit reports on the spouse, bank statements, cancelled checks (front and back), deposit slip details, debited and credit memos, check registers, signature cards, monthly credit card statements, applications for credit cards or

checking accounts, loan applications, and so on. Requesting a copy of you and your spouse's credit report can sometimes yield some revealing information. It can provide you with bank accounts, credit cards, and other loans you may not have been aware of.

With respect to the business, you will want to obtain items such as: detailed general ledgers; cash disbursement journals; payroll records; copies of contracts for services; lease agreements; bank statements; deposit slips; credit card statements; loan files; any brokerage statements; and telephone records. This is where the spouse of the company owner can be useful in reviewing and highlighting the personal nature of certain expenditures. Also, obtaining the individual's gift tax returns may be helpful in identifying assets that have been transferred.

### **Economic Benefits Received from the Company**

Some of the more straightforward items that are typical benefits, perks, or additional economic income to the owner are automobile usage and personal use of the credit cards that are paid for by the company. In looking at the automobile, follow up with the related expenses such as gas, insurance, maintenance, and parking expenses. Identifying the true nature of the spouse's job and the perks provided to other non-related employees can downplay the argument of "business need."

In reviewing the cash disbursement journal you should be able to identify which credit cards the company is paying for. It will also be important to identify all people who have credit cards that are paid for by the company and the relationship they have to your spouse. There are situations where the spouse, in an attempt to hide the personal use of the credit cards, would have other company employees charge items on his behalf so they wouldn't show up on his credit card even though the company is still paying for them.

As you go through the cash disbursement journal or cancelled checks, identify those payments directly to the spouse as there may be non-payroll checks that are being cashed for cash. Additionally, look at the back of the checks as they may show the deposit into accounts that you are not aware of. The review of the payroll records may also indicate payments to relatives or girlfriends that do not even work at the company. You may also need to look for fictitious employees by comparing payroll records to health insurance policies (business owners will not usually bother to insure a phantom employee) or other records. You may also notice the loss of key employees who are either aware of the activities of the owner spouse or may have actually been involved in helping the spouse obtain the various perks. These former employees may be great people to talk to, especially if they did not leave on good terms.

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In reviewing the detailed expenses of the company for the past few years and common-sizing them, look for unusual increases or trends in a particular expense category that will require further investigation. Common-sizing is taking each expense as a percentage of revenues. For example, if property taxes had been 1.2 percent of revenues for four years straight and then in the last year increased to 2.5 percent it would raise questions as to why. In one instance, after further investigation, including the review of the real estate tax bills and discussions with the controller of the company, it was determined that the owner spouse had acquired a condo for his girlfriend and the expenses were paid for by the company. Increases in the repairs and maintenance account or capitalized leasehold improvements when there have been no changes at the company's facilities can lead to either activities at the spouse's personal residence being paid for by the company or even a condo or house that you were not aware the spouse had.

Another source may also be the company's depreciation lapse schedules. These detailed depreciation schedules are usually maintained by the company or its outside accountants and are usually more detailed than what you may find as part of the corporate income tax return. This may also lead to the discovery of unplanned remodeling, upgrading, and replacement of corporate facilities. This is a subtle way of using profits/funds that may have ordinarily been paid out to the owner spouse, thus in essence a reinvestment by the spouse into the business. This becomes even more important if the business is non-marital, and the spouse has devised a plan to take funds that would be marital if paid out as salary to now reinvest in the non-marital asset. A key is to talk to your financial expert, the company's controller, bookkeeper, or secretary/office manager. They may unknowingly provide information that is needed.

Detailed review of the insurance policies that the company pays for can indicate payments for the spouse's home, car, or life insurance policies that are not business-related. A detailed review of the insurance policies may also indicate assets that you were not aware of as well. For example, the property and casualty policy may show an automobile driven by the owner spouse's significant other or a side condo being maintained by the company. Life insurance policies paid for by the company should be reviewed to see who the beneficiaries are as well as the insured. The company's pension plan(s) should also be reviewed for unusual or extraordinary payments credited to the owner spouse's account.

Another source of a perk is for house accounts or direct pays. The company may have house accounts at a florist, liquor store, or travel agency. The subpoenaing of these records and deposition of the individual may also uncover extensive personal spending by the company on behalf of the owner. For example, the company may have a house account with a local florist. After subpoenaing the florist's records, the routing sheets may show that the flowers were not

delivered to the office but rather to the girlfriend of the owner spouse. This same concept can work with the company's travel agent.

