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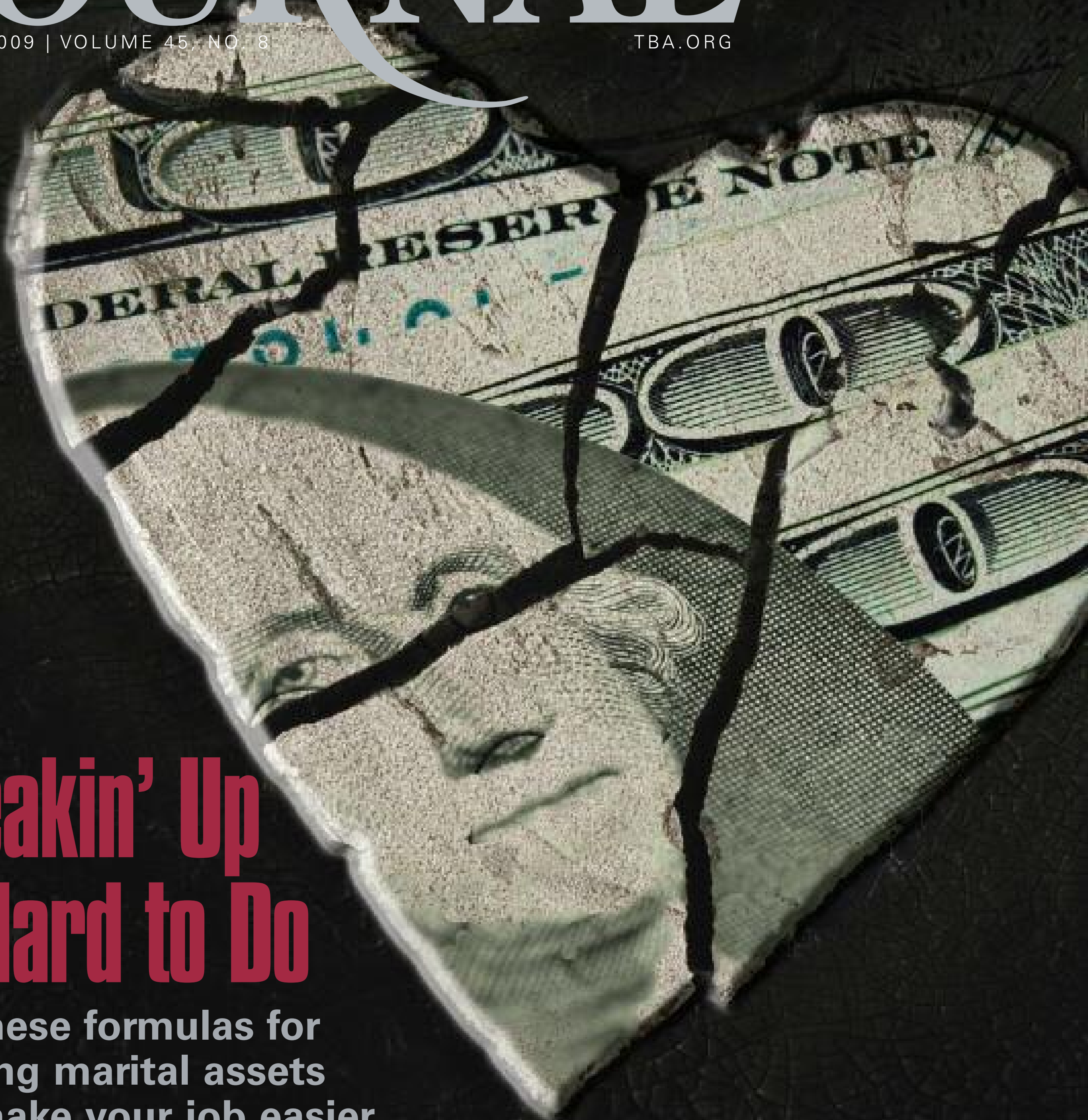

Breakin' Up Is Hard to Do

But these formulas for dividing marital assets will make your job easier

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ON THE COVER

Love hurts — like trying to figure out reasonable needs and the ability to pay alimony in a divorce. This article, with detailed illustrations, will help. With the figuring, not with the heartache.
Cover design by Landry Butler.

Breakin' Up Is Hard to Do

By Robert Vance

But these formulas for dividing marital assets will make your job easier

In a divorce engagement, attorneys strive to discover methods of dividing the marital estate in their client's favor and justify an alimony figure that is low if they represent the obligor and high if they represent the obligee. Explaining either side to the trier of fact is best accomplished with a straightforward, logical and businesslike approach, rooted in facts, with documentation and analysis to support the positions. From my understanding, most states that allow alimony typically base awards on one spouse's reasonable need and the other spouse's ability to pay, with Tennessee following this premise.[1] The proposed equitable division of the marital estate should be a central factor before alimony is considered as this will affect the need.

This article features two methods or "steps" that assist in the division of the marital estate and figure alimony need and the ability to pay that alimony. The steps follow a case study that illustrates the primary factors the attorney should be considering and the knowledge and services that should be expected from a forensic accountant (hereinafter "expert"). Step 1, Dividing the Marital Estate, describes a method to facilitate marital estate division in an understandable manner while highlighting several common issues that typically arise during the process, such as the valuation of pensions and other retirement assets, the value and nature of separate property, documenting dissipation and factoring in the tax characteristics of assets. Step 2, Figuring Reasonable Needs and the Ability to Pay Alimony, introduces a method to calculate and justify the reasonable need for alimony (or lack thereof) and the ability to pay alimony (or lack thereof). The alimony analysis is based upon both spouses' income, proposed child support, personal living expenses, taxes, retirement draws and future income generated from the divided assets. The analysis illustrates a simplified lifetime financial plan for all of the remaining years of each spouse's life expectancy so the court can understand the impact of a proposed settlement on each spouse's cash flow and the ability to accumulate wealth as the years pass.

Hiring Experts

An expert can be hired by both parties as a mutual expert with the settlement details being negotiated and contributed by both parties. The mutual expert method is the wave of the future since it offers the ability to reduce conflicts and professional fees. Of course, an expert is most often consulted by an attorney who asks that the parties' financial situation be reviewed in order to frame a favorable settlement for their client and then present that at mediation or trial. In those situations, the expert must have cold, hard facts to support the position so as not be labeled a complete partisan or hired gun. In highly complex matters or in cases with opposing experts holding polar opposite opinions, the court can appoint an expert as its own witness or as a special master. In all three types of employment, the expert's analytical and communication skills are critical.

Case Study

This article features a case study that illustrates the concepts discussed. Mr. Smith ("Husband" and "money spouse") and Mrs. Smith ("Wife" and "non-money spouse") have two children, ages 15 and 13, and seek to end an 18-year marriage. Both spouses are financially conservative and have amassed a sizable amount of investments and retirement savings with the net marital estate exceeding $2.2 million. Alimony is a definite possibility because of the length of the marriage, disparity in each spouse's future income earning capacity and Husband's admitted fault. Husband, age 48, is an airline pilot with income greatly exceeding that of Wife, who is also age 48 and works at a nonprofit agency.

Wife desires to stay in the Tennessee marital residence which has 20 years remaining on the mortgage. The Smiths own an expensive rental house that is listed for sale, which was the former marital residence located in the Washington D.C. area. Husband is vested with a defined benefit pension from his current employer and the military, but he joined the military several years before marriage and thus claims some of that pension to be his separate property. Husband spent significant assets on a paramour, along with other questionable financial transactions and transfers, but claims none of it to be dissipation.

