CHAPTER 5

ALIMONY

KEY TERMS

Adultery
Alimony
Alimony in gross
Allowable deduction
Arrearages
Attorney’s fees
Canon law
Church court
COBRA
Cohabitation
Contempt proceeding
Cost of living clause
Desertion
Discretion of the court
Divorce
Divorce a mensa et thoro
Divorce a vinculo matrimonii
Ecclesiastical court
Escalation clause
Family support payments
Front loading
Gross income
Habitual intemperance
Incarceration in a penal institution
Incompatibility
Institutionalization for mental illness
Irreconcilable differences
Irremediable breakdown
Irretrievable breakdown
IRS recapture rule
Legal grounds
Lump sum alimony
Married Women’s Property Act
Mental cruelty
Modification of alimony
Net income
No-fault divorce laws
Nominal alimony
Pendente lite alimony
Periodic alimony
Alimony is the term given to a sum of money, or other property, paid by a former spouse to the other former spouse for financial support, pursuant to a court order, temporary or final, in a divorce proceeding. Terms such as spousal support or spousal maintenance are synonyms for alimony and any one or all of these terms may be used by different jurisdictions in statutory or case law.

HISTORY OF ALIMONY

Historically married women had no rights to property in their own name or independent of their husbands. They could not control their own income, enter into contracts, buy and sell land, or sue or be sued. Since the United States inherited its legal system from England, we must look to early English law to trace the history of alimony. In England, the ecclesiastical courts or church courts had the power to grant divorces.

ECCLESIASTICAL COURTS

For many centuries throughout Western Europe, ecclesiastical courts or church courts coexisted with secular courts or courts administered by the state. In many European countries, there was an official state church and it was this church that controlled ecclesiastical courts. In England, eventually it was the Church of England or Anglican Church that administered the church courts. These courts had the jurisdiction to hear some matters that could also be heard in the general state courts. In certain areas, however, the ecclesiastical or church court was the exclusive forum for addressing disputes.

Ecclesiastical courts had exclusive jurisdiction over all family-related legal matters. In these matters, the church courts applied canon law. The term canon law refers to the Church’s body of law or rules that determine man’s moral obligations to man, to woman, and to God. In England, the Anglican Church retained much of the doctrine and dogma of the Roman Catholic Church, including the proscription against divorce as we known it and the status of matrimony as a sacrament. The “divorces” granted by these courts were not the divorces we are accustomed to today. Our definition of divorce, or divorce a vinculo matrimonii, is the complete severance of the marital relationship, allowing the parties to go their separate ways. This includes the right to remarry. The ecclesiastical courts only granted divorce a mensa et thoro, which means divorce from bed and board. The result of a divorce a mensa et thoro did not sever the marriage; it merely enabled the spouses to live separate and apart. In many religions, marriage is a sacra-
ment not to be entered into lightly. In the eyes of God and the church, only the death of one of the two spouses ended a marriage. The church allowed only widowed persons to enter into new or second marriages.

The church also changed the status of individuals upon marriage in that they were viewed as one entity. This concept influenced the secular law regarding the economic positions of spouses at common law. Upon marriage, husband and wife merged into “one body,” the “one” being the husband. By virtue of the marriage ceremony, the spouses entered into a marital contract that imposed the duty of support on the husband. In turn, the wife gave up her rights to control or possess property or earnings that belonged to her. Women did not work outside the home and upon marriage took on the traditional roles of homemaking and rearing the children. This enabled the husband to focus on his career and increase his earning capacity.

**Origins of the Alimony Award**

Upon granting a divorce *a mensa et thoro*, the ecclesiastical courts ordered the husband to pay “alimony” or support to the wife. Not only was the husband obligated to support the wife during the marriage, this duty was ongoing, even through the separation period. The husband’s duty to support the wife upon divorce was not absolute. The wife was entitled to alimony as long as she was an “innocent spouse.” If she had caused the breakdown of the marriage, she would get nothing. This would leave the wife with no monetary support. If the husband were at fault for the breakup of the marriage, his punishment obligated him to pay for his fault. Historically, both the theoretical and practical basis for the creation of alimony was to provide compensation for the wife and punish the husband for his wrongdoing.

**FIGURE 5–1**

In early times, a married couple was viewed as “one body” by the church, that one body being the husband.
ALIMONY IN EARLY AMERICA

The English common law system was adopted by the settlers of America and along with it came the laws regarding the severing of a marriage and the legal disadvantages suffered by married women. The duty of husband to pay alimony upon divorce was codified in statutes of many American jurisdictions. In the late 1830s, American jurisdictions began passing the Married Women’s Property Acts. These statutes eliminated the disadvantages of married women and gave them the right to control their own earnings, bring lawsuits, be sued, own their own property, enter into contracts, and function in a legal capacity. As time passed, societal attitudes toward women changed. Women were increasingly joining the workforce and gaining the ability to support themselves. Even though times were changing and more opportunities opened up to women, the American legal system still held on to the husband’s duty to support his former wife.