The obtaining of shareholder loans can be a disguise of income. This can be a way of providing funds to the spouse without including it on his W-2 as wages. Additionally, the sudden paying off of previous loans made to the company by the spouse may also be a way of changing the characteristic of funds obtained by the spouse. Regardless of what it may be called, this is another source of economic benefit to the spouse. Look for trends. Has the company ever borrowed money from the owners in the past? If there had been loans from shareholders on the books has the company paid down shareholder loans or even interest in the past? Compare these payments with other related items. Have shareholder/officers' salaries gone down but are shareholder loans now being paid off? Remember that loans to the company may be a marital asset.

We must also not forget to investigate financial arrangements between the business and a party related to the spouse. For example, the building may be leased from a parent of the spouse with the rent above current market rents. Also, look for gifts. After collecting the rent the spouse's parents may be turning over the net profits to the spouse as a gift. Have the real estate appraiser address this issue as part of their work in determining the fair market value of the property by looking at proper rents.

You should also be aware of the concept of parking profits with friends. The business may have a venture relationship where it is not formally written in the agreement but there is an unwritten understanding that a share of the vendor's profits would be given back to the owner spouse. Look out for changes in customers and vendors and be aware of how the company conducts its business. Be aware of sudden shifts in costs of goods sold without increases being passed on to the customer or sudden changes in customers or suppliers. Also look for significant purchases of inventory at year-end when the owner can possibly understate profits until after the divorce. In one case the owner spouse paid significant commissions and bonuses to a member of his management team and after further investigation it was found that the manager had bought a boat which the owner spouse just happens to have the right to use at his leisure.

Most business owners will need assistance with RAIDS, thus a review of invoices from professionals is needed to determine whether services were performed with respect to the business or were personal. Even more important, does the detailed billing indicate any changes in business patterns, transfer of assets, ownership changes, or any other type of planning? It is not uncommon for an owner spouse's salary to decrease but their lifestyle does not seem to change because the company is now paying for the owner spouse's personal expenses.

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The detailed review of the entertainment and travel category on the financial statements always needs to be reviewed. Look for trends and the number of meals taken in any one particular day. Compare this pattern prior to the divorce proceedings.

Another item will be the use of cell phones. Determine how many phones the company is actually paying for and to whom the numbers are assigned. Ask for the employee's expense reports. Look at how they are recorded on the books of the company, how they compare to industry standards, how they compare to others in the company, and how they relate to the role that the owner spouse plays in the company.

When the company is in the manufacturing business, a review of the scrap sales can lead to significant unreported cash. Talking with the shop foreman or former employees can help in this area. Discussion with the bookkeeper as to how this is recorded is also helpful. This might also lead to the issue of sales that are not recorded or out the backdoor sales. Compare bank deposit slips to day sheets or other company reports that record company daily sales and collection activity.

Lastly, review the company's assets for significant prepaid assets; prepayment of credit cards; or annuities that are part of insurance policies.

Looking beyond the W-2 is the key. The best cure for the case of RAIDS is the presentation to the court of the true economic income of the spouse. It is amazing how a case of RAIDS usually becomes cured upon the finality of the divorce proceeding or the obligations under it.

#### Developing Your Lifestyle Analysis

Maintenance (alimony) is court-ordered financial support that one spouse pays to the other in the event of a divorce. Three common types of maintenance are: temporary maintenance; rehabilitative or reviewable maintenance; and permanent maintenance. Temporary maintenance (often called by the Latin term *pendente lite* maintenance) awards are made while the divorce case is still pending. Rehabilitative or reviewable maintenance awards are generally made for the time period necessary for the person to receive maintenance to "rehabilitate" herself or himself by improving her or his earning potential to narrow the income difference between the parties' incomes. Permanent maintenance means there is no set time for the maintenance to end. Unless the parties otherwise agree, the maintenance will end when either spouse dies, the spouse receiving maintenance remarries, or the spouse receiving maintenance co-habits on a resident, continuing conjugal basis.