Continued on page 14

Marital Estate *continued from page 13*

STEP 1. DIVIDING THE MARITAL ESTATE

The attorney or expert usually begins with the classification and organization of the assets and debts into a spreadsheet known as the Marital Balance Sheet (MBS). In the property division context, "balance sheet" refers to the listing of separate and marital assets and debts in a single table representing the entire estate with a proposed division of each item. The table "balances" the net estate into one version of an equitable division and serves as the foundation for an alimony needs analysis. See Exhibit 1.

In a perfect world, a proposed division would be based upon reasonable and sensible factors. Of course, "reasonable" is defined in the mind of the one proposing the idea. Some sensible factors include the spouses' desire for a particular asset (e.g., mother wants to stay in the house until children go to college), the practicality, legality or necessity of one spouse owning an asset or owing a debt (e.g., Wife is a dentist and thus cannot split ownership of the practice or its line of credit with her husband), the tax consequences (e.g., an IRA is taxable if withdrawn but a money market is not) and the future income earnings from an asset (e.g., the cash and IRA settlement may be large enough to generate enough income to cancel the alimony need). The proposed settlement does not have to be equal, only equitable; however, neither party is served well if a proposal is rendered dead-on-arrival by containing extreme assumptions or positions.

The MBS is a flexible presentation. The MBS should be constructed using formulas in an electronic spreadsheet, such as Excel, which allows an attorney or expert to easily make changes and adapt to new scenarios and proposals. Several scenarios may be needed on hand during negotiations. Including the following features in the MBS will allow it to be more useful: 1) relating debts to secured assets and showing the net equity as in Exhibit 1 line numberss 1-5; 2) displaying property claimed as separate in whole or in part so as to establish the separate claim; 3) offsetting the present value of a pension or fair market value of a small business with other estate assets; 4) grouping asset and debt categories such as real estate and investments; and 5) displaying the

Smith v. Smith
Exhibit 1-Marital Balance Sheet
3/31/08

No.	Description	Title	FMV	Debt	Equity	Child or Separate Account	Marital	Proposed Division		Notes
								Husband	Wife	
	REAL ESTATE									
1	Rental Property-1234 Maple Cove	J	410,000				0			Appraisal dated 11/30/07; listed for sale
2	Estimated Sales Comm. on Rental Prop. Sale	J		(24,000)			0			Estimated
3	Estimated Income Tax on Rental Property Sale	J		(35,000)	351,000		351,000	175,500	175,500	Estimated
4	Marital Residence-4567 Main St.	J	250,000				0			Appraisal dated 11/30/07
5	Marital Residence-Mortgage #05-227	J		(119,000)	131,000		131,000		131,000	Statement dated 2/28/08
	CASH & INVESTMENTS									
6	Checking Account #5689	H	2,500		2,500		2,500	2,500		Per statement as of 2/28/08
7	Checking Account #9876	W	3,500		3,500		3,500		3,500	Per statement as of 2/28/08
8	Savings Account #1234	J	11,500		11,500		11,500	11,500		Per statement as of 2/28/08
9	ABC Corporation Stock-200 shr	H	20,000		20,000		20,000	20,000		Per statement as of 2/28/08
10	Amer. Century I #3698	W	20,000		20,000		20,000		20,000	Per statement as of 2/28/08
11	Amer. Century-Money Market #5678	J	31,000		31,000		31,000		31,000	Per statement as of 2/28/08
12	Amer. Century-II #6543	J	36,000		36,000		36,000		36,000	Per statement as of 2/28/08
13	Jones Fund #1478	J	7,000		7,000		7,000		7,000	Per statement as of 2/28/08
14	Janus-Wordwide #9998	J	2,000		2,000		2,000		2,000	Per statement as of 2/28/08
15	Janus-Twenty $8889	J	9,000		9,000		9,000		9,000	Per statement as of 2/28/08
16	eTrade Account #2589	H	4,000		4,000		4,000	4,000		Per statement as of 2/28/08
	RETIREMENT									
17	ABC Co. Pension Plan #AB-123	H	428,959		428,959		428,959	428,959		PV of future benefits as of 1/31/08
18	Military Pension Plan	H	190,000		190,000	20,000	170,000	170,000		PV of future benefits as of 1/31/08
19	Money Purchase Pension Plan #XY-9876	H	140,000		140,000		140,000		140,000	Per statement as of 2/28/08
20	Retirement Savings Plan #JK-6543	H	550,000		550,000		550,000		550,000	Per statement as of 2/28/08
21	IRA #02-3456	H	11,000		11,000		11,000	11,000		Per statement as of 2/28/08
22	IRA II #98-7654	H	122,000		122,000		122,000	48,800	73,200	Per statement as of 2/28/08;40%/60%
23	403b Plan #9876	W	38,000		38,000		38,000		38,000	Per statement as of 2/28/08
24	IRA III #6543	W	35,000		35,000		35,000		35,000	Per statement as of 2/28/08
	PERSONAL PROPERTY									
25	1982 Mercedes	J	12,000		12,000		12,000	12,000		NADA Average retail value as of 1/31/08
26	1994 Toyota	W	3,200		3,200		3,200		3,200	NADA Average retail value as of 1/31/08
27	1998 Chevrolet PU Truck	H	8,800		8,800		8,800	8,800		NADA Average retail value as of 1/31/08
28	Personal Property	J	20,000		20,000		20,000	10,000	10,000	H & W Estimate
29	Husband's Dissipation of Marital Assets	H	109,538		109,538		109,538	109,538		CPA Analysis
	OTHER DEBTS									
29	Visa #4529	J		(4,000)	(4,000)		(4,000)		(4,000)	Per statement as of 1/31/08
30	Amex #1234	W		(8,500)	(8,500)		(8,500)		(8,500)	Per statement as of 1/31/08
31	Discover #6549	W		(9,500)	(9,500)		(9,500)		(9,500)	Per statement as of 1/31/08
	TOTALS		2,474,996	(200,000)	2,274,996	20,000	2,254,996	1,012,596	1,242,400	
								44.9%	55.1%	

proposed division of each and every item along with the total net percentage to each spouse. Judges often rule directly from an MBS and attach it as an exhibit to the decree since they find it to be simple, concise and unambiguous. Occasionally, a judge will ask for a blank copy of the spreadsheet template so as to fill in the division pursuant to the ruling.

What sort of supporting documentation is needed? The expert and attorney must collaborate to gather the supporting documents that evidence each line item in the MBS. One or the other should accumulate a document or work paper representing backup for each listed asset and debt, dated as close as possible to the date of the final divorce hearing.[2] Exhibit 2 provides a basic list of documents or analysis needed for the most common MBS items. If the case is continued, a discovery request for updated documents should be issued if allowable.

Request for Production of Documents (RPD) and Other Discovery Tips

Account numbers and the name of the asset or debt should be included in an RPD if known. Using a truncated version of those numbers on the MBS allows for easier identification. For mediation and trial, the documents that identify and value the assets and debts should be labeled with exhibit numbers that correspond with the line numbers in the MBS and then placed in a three-ring binder with several identical copies. If an expert is to be hired, he should be engaged early in the divorce process and used to assist in formulating the RPD. In the case study, Wife's attorney sent an RPD which resulted in production of monthly or quarterly statements for most, but not all, of Husband's accounts containing cash, investments, retirement and debts. Wife's attorney had hired an expert who reminded her to request the couple's tax returns for the last five years. The expert discovered dividend income on the tax returns that identified an on-line brokerage account that Husband failed to "remember" in the RPD and Interrogatories. A subpoena was issued for this account and it was discovered that, during the months leading up to separation, Husband made several large profitable trades of stocks and wired the proceeds to another unidentified account.