When initiating a divorce action, the plaintiff spouse had to allege a legal reason or ground for requesting a divorce in the complaint or petition, for dissolution of marriage. In the early 1970s many jurisdictions began passing no-fault divorce laws. Prior to the passage of no-fault laws, a spouse seeking a divorce was required to have legal grounds—that is, facts proving that the other spouse was at fault. Some of the fault grounds included:

- Adultery,
- Habitual intemperance,
- Desertion,
- Mental cruelty,
- Physical cruelty,
- Incarceration in a penal institution, and
- Institutionalization for mental illness.

The plaintiff spouse was required to produce evidence to prove his case. If the wife was responsible for the breakdown of the marriage, she lost alimony and property. If the husband were at fault, he would probably have to pay alimony and give the wife a considerable portion of property. If the plaintiff spouse could not meet the burden of proof, no divorce would be granted. Parties seeking divorces colluded or conspired together to commit perjury in cases where no fault existed and the parties merely wished to go their separate ways and end an unhappy marriage. The frequency of this type of charade was one of many factors that prompted state legislatures to consider and eventually enact laws that made divorce easier in most circumstances. In 1969, California led the nation in the passage of this country’s first no-fault divorce law.

ALIMONY AWARDS IN A NO-FAULT SETTING

Under our current system of no-fault divorce, the courts must first dissolve the marriage. After the marriage is dissolved, the court will then render orders regarding alimony, property division, child support, child custody, and attorney’s fees. No-fault divorce means that in order for the court to dissolve a marriage, one of the parties only has to allege that the marriage has broken down and that there is no hope of reconciliation.
Depending on the jurisdiction, the no-fault ground may be referred to as one of the following:

- Irreconcilable differences,
- Incompatibility,
- Irretrievable breakdown, and
- Irremediable breakdown.

While all states have some form of no-fault divorce law, many jurisdictions also allow spouses to allege a fault ground in their divorce pleadings. Whether the issue of fault may be raised in determining alimony or property division depends on the jurisdiction.

**Cheating Husband Tries to Cheat Wife!**

In this case, the wife was awarded permanent alimony at the trial court level. On appeal, the court found that the husband was unable to meet his burden of proving that his wife was at fault for the breakdown of the marriage and not entitled to alimony. Both the husband and the wife represented themselves on the appeal as pro per parties.

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**ETHEL RAE CORMIER THIBODEAUX v. EUGENE THIBODEAUX**

454 S.2d 813 (1984)

COURT OF APPEAL OF LOUISIANA, THIRD CIRCUIT

ETHEL C. THIBODEAUX, IN PRO PER.

EUGENE THIBODEAUX, IN PRO PER.

DOUCET, JUDGE.

Defendant, Eugene Thibodeaux, appeals from a judgment awarding plaintiff, Ethel Rae Cormier Thibodeaux, permanent periodic alimony at the rate of $150.00 per month. . .

. . . On appeal defendant contends that the trial court erred in not finding that plaintiff was at fault in causing the dissolution of the marriage, thus precluding her from receiving permanent alimony. In the alternative, defendant asserts that the trial court erred in finding that the plaintiff did not have sufficient means for support such as would entitle her to an award of $150.00 per month in alimony.

Permanent periodic alimony may be awarded a spouse who had not been at fault and has not sufficient means for support. La.C.C. art. 160; Lamb v. Lamb, 460 So. 2d 722 (La. App. 3rd Cir. 1983). . .

. . . Defendant bases his allegations of fault on (1) cruel treatment by his wife, C.C. art. 138(3); and/or (2) her public defamation of him, C.C. art. 138(4). C.C. art. 138(3) provides that cruel treatment by one of the spouses towards the other must be of such a nature as to render their living together insupportable. In addition, the jurisprudence holds that the fault sufficient to preclude a spouse from receiving permanent alimony must be a serious and independent contributory or proximate cause of the dissolution of the marriage. Pearce v. Pearce, supra; Lamb v. Lamb, supra.

Defendant cites as cruel treatment accusations by his wife that he was dating other women. The defendant testified that almost every week his wife would accuse him of seeing other women, usually when he “came home late from work.” Defendant flatly denied dating or seeing
other women. Plaintiff testified that she suspected defendant was seeing other women and that she accused him of this—but not every week. Plaintiff and her thirteen-year-old daughter both testified that, as they were returning from church services one evening at approximately 10:00 p.m., they happened to see the defendant and a former girlfriend of his coming out of the front door of her residence. Defendant denied this allegation. Plaintiff also admitted that she had accused defendant of dating her brother's girlfriend.

The parties physically separated when plaintiff and her two children moved out of the family home. This step was taken approximately one week after defendant began hiding the household cookware so that plaintiff could not prepare meals. This was never specifically denied by defendant. There was evidence that shortly before plaintiff left, defendant disconnected the air conditioner—this was in the month of August. Defendant claimed that he only did this during the day when no one was home to save on his utility bill. However, plaintiff claims that defendant told her that he could not afford to support her and his girlfriend and that he wanted her out of the house. In other words, plaintiff claimed that defendant drove her out of the house. On a couple of occasions, plaintiff’s son heard defendant tell his mother that he didn’t want her in the home.