A maintenance award is based on the needs/lifestyle of one spouse during the marriage and the ability of the other spouse to pay it. The law in all states that

have maintenance is gender neutral. Though in most cases the wife is awarded maintenance, husbands may be awarded maintenance also. Many factors go into determining whether a spouse qualifies for maintenance. Specific factors include the duration of the marriage, the income and property of each party, age, physical and emotional problems and the standard of living established during the marriage. Concerning physical health, the courts are looking at that spouse's ability to work and what their health costs and needs will be. Additionally, many courts will consider, especially with long-term marriages, the ability of the spouse to work and the type of employment he or she can realistically expect to get. In these situations a medical expert or vocational expert may be necessary to prove your case. As discussed in Section II, the tax consequences of maintenance should be reviewed in negotiating an amount.

### **How Much Maintenance Is to Be Awarded?**

There is no set amount. Understanding your state's statutes and case decisions is important. Having said that, many court cases and maintenance laws often speak of the economic lifestyle of the parties as being a very significant factor in determining the amount of maintenance awarded. While the lifestyle factor is important, and maintenance awards all vary, averaging out the maintenance awards tends to show that maintenance increases based upon the length of the marriage. It appears that judges find the income disparity and the length of the marriage are the most significant factors in determining the amount of maintenance awards. Additionally, many judges will have a perceived cap in terms of potential maintenance awards, with this cap increasing based upon the length of the marriage. Another consideration is based on the property settlement regarding what sources of income each party will have. The key is to review what kind of after-tax income your assets will provide to you. This is where a financial expert will come into play in providing the attorney with a detailed analysis and alternative case scenarios. An expert should analyze the parties' marital assets and demonstrate to the court under various allocations of the assets what amount of after-tax cash flow will be generated to the nonworking spouse. The figure arrived at will have a direct impact on the amount of maintenance the court awards her.

Most people cannot live as cheaply in two households as one and thus in many cases the maintenance one spouse receives generally does not allow the less monied spouse to continue to live at the lifestyle established during the marriage. However, this is why it is so important to properly complete and analyze a true standard of living during the marriage by completing an expense affidavit or lifestyle report. The affidavit will list all expenses either on an annual or monthly basis to determine what your needs are. Again, the financial expert or certified

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divorce planner can assist in developing this information for the attorney. Looking at the check book, cancelled checks, credit cards, and adding in what is paid by the spouse's closely held business are all factors needed to put together a complete affidavit. Figure 1.6 is a sample of how to gather and report this

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**FIGURE 1.6** Financial Disclosure Statement

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Mr. NOAH BOATMAN

Case Number: \_\_\_\_\_

**FINANCIAL DISCLOSURE STATEMENT  
STATEMENT OF MONTHLY LIVING EXPENSES**

**2001**

**1. HOUSEHOLD**

Main Residence located at 10 Main Street, Boatville, MA

a. Mortgage	\$	-
b. Home equity payment		_____
c. Real estate taxes, assessments		_____
d. Homeowners insurance		_____
e. Heat/Fuel		_____
f. Electricity		_____
g. Telephone		_____
h. Water and Sewer		_____
i. Refuse removal		_____
j. Laundry/dry cleaning		_____
k. Maid/cleaning service		_____
l. Furniture and appliance repair/replacement		_____
m. Lawn and garden/snow removal		_____
n. Food (includes Groceries, Restaurants, Supplies)		_____
o. Liquor, beer, wine, etc.		_____
p. Other (specify):		
Electronics		_____
Maintenance		_____
Home Improvement		_____
Flowers		_____
Other		_____
China		_____
<b>SUBTOTAL of main residence HOUSEHOLD EXPENSES:</b>	<b>\$</b>	<b>-</b>
		=====

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**FIGURE 1.6** Continued
 

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## 1a. Summer House located in Nonboatville, Vermont

- |   |       |
|---|-------|
| a. Mortgage                                   | _____ |
| b. Home equity payment                        | _____ |
| c. Real estate taxes                          | _____ |
| d. Homeowners insurance                       | _____ |
| e. Heat/Fuel                                  | _____ |
| f. Electricity                                | _____ |
| g. Telephone                                  | _____ |
| h. Water and Sewer                            | _____ |
| i. Refuse removal                             | _____ |
| j. Laundry/dry cleaning                       | _____ |
| k. Maid/cleaning service                      | _____ |
| l. Furniture and appliance repair/replacement | _____ |
| m. Lawn and garden/snow removal               | _____ |
| n. Food (groceries, household supplies, etc.) | _____ |
| o. Liquor, beer, wine, etc.                   | _____ |
| p. Other (specify):                           | _____ |