When requesting personal tax returns, always specify five years of Form 1040, *including all schedules* since Form 1040 is actually only two pages in length. If the spouse is also a small business owner, request five years of that business's tax returns *with all schedules.* The form numbers are Form 1065 for a partnership or LLC, Form 1120 for a corporation and Form 1120S for an S corporation. The owner's income reporting form known as Schedule K-1 from a 1065 or 1120S, unlike a W-2, will not be attached to an individual form 1040. Request the K-1s for all business owners of the entity even if discovery of the full business returns is denied. A K-1 can reveal valuable information such as changes in ownership percentages, nontaxable cash distributions and capital contributions that can be used as a method of "parking" or hiding funds until the divorce is final.

The attorney should consider sending a subpoena to all banks that a spouse may use, especially if that person owns a small business and must periodically renew loans and substantiate good credit. Request the entire loan file, including personal financial statements (PFS) and loan applications. In a PFS, owners often list their "estimate" of the value of a small business and are required to list details of all assets and debts. Assets might appear in a PFS that might be unknown to the other spouse

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Exhibit 2-Common Documents/Analysis for Marital Balance Sheet

Asset/Liability	Related Document/Analysis
General	5 Years of business & personal tax returns, with W-2s
Marital Residence	Real estate appraisal
Mortgage	Payoff or monthly statement
Checking/Savings Accounts	Latest bank stmnt & canceled checks (may need 24 months)
Investment Accounts	Latest monthly/quarterly statement
Defined Benefit Pension	Vested benefit statement & plan document
Defined Contribution Plans-401(k) Savings Plan, etc.	Latest monthly statement
Stock Options	Vested & unvested grant statement & plan document
IRA	Latest monthly/quarterly statement
Vehicles	NADA valuation from Internet
Other Personal Property	List & estimates from parties; personal property appraisal
Small Business	Business valuation from qualified expert
Dissipation of Marital Assets	Receipts, canceled checks, CC stmnts, depo. excerpts, etc.
Credit Cards	Latest statement (may need 24 months)

and are often valued higher than that claimed for divorce purposes since the loan applicant is motivated to inflate values in order to renew the loan. In Tennessee,[3] a person can be held to values listed in a PFS issued to a bank since it is a document that is generally subject to federal bank fraud provisions.

The RPD should also request electronic file copies or access to all electronic ledgers, including passwords, maintained by the spouse or the business, such as Quicken for personal records and QuickBooks for business records. Access to electronic files allows the expert to easily and inexpensively sort data a number of ways, discover previously unknown activities of the spouse, and extract the true income, expenses, and fringe benefits from the data.

Pensions and Other Retirement Assets

The most common types of retirement assets are Defined Benefit Plans, Defined Contribution Plans and Individual Retirement Accounts.

Defined Benefit Plans. These types of plans do not usually have an investment "balance" that can be withdrawn and are often characterized as the classic pension whereas the spouse accruing the benefit, the employee-spouse, vests in the plan over time and draws a monthly benefit for life during retirement. The nonemployee-spouse can often request, through a Qualified Domestic Relations Order ("QDRO"), that an account be segregated or monthly payments allocated to him/her, often with many of the same rights as the employee-spouse.

What if the pension cannot be divided? The future monthly pension benefit stream can be discounted to present value by an expert and placed on the MBS as if a lump-sum, cash-equivalent balance existed in an account. The present value can then be offset against other estate assets. See line item #17 on the MBS, Exhibit 1, for the present value conclusion of Husband's defined benefit plan. Husband's military pension was also present-valued and placed on the MBS as line item #18. Tennessee, like many other states, has allowed present value pension offset in property divisions.[4] Offset may be the most practical and the only legal remedy to deal with a pension division, assuming other assets of equal value exist to offset the hypothetical pension balance.

The attorney will want to know the monthly pension benefit amount that is vested and accrued to date whether or not the plan is present-valued. When this document is obtained through RPD or subpoena, remember to order the vested benefit assuming a hypothetical retirement *as of the required valuation date near the divorce*, not a projection of the benefit to retirement age. Post-divorce future vesting of benefits is not usually available as marital property to the nonemployee-spouse. If the pendency of the divorce is drawn out, pension benefits may increase; therefore, the attorney should obtain an updated benefit statement.

Unvested Pension. In some cases, a coverture fraction is an acceptable method to value the marital portion of unvested pensions that may require the court to retain jurisdiction so as to divide the monthly payment once the employee vests and begins to draw on the plan. The marital property interest is often expressed as a fraction or a percentage of the employee-spouse's monthly benefit. Under one variation, the percentage may be derived by dividing the number of months of the marriage during which the benefits accrued by the total number of months during which the retirement benefits accumulate before being paid.

Defined Contribution Plans and Individual Retirement Accounts (IRAs) These types of assets do have a tangible investment balance that can be withdrawn (usually with tax and penalty if age and other requirements are not met) and are comprised of contributions made by the individual. The 401(k) is the most well-known defined contribution plan, which is often matched or contributed to by an employer. Note that an IRA is the investment "vehicle" that receives a rollover balance from a defined contribution or defined benefit plan; therefore, IRAs can be created by the traditional annual contribution of $5,000 (2009 limit) or from a rollover.

Both types of assets generally do allow for division in divorce and can be transferred or rolled over tax-free to an IRA in the other spouse's name. Note that in lines #19 and #20 of the MBS, two of Husband's retirement assets are proposed to be transferred to Wife through a rollover. The assets do not become taxable to Wife until she begins to draw funds from the accounts.

The attorney or expert must confirm that the retirement plan allows for segregation or distribution and will accept a QDRO. Avoid being caught in the malpractice web of negotiating a deal with the client receiving some of the benefit plan, but the plan itself does not allow for the provisions of the negotiated deal. *Read the plan organizing document!* Private and union plans are usually covered by ERISA and thus are subject to QDROs. Government, public schools and the military are generally not subject to ERISA and do not accept QDROs, but may have developed their own version.

Separate Property Issues

Tennessee defines marital property to include "income from, and any increase in value during the marriage of, property determined to be separate property … if each party substantially contributed to its preservation and appreciation."[5] The courts have generally determined that a spouse can contribute to the preservation and appreciation of the other spouse's separate property through a number of ways, including running a household as a homemaker, payment of property taxes by one spouse on property owned separately by the other, filing a joint tax return with one spouse paying federal income taxes through withholding or paying estimated tax payments on the other's separate income, one spouse "allowing" the other to contribute marital income to a separate, premarital retirement account, and one spouse operating a farm or small business owned separately by the other, among many others. Tennessee courts do not generally allow purely market-driven separate property appreciation to become marital.[6]

When figuring the premarital separate portion of a pension account, consider the fact that a valuation that uses a monthly retirement benefit that was derived based on a plan's prescribed compensation formula may render a result that is dramatically different than applying a coverture fraction based on the months married. The facts of the situation may give guidance as to which method to use. Note the military pension on line #18 has a separate element since the Husband joined the military three years before the marriage and military pensions vest after 20 years; thus the pension was fully vested after year 17 of the 18-year marriage. The calculated present value using the plan's own compensation formula to figure the hypothetical monthly benefit accrued at date of marriage was $20,000 and the date of divorce value was $190,000, resulting in a $170,000 marital value appreciation. Had the coverture fraction been used, the separate value would have been $28,500 ($190,000 x 3/20).

Commingling and Transmutation. Concepts that are often difficult to illustrate include identifying property acquired in exchange for separate property and determining whether funds have been commingled and/or transmuted. Exchanges of assets occurring over multiple financial accounts and multiple years can be especially confusing. A typical example might involve a premarital 401(k) plan that was rolled over into an IRA that is with a brokerage house that has merged and changed names a few times. The attorney should avoid assuming an account or other asset that exists today that seemingly did not exist at marriage is automatically marital property. An expert can create a schedule that traces the flow of separate funds over time in order to demonstrate if separate funds were used to purchase other separate assets or whether separate funds that may have been deposited with marital funds are still identifiable or inseparable so as to prove or disprove commingling and transmutation.

Proving Dissipation

Dissipation of marital property occurs when one spouse uses marital property, frivolously and without justification, for a purpose unrelated to the marriage and at a time when the marriage is breaking down.[7] The factors that Tennessee courts frequently consider when determining whether a particular expenditure or transaction amounts to dissipation include whether the expenditure benefited the marriage or was made for a purpose entirely unrelated to the marriage, whether the expenditure or transaction occurred when the parties were experiencing marital difficulties or were contemplating divorce, whether the expenditure was excessive or de minimis, and whether the dissipating party intended to hide, deplete or divert a marital asset. The timing of the expenditure or transaction is extremely relevant. Expenditures that were typical or commonplace during the marriage will be difficult to prove as dissipation, especially when the other spouse acquiesced in them.[8]

After the party alleging dissipation establishes a prima facie case that marital funds have been dissipated, the burden shifts to the party who spent the money to prove that the challenged expenditures were appropriate. Exhibit 3 illustrates a table containing a list of what Wife alleges were highly questionable, frivolous and wasteful expenditures that were not typical during the

Continued on page 18

Marital Estate *continued from page 17*

marriage of the Smiths. Through the RPD, Wife's attorney had requested checking account statements, with canceled check copies, along with credit card statements for the two years before the marital problems surfaced. The cash ATM withdrawals were atypical for Husband during the marriage as were the travel and meals expenditures since he enjoyed a generous expense account from his employer and rarely incurred personal expenses of this nature. Husband also incurred numerous new loans around separation time with no apparent need for the proceeds.

An organized table, such as that presented as Exhibit 3, along with properly referenced copies of checks, receipts, deposition excerpts, etc., is a powerful tool to use in presenting the prima facie case. The total balance of dissipated funds should be placed on the MBS as an asset as if the funds still exist and the non-dissipating spouse will receive an offset of another marital asset. A similar asset offset can be used to obtain credit for marital funds used to pay divorce attorney fees since this could be considered a form of dissipation. Line item #29 of the MBS, Exhibit 1, represents the total dissipation as a single figure as if the funds still existed.

If marital funds were spent on a frivolous or wasteful asset that does still exist, such as a car for a girlfriend, or the funds are suspected of being diverted to an unknown account, consider placing the asset as a single line item on the MBS rather than on the dissipation schedule. Dissipation is often perceived as subjective in the eyes of the court; thus minimizing the entries and dollar amounts on that schedule is often more beneficial.

Tax Characteristics of an Asset

Assets of similar gross fair market value may result in different amounts of tax due if sold and, therefore, have different net intrinsic values, i.e., an asset with a higher tax basis[9] will result in lower taxes. When dividing up the marital estate, the attorney or expert should consider whether or not a particular asset is of a taxable nature and, if so, determine the tax basis. Some assets, like checking accounts, would not be taxable if spent, but a mutual fund may be taxable if sold. The personal residence may or may not be taxable if sold, but most retirement accounts will be taxable if liquidated.

In the Smith MBS, the proposed division transfers item #9, ABC Corporation Stock-200 shares, with a value of $20,000 to Husband, and #10, Amer. Century I (a mutual fund), with a value of $20,000 to Wife. Husband purchased ABC five years ago at $20 per share; thus his tax basis is $4,000 and will have a $16,000 capital gain if sold. Wife

Smith v. Smith
Exhibit 3-Dissipation of Marital Assets by Husband
3/31/08

					Girlfirend Expenses				Other	
Date	Check Num	Description	Memo	Totals	Clothing & Dept. Stores	Travel, Meals & Ent.	Loans to G'friend	Cash	Bank Loans	Cosmetic Medical
10/1/05		Refinance of H's Paid-for Car	Per H's Depo	15,000.00					15,000.00	
10/1/05		Disney World Trip	Per Answers to Interrog.	5,000.00		5,000.00				
10/13/05	1032	Sports Tickets Etc.	Per Answers to Interrog.	3,000.00		3,000.00				
11/1/05	1016	Check to Girlfriend		2,500.00			2,500.00			
11/1/05		Credit Union Loan #12345	Unknown purpose	20,000.00					20,000.00	
11/1/05	1045	Sports Tickets Etc.	Per Answers to Interrog.	3,000.00		3,000.00				
12/20/05	1053	Check to Girlfriend		415.00			415.00			
12/27/05		Miguelas Clothing	Women's clothing shop	692.48	692.48					
12/29/05		Miguelas Clothing	Women's clothing shop	567.00	567.00					
1/3/06		Airline		915.14		915.14				
1/3/06		Airline	Chicago trip	915.14		915.14				
1/3/06		Apple Store		398.00	398.00					
1/18/06		Ruth's Chris Steak House	H seen out w/ Girlfriend	341.00		341.00				
1/31/06		Cash Advance on cc	Vegas trip	402.00		402.00				
2/2/06		Over-the-counter W/D	Vegas trip	400.00		400.00				
2/2/06		SunTrust Cash	Vegas trip	402.00		402.00				
2/5/06		Cash Advance on cc		402.00		402.00				
2/15/06		Cosmetic Dentist Inc.	Per H's Admission	7,890.00						7,890.00
2/15/06		Hair Plugs R Us	Per H's Admission	12,107.00						12,107.00
2/23/06		Banana Republic		1,095.76	1,095.76					
3/4/06		Delta Air	Trip w/ Girlfriend	678.00		678.00				
4/5/06		Delta Air	Trip w/ Girlfriend	678.00		678.00				
5/10/06		Victoria's Secret	Women's clothing shop	789.00	789.00					
5/19/06		Girlfriend's Diamond Ring	Per H's Depo	20,000.00	20,000.00					
6/8/06		Atm Cash Withdrawal		2,000.00				2,000.00		
7/10/06		Victoria's Secret	Women's clothing shop	150.00	150.00					
8/17/06		Over-the-counter Withdrawal		7,300.00				7,300.00		
9/8/06	1283	Cash		2,500.00				2,500.00		
		Totals		109,537.52	23,692.24	16,133.28	2,915.00	11,800.00	35,000.00	19,997.00

purchased the Amer. Century I fund last year for $22,000; thus it will have a $2,000 capital loss if sold. Husband would owe $2,400 in capital gains taxes and Wife would owe nothing; therefore, Wife's asset possesses a higher net intrinsic value.

STEP 2. FIGURING REASONABLE NEEDS AND THE ABILITY TO PAY ALIMONY

A property division must be considered before figuring one spouse's needs and the other spouse's ability to pay alimony since the divided assets and debts each carry their own future cash flow implications. Attorneys need a method to calculate and justify the reasonable need for alimony (or lack thereof) and the ability to pay alimony (or lack thereof) after a working property division is on their table. The Alimony Needs and Ability to Pay Analysis illustrates a simplified, lifetime financial plan covering all of the remaining years of each spouse's life expectancy. The court and the parties can use the analysis to understand the impact of the proposed settlement on each spouse's cash flow, along with the accumulation or dispersion of wealth as the years pass.