SUBTOTAL of Vacation Home HOUSEHOLD EXPENSES: \$ \_\_\_\_\_

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## 2. TRANSPORTATION

- |                                    |       |
|------------------------------------|-------|
| a. Gasoline                        | _____ |
| b. Repairs                         | _____ |
| c. Insurance/license/city stickers | _____ |
| Insurance                          | _____ |
| License/city stickers              | _____ |
| d. Payments/replacement            | _____ |
| e. Alternative transportation      | _____ |
| f. Other (specify)                 | _____ |

SUBTOTAL of TRANSPORTATION EXPENSES: \$ \_\_\_\_\_

---



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*(continued)*

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a. Clothing	\$	-
b. Grooming		_____
c. Medical (after insurance reimbursement)		_____
(1) Doctor		_____
(2) Dentist		_____
(3) Optical		_____
(4) Medication		_____
d. Insurance		_____
(1) Life (term)		_____
(2) Life (whole)		_____
(3) Medical/Hospitalization		_____
(4) Dental/Optical		_____
e. Other (specify):		_____
Fitness		_____
Jewelry		_____
Other		_____
<b>SUBTOTAL OF PERSONAL EXPENSES:</b>	<b>\$</b>	<b>-</b>

**4. MISCELLANEOUS:**

a. Club/social obligations/entertainment	\$	-
b. Newspapers, magazines, books, and CD's		_____
c. Gifts		_____
d. Donations, church or religious affiliations		_____
e. Vacations (includes Airplane Tickets, Baggage, Car Rental, Hotels, Entertainment, Foreign Currency, and Restaurants)		_____
f. Other (specify):		_____
Annual fee—AMEX		_____
Charity		_____
Computer Expense		_____
Dues & Subscription		_____
Education		_____
Legal and Consulting fees		_____
Photography		_____
Postage		_____

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**FIGURE 1.6** Continued
 

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Other Expense	_____
Spending Cash/ATM	_____
Sporting Goods	_____
Income Taxes	_____
Video Rental	_____
<b>SUBTOTAL of MISCELLANEOUS EXPENSES:</b>	<b>\$ _____</b>
<b>5. DEPENDENT CHILDREN:</b>	
a. Clothing	\$ _____
b. Grooming	_____
c. Education	
(1) Tuition	_____
(2) Books/Fees	_____
(3) Lunches	_____
(4) Transportation	_____
(5) Activities	_____
d. Medical (after insurance proceeds)	
(1) Doctor	_____
(2) Dentist	_____
(3) Optical	_____
(4) Medication	_____
e. Allowance	_____
f. Child care/after school care	_____
g. Sitters	_____
h. Lesson and Supplies	_____
i. Clubs/Summer Camps	_____
j. Vacation	_____
k. Entertainment	_____
l. Other	_____
<b>SUBTOTAL of DEPENDENT CHILDREN:</b>	<b>\$ _____</b>
<b>TOTAL EXPENSES</b>	<b>\$ _____</b>

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information. An easy way is to use a program such as Quicken to set up the categories in the same format as in Figure 1.6. Then enter all activity from all bank accounts, credit cards, and investment accounts. Quicken will summarize the data and provide a good work paper outlining the detail that makes up each category of expense. Then use your Quicken reports to complete the income and expenses affidavit, which can also be summarized in an Excel spreadsheet.

Another frequently asked question, in addition to the amount of alimony, is how long it will have to be paid. The answer to this varies. Spouses will need to look at their state rulings, however, some general items that are usually considered include: financial ability of the spouse; time until retirement of the spouse; age of the spouse; length of the marriage; and health of the spouse. Sometimes the spouse will receive reviewable maintenance or rehabilitative maintenance. In this situation the period of maintenance is for a set period of time, say 3, 5, or 7 years, and at the end of that time period the burden will be on the spouse to petition the court for additional maintenance. In other cases the non-working spouse may get permanent maintenance. In this case the spouse will usually pay maintenance until he/she retires at which time it will be adjusted. Regarding adjustment, if the economic circumstances significantly change, the spouse paying the maintenance can usually petition the court to reduce the amount of maintenance that he or she is paying. For example, Noah, at the time of the divorce from Dez, was a president of a major company making \$2,000,000 a year in salary. The court had determined that he was to pay Dez \$35,000 per month in alimony for 5 years reviewable. In the third year Noah lost his job and could only get a job which paid him \$250,000 per year. This change is substantial and Noah petitioned the court to reduce his support obligation. Noah could not reduce the amount of his obligation on his own but needed a court order to adjust his obligation. Reduction in the amount of alimony will usually also occur when the spouse retires. To settle a case, the spouse may agree to non-modifiable maintenance which is when the spouse agrees to pay maintenance for a certain period of time with no rights to change the amount due, even if his economic situation changes significantly.