Foundation for Alimony

Tennessee's statutes and case law provide for and define the foundation for alimony based upon the nature of the case and circumstances of the parties. The courts must consider many factors in setting alimony, but generally it is appropriate when one spouse is economically disadvantaged relative to the other spouse.[10] No absolute formula exists; however, numerous cases and the *Tenn. Code Ann.* provide that "the court shall consider the financial needs of each spouse and the financial ability of each spouse to meet those needs…"[11]

The Tennessee Supreme Court expounded upon the *Tenn. Code Ann.* and set out several guiding principles regarding the foundation for alimony, including: 1) the real need of the spouse seeking the support is the single most important factor; 2) in addition to the need of the disadvantaged spouse, the courts most often consider the ability of the obligor spouse to provide support; 3) further, the amount of alimony should be determined so that the party obtaining the divorce is not left in a worse financial situation than he or she had before the opposite party's misconduct brought about the divorce;[12] and 4) while alimony is not intended to provide a former spouse with relative financial ease, we stress that alimony should be awarded in such a way that the spouses approach equity. Thus, need, ability to pay, status, and fault are the primary considerations.[13]

Standard of Living. As the courts assess the real or reasonable need of a non-money spouse, most attempt to make the post-divorce standard of living reasonably comparable to that experienced during the marriage, while considering the standard that the money spouse will enjoy post-divorce. Standard of living is broadly defined as "a level of material comfort as measured by the goods, services, and luxuries available to an individual, group, or nation".[14] Considerations can include the value and furnishings of the marital residence, models of cars driven, schools attended by the children, social or club memberships, types of vacations enjoyed, etc. I generally define the term as the level of expenses that a family could afford to enjoy during their marriage, not necessarily what they did enjoy, since many families today spend more than they make and pile on the credit card debt.

Figuring Reasonable Needs

A majority of attorneys I encounter use a single-month financial statement format for "proving" alimony need or ability to pay since most people tend to think in terms of monthly budgets: thus it is easier to comprehend. Additionally, many courts require this type of monthly income and expense

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Marital Estate *continued from page 19*

illustration in the form of an affidavit. The article presents an alternative solution since single-month formats are often flawed for these reasons: 1) use of a single month representing a snapshot in time, not a realistic, forward-looking projection of the actual incomes and expenses the spouses expect over their remaining lifetimes, 2) gross understatement of income by self-employed and commission or bonus-dependant spouses,[15] 3) use of expense figures that appear to be an accurate accounting of the historical standard of living, although the future expenses will inevitably be different because of new housing arrangements, additional child care expenses, duplications, etc., 4) failure to incorporate the use of investment earnings available from the divided property, 5) failure to incorporate the use of retirement assets or pensions at retirement date or for use immediately if necessary, 6) overstatement of monthly expenses due to a lack of knowledge of the real details, and 7) overstatement of monthly expenses after listing those ordered to pay as temporary support such as the house note, utilities and car note; these expenses may be misleading as to the money-spouse's future ability to pay if they will transfer to the non-money spouse or change to a new amount after the divorce is final.

A Forward-Looking Projection. The goal in "proving" alimony need should be to illustrate the non-money spouse's real and reasonable need based on a forward-looking projection of income and expenses. A logical and business-like analysis resembling a lifetime financial plan is very useful if the marital estate contains diverse financial and retirement assets, the assets need to be present-valued or appraised and used as offset, or each spouse's income and expense affidavit displays great disparity or negative cash flow (which frequently occurs).

The future income should reflect a realistic earning capacity along with a reasonable return on retirement and investment accounts distributed in the property settlement. The future expenses should reflect those that the spouse actually expects to incur. The court needs to be informed of the possibility that a spouse might become destitute by receiving too little support, or by paying too much, or that one spouse may have the ability to accumulate a considerably larger amount of future wealth and therefore experience a greatly superior post-divorce standard of living to that of the other spouse.

Steps for Figuring Reasonable Needs

Calculate the remaining life expectancy of each spouse based upon age and other factors. An often cited source is the *United States Life Tables, National Vital Statistics Reports*, compiled by the National Center for Health Statistics.

For alimony and child support purposes, generally use earnings from W-2s or the tax return, or determine the true income of the self-employed and commission or bonus-dependant money spouse through forensic examinations of tax returns, company books, bank statements, etc. A multiple-year average may be appropriate along with cost-of-living adjustments. Consider hiring a vocational expert to examine the unemployed or underemployed spouse to determine a fair and attainable future earning capacity, if any.

Allow for contributions to retirement plans and/or IRAs based on past practices. One or both spouses will most likely need to rebuild retirement assets post-divorce. Incorporate an investment rate of return on the retirement assets from the proposed settlement in the MBS, thereby allowing for an accumulation of funds until retirement age at which point the assets should be drawn down. The availability of retirement assets and Social Security as a future source of income is often a forgotten aspect, or at least one that is difficult to quantify, unless a lifetime illustration is presented. A reasonable return based upon financial planning portfolio theory should be used.

Incorporate an investment rate of return on the non-retirement financial assets like brokerage accounts, money market accounts, cash and rental properties from the proposed settlement in the MBS. The accumulation becomes the "go to" or emergency fund if cash flow is negative in a particular year. A reasonable return based upon financial planning portfolio theory should be used.

Factor in the receipt of child support. Note that child support is often the element that produces the short-term façade of well-being for the obligee and pain for the obligor. The attorney must consider and be prepared to illustrate what occurs to each spouse once the obligation ceases.

Since at least one of the spouses will be moving to a new residence, figure the new mortgage note or rent based on an approximation of the pre-divorce standard of living while being realistic as to the proposed new home(s). In today's economy, many couples are house poor in that they are "upside down" in the marital residence equity and have too few financial and retirement assets. Affordable future housing plays much better with a judge than the same old financial irresponsibility that probably contributed to the marriage breakdown in the first place.

Analyze the personal living expenses from the bank statements, canceled checks and credit card statements. Having a detailed accounting or general ledger of actual historical expenses is a powerful rebuttal to an over-stated expense affidavit. Inflation is another element of the future expenses that should be factored into any projection, that, when ignored, can produce a façade of future well-being for both spouses. Beware of the double-dip expense list or affidavit that details routine expenses, such as clothing replacement, groceries, entertainment, gas, etc., along with the nebulous item: "credit card payments." Who pays cash or writes checks for clothing, groceries and gas these days?

Calculate federal and state taxes on the projected earnings, other taxable incomes, itemized deductions and the tax consequences for paying/receiving alimony. Avoid the mistake of using the withholding amounts from the spouses' pay checks or the tax liability from the latest tax return as these tax amounts will change with the new deduction/inclusion of alimony.

Explanation of Wife's Need for Support Analysis

The Needs Analysis, Exhibit 4, represents the result of scientific and methodical calculations and analysis using the

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Smith v. Smith
Exhibit 4-Wife's Need for Support
3/31/08

(A) Year	(B) Age	(C) + Employment Earnings 2.0% COLA	(D) - FICA	(E) - Retirement Deductions	(F) + Child Support	(G) + Draws From Retirement	(H) + Social Security 2.5% COLA	(I) + Earnings & Principal Draws From Investments	(J) = Total Income	(K) - Federal Income Tax	(L) = Net Disposable Income	(M) - Mortgage Prin & Int	(N) - Personal Living Exp. 2.5% Inflation	(O) = Annual (Deficit) or Surplus	(P) = **Monthly (Deficit) or Surplus**	(Q) * **Monthly Alimony Need**
1	48	45,000	(3,443)	(15,000)	38,400	0	0	0	64,958	(12,941)	52,016	(23,400)	(85,588)	(56,972)	**(4,748)**	**5,000**
2	49	45,900	(3,511)	(15,000)	25,200	0	0	12,000	64,589	(16,967)	47,621	(23,400)	(87,728)	(63,507)	**(5,292)**	**5,000**
3	50	46,818	(3,582)	(15,000)	25,200	0	0	14,000	67,436	(17,678)	49,758	(23,400)	(89,921)	(63,563)	**(5,297)**	**5,000**
4	51	47,754	(3,653)	(15,000)	0	0	0	24,000	53,101	(18,341)	34,760	(23,400)	(74,724)	(63,364)	**(5,280)**	**5,000**
5	52	48,709	(3,726)	(15,000)	0	0	0	25,000	54,983	(18,816)	36,168	(23,400)	(76,592)	(63,824)	**(5,319)**	**5,000**
6	53	49,684	(3,801)	(15,000)	0	0	0	26,000	56,883	(19,242)	37,641	(23,400)	(78,506)	(64,265)	**(5,355)**	**5,000**
7	54	50,677	(3,877)	(15,000)	0	0	0	27,000	58,800	(19,619)	39,181	(23,400)	(80,469)	(64,688)	**(5,391)**	**5,000**
8	55	51,691	(3,954)	(15,000)	0	0	0	28,000	60,737	(19,946)	40,790	(23,400)	(82,481)	(65,090)	**(5,424)**	**5,000**
9	56	52,725	(4,033)	(15,000)	0	0	0	30,000	63,691	(20,222)	43,470	(23,400)	(84,543)	(64,473)	**(5,373)**	**5,000**
10	57	53,779	(4,114)	(15,000)	0	0	0	31,000	65,665	(20,444)	45,221	(23,400)	(86,656)	(64,835)	**(5,403)**	**5,000**
11	58	54,855	(4,196)	(15,000)	0	0	0	34,000	69,658	(22,724)	46,935	(23,400)	(88,823)	(65,288)	**(5,441)**	**5,000**
12	59	55,952	(4,280)	(15,000)	0	75,000	0	0	111,672	(43,551)	68,121	(23,400)	(91,043)	(46,323)	**(3,860)**	**5,000**
13	60	0	0	0	0	150,000	0	1,000	151,000	(36,733)	114,267	(23,400)	(93,319)	(2,453)	**(204)**	**0**
14	61	0	0	0	0	150,000	0	3,000	153,000	(36,901)	116,099	(23,400)	(95,652)	(2,953)	**(246)**	**0**
15	62	0	0	0	0	150,000	0	6,000	156,000	(37,034)	118,966	(23,400)	(98,044)	(2,478)	**(207)**	**0**
16	63	0	0	0	0	150,000	0	8,000	158,000	(37,130)	120,870	(23,400)	(100,495)	(3,025)	**(252)**	**0**
17	64	0	0	0	0	150,000	0	11,000	161,000	(37,186)	123,814	(23,400)	(103,007)	(2,593)	**(216)**	**0**
18	65	0	0	0	0	150,000	15,000	2,000	167,000	(40,769)	126,231	(23,400)	(105,582)	(2,752)	**(229)**	**0**
19	66	0	0	0	0	150,000	15,375	4,000	169,375	(41,032)	128,343	(23,400)	(108,222)	(3,279)	**(273)**	**0**
20	67	0	0	0	0	150,000	15,759	6,000	171,759	(41,264)	130,496	(23,400)	(110,927)	(3,832)	**(319)**	**0**
21	68	0	0	0	0	150,000	16,153	0	166,153	(41,460)	124,693	0	(113,701)	10,993	**916**	**0**
22	69	0	0	0	0	150,000	16,557	0	166,557	(42,042)	124,515	0	(116,543)	7,972	**664**	**0**
23	70	0	0	0	0	150,000	16,971	0	166,971	(42,605)	124,367	0	(119,457)	4,910	**409**	**0**
24	71	0	0	0	0	150,000	17,395	0	167,395	(43,143)	124,252	0	(122,443)	1,809	**151**	**0**
25	72	0	0	0	0	150,000	17,830	0	167,830	(43,657)	124,174	0	(125,504)	(1,331)	**(111)**	**0**
26	73	0	0	0	0	150,000	18,276	0	168,276	(44,143)	124,133	0	(128,642)	(4,508)	**(376)**	**0**
27	74	0	0	0	0	150,000	18,733	3,000	171,733	(44,598)	127,135	0	(131,858)	(4,723)	**(394)**	**0**
28	75	0	0	0	0	150,000	19,201	6,000	175,201	(45,020)	130,181	0	(135,154)	(4,973)	**(414)**	**0**
29	76	0	0	0	0	150,000	19,681	9,000	178,681	(45,406)	133,275	0	(138,533)	(5,258)	**(438)**	**0**
30	77	0	0	0	0	150,000	20,173	12,000	182,173	(45,753)	136,420	0	(141,997)	(5,577)	**(465)**	**0**
31	78	0	0	0	0	150,000	20,678	15,000	185,678	(46,058)	139,620	0	(145,546)	(5,927)	**(494)**	**0**
32	79	0	0	0	0	150,000	21,195	18,000	189,195	(46,317)	142,878	0	(149,185)	(6,307)	**(526)**	**0**
33	80	0	0	0	0	150,000	21,724	22,000	193,724	(46,526)	147,198	0	(152,915)	(5,717)	**(476)**	**0**
34	81	0	0	0	0	150,000	22,268	25,000	197,268	(46,683)	150,585	0	(156,738)	(6,153)	**(513)**	**0**
35	82	0	0	0	0	150,000	22,824	28,000	200,824	(46,782)	154,043	0	(160,656)	(6,613)	**(551)**	**0**
		603,544	(46,171)	(180,000)	88,800	3,525,000	335,795	430,000	4,756,968	(1,228,732)	3,528,236	(468,000)	(3,861,195)	(800,960)		

same process as in the section, "Steps for Figuring Reasonable Needs," from above. The table is constructed with the lines representing years of remaining life expectancy and the columns representing the incorporation of various incomes, deductions, expenses, etc. The figures add (or subtract) going from left to right with a subtotal of Total Income in column J, a subtotal of Net Disposable Income in column L, and the ultimate goal of figuring the Annual (Deficit) or Surplus in column O. The Annual (Deficit), if any, is divided by 12 to result in the Monthly (Deficit) or Surplus which approximates the spouse's monthly need.

The following steps explain the process for compiling the need for support of Wife from the case study. These steps are embodied in Exhibit 4 with incomes illustrated as positive numbers and expenses as bracketed or negative numbers.

Wife is 48 years old and in good health. Women in her family tend to live into their mid-80s. The life table suggests a 35-year remaining statistical life expectancy, thus Exhibit 4 contains 35 lines, one for each year of Wife's estimated remaining life, which are reflected in Columns A and B.

Wife is primarily a homemaker, but has worked a part-time job for a nonprofit agency for the past 10 years of the marriage earning around $18,000 per year. Husband's attorney received a court order to have Wife tested by a vocational consultant in order to determine whether her income earning potential was higher, but in today's economy, the ability even to obtain a new job could be questionable. She has a master's degree in finance and scored high in intelligence and vocational abilities on the test; thus the consultant determined her earning ability to be $45,000 per year. Wife corroborated in her deposition testimony that this income level was achievable. Column C reflects the $45,000 earnings with a 2 percent cost-of-living/raise adjustment per year with the mandatory FICA withholdings deducted in column D.

Wife will need to maximize her retirement contributions as reflected in Column E. These contributions are added to the "pool" of other retirement assets she is proposing to receive in the property settlement (lines 17-24 in the MBS, Exhibit 1). The term "pool" is used to describe the various retirement assets, like 401(k)s, 403(b)s, IRAs and other similar accounts that either remain in the spouse's name as originally titled or are rolled over from the other spouse's ownership into an IRA. Although not illustrated here, all of the accounts are pooled together in a single table as if all of the assets were invested in one generic account for ease of explanation to the court.

> *"If I had a dime for every time I heard the statement 'business is way-off this year' during the pendency of a divorce, I would be a rich man."*

As illustrated in Column G of Exhibit 4, the plan calls for Wife to begin drawing $150,000 annually from the retirement assets (which could all be in one IRA or in several different accounts) at age 59 ½. The Social Security income is estimated and presented in Column H. Without illustrating the compounded earnings on the investments in the retirement accounts in a table, it might be difficult to imagine that Wife could draw $150,000 per year for 23 ½ years. Had the impact of this element been ignored, Wife might have seemed to have a need for long-term or lifetime alimony.