#### **What Is This Thing Called Dissipation?**

Another common statutory term for spending marital assets outside of the family unit is often called dissipation or economic misconduct. What is dissipation? The definition varies from state to state. Often dissipation may be defined as expenses by a party which are personal in nature—not expenses for the family [incurred outside of the family unit]—that are made at a time the marriage has undergone an irretrievable breakdown, or at least is on the rocks (perhaps due

to one party's affair). For example, in Illinois it is held that dissipation refers only to a spouse's improper use of marital property during a time in which the marriage is undergoing irreconcilable breakdown. In states that follow dissipation at the time after the breakdown of the marriage the big litigated point is the date on which the marriage broke down. The financial expert can assist in this area by investigating the financial records to find signs of this breakdown such as expenditures on marriage counselors or temporary housing. In some states there is no requirement to prove that the marriage was broken down at the time of the expenditure. In other states there is a requirement to prove this. The thinking in those states is that if dissipation was not limited to the time period when the marriage was on the rocks it would open the floodgates to allow the parties to litigate over a laundry list of expenses throughout their marriage.

What types of expenses might be considered dissipation? This varies from state to state. Generally, expenses paid to or on behalf of a boyfriend or girlfriend are considered dissipation. Thus, expenses for such items as jewelry, flowers, and so on, are often considered as dissipation. Gambling expenses might also be considered a dissipation of marital assets. In some states if one party moves out of the marital residence without good cause and incurs a substantial rental expense, this might be considered a dissipation. For this reason, consult with a lawyer before moving out of the marital residence and incurring separate living expenses.

The issue of dissipation should be addressed early on in the divorce case. Depending on your state, jurisdiction will dictate when the claim must be raised. On the other hand, the attorney should be consulted in order to understand what constitutes dissipation so that not only can the potential exposure be quantified but also the dissipation acts by the spouse can be limited. As mentioned above, each state will control what is considered to be dissipation. For example, courts have found dissipation to include, but not limited to, the following: significant gifts to children during the divorce; excessive drinking and gambling (a case held that a husband's expenditure of most of his salary on alcohol was dissipation of marital assets), and loans or gifts to relatives. In a 1982 Illinois case, where the husband already owned a yacht and went out and bought a very expensive racing boat, this was considered dissipation. If a spouse has sufficient funds but still lets a marital property go into foreclosure, this may be considered dissipation. Other situations found to be dissipation include: money spent on a companion while still married; the failure to file a joint return resulting in additional income taxes to be paid may be considered dissipation in the amount of the additional taxes incurred; marital funds spent on drugs; and the spouse's intentionally mismanagement of the marital assets such that the value of such assets are significantly reduced. Again, guidelines for your specific states should be addressed

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with the attorney and/or certified divorce planner. Your certified divorce planner/financial expert can play a big role in putting together the dissipation claim by searching out unexplained uses of marital funds or actual misuses such as purchases for hotel rooms, dinners, trips, jewelry, and gifts as discussed above.

Once the issue of dissipation is raised by one spouse, the spouse that is charged with dissipation usually must prove by clear and convincing evidence how the marital funds were spent. Just providing general and vague statements regarding unaccounted-for expenditures will probably still be claimed to be dissipation.

Because of the potential dissipation issue, it is not a good idea to have an affair while going through a divorce even if no money is spent on this person. Also consider the potential additional cost of litigation if your spouse takes an unreasonable position if he or she finds out about your affair. It is for this reason that family lawyers will often give advice to try to avoid your spouse learning about an affair (or your having an affair) during the course of your divorce.

### Note

<sup>1</sup>Excerpts taken from an article written by Bruce L. Richman for the Family Advocate entitled "Determining the true income of an entrepreneur" published by the ABA Family Law Section.

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