Column I illustrates draws of earnings and principal from the non-retirement investment asset pool Wife is proposing to receive in the property settlement (lines 6-16 in the MBS, Exhibit 1). In this particular case, the draw amount was crafted so that Wife's total investment balance would not dip below its original principal balance. Although not illustrated here, all of the accounts are pooled together in a single table as if all of the assets were invested in one generic account, just as with the retirement assets above, for ease of explanation to the court. A separate calculation of this sort is also useful when attempting to illustrate the impact of a non-recurring item, such as the sale of the Smiths' rental property and splitting of the net proceeds (line 3 in the MBS). Wife will have an additional $175,500 to invest after the sale of the property, and the availability of the earnings on this new investment principal should not be ignored.

The child support income presented in Column F was calculated pursuant to the state child support guidelines. Additional child-related expenses paid by Husband will be reflected in his personal living expense schedule and identified specifically in the parenting plan.

Wife desires to remain in the marital residence since it is the only house the children have ever known and it provides for less disruption to their lives. The principal and interest of the fixed-rate mortgage is presented as a deduction in Column M for the 20 years remaining on the note and were separated from the other personal living expenses since they will not inflate. The escrowed property taxes and insurance will inflate, thus they are included with the other personal living expenses. Husband will have a new mortgage on his proposed new residence, and this will be reflected in The Ability to Pay Analysis, Exhibit 5.

Wife's personal living expenses were compiled and documented from her bank statements, canceled checks and credit card statements since historical figures should usually be the starting point from which to project the future expenses. Adjustments will need to be made for changing expenses, like those of the children that will be paid by Husband, new health insurance, different expenses reflecting a change of residence (taxes, insurance, utilities, etc.), vacations, etc. Although not illustrated here, the personal living expenses were were summarized in a table and are totaled in Column N along with an annual increase of 2.5 percent for inflation. Note the drop in expenses after year three, which represents the decrease as the children emancipate and leave the household.

Finally, Column K reflects the federal and state income taxes, calculated on a year-by-year basis, that Wife will pay with the newly projected employment earnings, retirement deductions while employed, retirement and Social Security income once retired, earnings from investments, itemized deductions and exemptions and, of course, the alimony income.

The alimony "need" is reflected as a (deficit), or shortfall, in Column O and is simply the result of adding and subtracting the elements from 1 - 8 above (i.e., Columns C - N in Exhibit 4) as if it were a formula. Courts tend to award alimony as a monthly figure, so Column P reflects one-twelfth of Column O, with the figure rounded to $5,000 per month in Column Q. The table illustrates the need or shortfalls throughout the lifetime of the non-money spouse, which helps the court to understand whether the non-money spouse will enjoy a reasonable post-divorce standard of living or become destitute after child support and alimony end.

Local jurisdictional custom may dictate the length of time alimony is paid — or it can be based in economic reality. In Wife's case, the proposed alimony (i.e., the need) ceases after year twelve as this coincides with Husband's mandatory retirement age of 60 and

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Smith v. Smith
Exhibit 5 - Husband's Ability to Pay Support
3/31/08

(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)	(K)	(L)	(M)	(N)	(O)	(P)	(Q)
		+	-	-	-	-	+	+	+	-	+	=	-	-	=	=
Year	Age	ABC & Military Employment Earnings 2.0% COLA	FICA	401(k) Deductions	Alimony	Child Support	Defined Contribution Plans Draw	Def. Benefit Plans & Military Draw	Social Security 2.5% COLA	Federal & State Income Tax	Draws From Investments	Net Disposable Income	Mortgage or Rent	Personal Living Exp. 2.5% Inflation	Annual (Deficit) or Surplus	Monthly (Deficit) or Surplus
1	48	225,000	(9,103)	(15,000)	(60,000)	(38,400)	0	0	0	(30,199)	20,000	92,298	(28,354)	(63,516)	428	36
2	49	227,250	(9,136)	(15,000)	(60,000)	(25,200)	0	0	0	(32,755)	8,000	93,160	(28,354)	(65,104)	(298)	(25)
3	50	195,000	(8,668)	(15,000)	(60,000)	(25,200)	0	0	0	(24,030)	33,000	95,102	(28,354)	(66,731)	17	1
4	51	196,950	(8,696)	(15,000)	(60,000)	0	0	0	0	(24,418)	8,000	96,836	(28,354)	(68,400)	82	7
5	52	198,920	(8,725)	(15,000)	(60,000)	0	0	14,412	0	(29,258)	0	100,349	(28,354)	(70,110)	1,885	157
6	53	200,909	(8,754)	(15,000)	(60,000)	0	0	14,412	0	(30,230)	0	101,337	(28,354)	(71,863)	1,121	93
7	54	202,918	(8,783)	(15,000)	(60,000)	0	0	14,412	0	(31,190)	0	102,357	(28,354)	(73,659)	344	29
8	55	204,947	(8,812)	(15,000)	(60,000)	0	0	14,412	0	(32,139)	0	103,408	(28,354)	(75,501)	(447)	(37)
9	56	206,996	(8,842)	(15,000)	(60,000)	0	0	14,412	0	(33,077)	1,000	105,490	(28,354)	(77,388)	(252)	(21)
10	57	209,066	(8,872)	(15,000)	(60,000)	0	0	14,412	0	(34,004)	2,000	107,603	(28,354)	(79,323)	(73)	(6)
11	58	211,157	(8,902)	(15,000)	(60,000)	0	0	14,412	0	(34,919)	3,000	109,748	(28,354)	(81,306)	88	7
12	59	0	0	0	(60,000)	0	55,000	146,412	0	(31,749)	2,000	111,663	(28,354)	(83,338)	(29)	(2)
13	60	0	0	0	0	0	55,000	146,412	0	(51,935)	0	149,477	(28,354)	(85,422)	35,702	2,975
14	61	0	0	0	0	0	55,000	146,412	0	(53,126)	0	148,286	(28,354)	(87,558)	32,375	2,698
15	62	0	0	0	0	0	55,000	146,412	0	(54,299)	0	147,113	(28,354)	(89,746)	29,013	2,418
16	63	0	0	0	0	0	55,000	146,412	0	(55,455)	0	145,957	0	(91,990)	53,967	4,497
17	64	0	0	0	0	0	55,000	146,412	18,000	(62,246)	0	157,166	0	(94,290)	62,876	5,240
18	65	0	0	0	0	0	55,000	146,412	18,450	(64,398)	0	155,464	0	(96,647)	58,817	4,901
19	66	0	0	0	0	0	55,000	146,412	18,911	(66,577)	0	153,746	0	(99,063)	54,683	4,557
20	67	0	0	0	0	0	55,000	146,412	19,384	(68,786)	0	152,010	0	(101,540)	50,470	4,206
21	68	0	0	0	0	0	55,000	146,412	19,869	(71,025)	0	150,255	0	(104,078)	46,177	3,848
22	69	0	0	0	0	0	55,000	146,412	20,365	(73,296)	0	148,481	0	(106,680)	41,801	3,483
23	70	0	0	0	0	0	55,000	146,412	20,874	(75,600)	0	146,687	0	(109,347)	37,340	3,112
24	71	0	0	0	0	0	55,000	146,412	21,396	(77,935)	0	144,873	0	(112,081)	32,792	2,733
25	72	0	0	0	0	0	55,000	146,412	18,000	(79,203)	0	140,209	0	(114,883)	25,326	2,111
26	73	0	0	0	0	0	55,000	146,412	18,450	(81,520)	0	138,342	0	(117,755)	20,586	1,716
27	74	0	0	0	0	0	55,000	146,412	18,911	(83,869)	0	136,454	0	(120,699)	15,755	1,313
28	75	0	0	0	0	0	55,000	146,412	19,384	(86,249)	0	134,547	0	(123,716)	10,831	903
29	76	0	0	0	0	0	55,000	146,412	19,869	(88,661)	0	132,620	0	(126,809)	5,810	484
30	77	0	0	0	0	0	55,000	146,412	20,365	(91,105)	0	130,672	0	(129,980)	693	58
31	78	0	0	0	0	0	55,000	146,412	20,874	(93,583)	0	128,704	0	(133,229)	(4,525)	(377)
		2,279,113	(97,292)	(165,000)	(720,000)	(88,800)	1,100,000	3,029,124	293,104	(1,746,836)	77,000	3,960,413	(425,304)	(2,921,753)	613,355	

Marital Estate *continued from page 33*

Wife commencing to draw on the rolled-over retirement accounts. Husband was very clear that he did not want to pay alimony after he retired. In order to eliminate a "drop dead" argument from Husband, Wife was allocated more investment assets that could be drawn upon (Column I) while alimony was being paid so that she could enjoy a reasonable standard of living similar to that experienced during the marriage, while still allowing for alimony to cease at Husband's retirement.

Explanation of Mr. Smith's Ability to Pay Support Analysis

An equally important flip side of the non-money spouse's need is the money spouse's ability to pay. A need can be very real, but the money spouse must be able to meet that obligation. An attorney should not seek alimony based on false or rosy assumptions that the obligor simply cannot pay unless the client wants to spend time and money in court for a round of contempt or change-of-circumstance hearings.

The "formula" used in Exhibit 5 clearly shows that Husband does have the ability to pay alimony of $5,000 per month, or $60,000 per year for 12 years. This table contains a deduction for the alimony (Column F) and child support (Column G) that Wife shows as income items in Exhibit 4. Similar to Wife's needs analysis, Husband's ability to pay analysis contains projections of his future employment income less FICA, deductions for contributions to his 401(k) plan, the eventual draws from the 401(k), two pensions and Social Security upon retirement, draws from investment earnings, taxes (after paying and deducting alimony), a new mortgage and personal living expenses. Note that Husband is to receive 100 percent of his two future pension payments since they were both present-valued on the MBS and Wife is proposed to receive an offset of assets of equivalent value of the property division.

Use of a Lifetime Net Worth Accumulator Graph

The non-money spouse's attorney will probably want the court to be informed as to the ability of each spouse to accumulate post-divorce wealth. Exhibit 6 illustrates the values of the marital estate assets and debts that are proposed to be divided to each spouse at the date of divorce and the values at the statistical dates of death. Using a simple graph, the disparities in lifetime earning ability are much more evident and can be especially useful when proposing an estate division that is not equal and weighted more heavily to the non-money spouse.

Wife proposed a 55 percent or $1,242,400 net property division in her favor plus $5,000 per month in alimony. The graph illustrates that Husband will accumulate much more wealth than Wife during their expected remaining lives, even after paying her alimony for twelve years. Wife's accumulation assumes she will obtain the new job and work until retirement, which may not happen; thus it is probably a best-case scenario. Husband may actually spend his assumed accumulation rather than save it as the graph depicts, but he has the luxury of making that choice.

Conclusion

The first half, or Step 1, of the article highlights a method known as the Marital Balance Sheet that attorneys can utilize to facilitate the asset and debt division of the marital estate. The second half, or Step 2, introduces a

Continued on page 36

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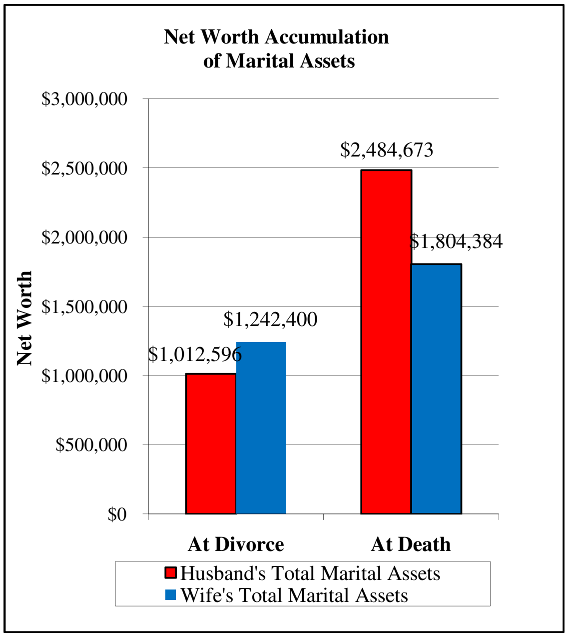
Exhibit 6 - Net Worth Accumulation of Marital Assets
3/31/08

	Husband Estimated Value At Divorce	Husband Estimated Value At Death	Wife Estimated Value At Divorce	Wife Estimated Value At Death
Marital Residence Equity - 2% Appreciat	0	0	131,000	549,970
New Home - 2% Appreciation	0	646,656	0	0
Investment Assets	213,500	1,826,598	284,000	445,290
Retirement Assets	658,759	11,419	836,200	809,124
Other Assets & Debts	140,338	0	(8,800)	0
	1,012,596	2,484,673	1,242,400	1,804,384



Marital Estate *continued from page 34*

method known as the Alimony Needs and Ability to Pay Analysis that attorneys can use to calculate one spouse's reasonable need and the other spouse's ability to pay alimony based upon the remaining lifetime incomes and expenses of the parties after accounting for the asset and debt division. The Needs Analysis allows attorneys to avoid presenting a potentially misleading financial snapshot of one year or one month to a judge or mediator while educating all parties as to the accumulation or dispersion of wealth using the post-divorce standard of living for each side. Attorneys should use these analyses at trial or mediation to prove the viability of their proposal or the unreasonableness of the opposition's offer, or to move a client away from unfounded or entrenched positions before mediation.

ROBERT VANCE is a partner in the Valuation and Litigation Services division of Lattimore Black Morgan & Cain PC in Knoxville, where he concentrates his practice on business valuation, divorce litigation support, business and personal economic damage calculations, civil mediation, forensic accounting and expert witness testimony. He has earned the license of certified public accountant. He is listed as a Rule 31 General Civil Mediator in Tennessee and has been appointed several times as a Special Master.

Notes

1. *Tenn. Code Ann.* § 36-5-121(b).
2. *Tenn. Code Ann.* § 36-4-121(b)(1)(A).
3. *Powell v. Powell*, 124 S.W.3d 100 (Tn. Ct. App. 2003).
4. *Cohen v. Cohen*, 937 S.W.2d 823, 830-832 (Tenn. 1996).
5. *Tenn. Code Ann.* § 36-4-121(b)(1)(B).
6. *Langschmidt v. Langschmidt,* 81 S.W.3d 741, 747 (Tenn. 2002).
7. *Altman v. Altman,* No. M2003-02707-COA-R3-CV, 2005 Tenn. App. LEXIS 207, at *5-6(Tenn. Ct. App. Apr. 7, 2005) (perm. app. denied).
8. *Halkiades v. Halkiades*, No. W2004-00226-COA-R3-CV, 2004 WL 3021092, at *4 (Tenn. Ct. App. Dec. 29, 2004).
9. Tax basis-the cost of the asset; when subtracted from the sale price, the result is the taxable gain.
10. *Aaron v. Aaron*, 909 S.W.2d 408 (Tenn. 1995).
11. *Tenn. Code Ann.* § 36-5-121(b).
12. *Burlew v. Burlew*, 40 S.W.3d 465, 469 (Tenn. 2000) citing *Aaron v. Aaron*.
13. *Aaron v. Aaron*, 909 S.W.2d 408 (Tenn. 1995).
14. www.answers.com.
15. If I had a dime for every time I heard the statement "business is way-off this year" during the pendency of a divorce, I would be a rich man.