From this evidence the trial court concluded that the plaintiff was free from fault. The trial judge’s reasons for this finding are not clear. However, from the evidence in the record before us we are unable to say that this conclusion of the trial court was clearly wrong. The record furnishes a basis for finding that the plaintiff’s accusations of extra-marital activity were not totally unfounded and therefore would not constitute cruel treatment. A wife who observes her husband and his ex-girlfriend leaving her residence together at 10:00 p.m. is justified in having her suspicions aroused. Moreover, it appears that the reason for the marital breakup rests on the shoulders of defendant who by his actions drove plaintiff from the family home. In addition, defendant testified at trial that he would welcome the plaintiff back but she refuses to return. Thus, by defendant’s own testimony, the accusations made by his wife could not be considered a serious and independent contributory or proximate cause of the marital breakup.

Defendant next contends that the plaintiff publicly defamed him, and under La.C.C. art. 138(4), and the applicable jurisprudence, this constitutes fault sufficient to preclude her from receiving alimony. We will examine the issue of defamation even though, as we have discussed above with reference to alleged cruel treatment (accusations of infidelity), any public defamation could not, we feel, have been contributory or proximate cause of the marital breakup.

To establish a public defamation as contemplated in C.C. art. 138(4) it is necessary to prove the alleged defamatory statement was: (1) false; (2) made publicly to a person to whom the accuser has no legitimate excuse to talk about the subject of the accusation; (3) not made in good faith; and (4) made with malice (citation omitted).

As we have previously discussed, plaintiff’s accusations were not totally unfounded and her suspicions were justifiably aroused. However, without regard to truth or falsity, there is no evidence that any statements made to others by the plaintiff were made with malice. Plaintiff, a beautician, apparently confided to her fellow beautician her belief that defendant was dating other women. There is nothing in the record to suggest that this was done with malice or was anything other than one person seeking sympathy or advice from another. A fellow employee of defendant testified that while he was working one day plaintiff came and asked him if “that woman” left. On another occasion as this same individual was walking past the parties’ residence, plaintiff asked him “what woman Eugene was talking to.” Again, we can discern no evidence of malice on the part of the plaintiff in making these vague inquiries and there is nothing to indicate that plaintiff acted other than in good faith. In view of these facts and circumstances and the applicable law and jurisprudence we find no error in the trial court’s failure to find fault on the part of the plaintiff on the grounds of public defamation. . . .

. . . Considering the evidence as a whole we are unable to find any abuse of discretion in the trial court’s awarding plaintiff permanent periodic alimony in the amount of $150 per month.

For the reasons assigned, we affirm the judgment of the trial court.

AFFIRMED.

The 1960s and 1970s also saw a change in society’s view of men, women, and marriage. More opportunities were available to women so they could become economically self-sufficient. In addition marriage was no longer viewed as a master/servant relationship, but rather an economic partnership, where the contributions of the wife as homemaker were also gaining a new respect.
The modern view of marriage is much like that of a business partnership, whereupon dissolution of the entity, the partners are entitled to a fair division of the marital assets. The courts prefer property division awards as opposed to alimony because the parties can make a “clean break” and go their separate ways, much like business partners. Alimony does not coincide with this modern view of marriage because there is still a legal tie between former spouses.

While most states gender neutralized their alimony statutes on their own initiative, other states resisted until court intervention required such a change. For instance, the Supreme Court of the United States in Orr v. Orr, 440 U.S. 268 (1979), held that an Alabama statute imposing the obligation on the husband alone to pay alimony was unconstitutional in that it violated the Fourteenth Amendment’s Equal Protection Clause. While the court may impose the duty to pay alimony on either spouse, the reality is that women are still earning less than men and comprise the majority of alimony recipients today. Spouses most likely to obtain alimony for a significant period of time are those who have been in long-term marriages (over ten years), have given up career opportunities to raise a family and care for the home, or those that are ill or have a disability and cannot work. Alimony may also be awarded to a spouse for a limited period of time, allowing the opportunity to become self-sufficient. Alimony is also appropriate if the parties do not have substantial assets and periodic payments would provide for the needs of a spouse. It is also crucial that the payor spouse be employed and have a stable work record. When substantial property is involved, property division is preferred for the purpose of allowing parties to make a clean break. From the ecclesiastical view to present, we have seen alimony evolve from a punishment to compensate a spouse for the bad acts of another, to a vehicle for providing economic support for a spouse.

Parties are free to negotiate an agreement regarding the amount of alimony to be paid. If the parties cannot agree, the court must make that decision. The determination of alimony is within the discretion of the court. This means that the court has the power to make the alimony decision and that an appellate court will not reverse that decision unless the judge somehow abused his discretion. The parties are also free to agree to a waiver, meaning that they will not seek an alimony award in the divorce case. Consider the following excerpt from Lawsuits of the Rich and Famous:

But husbands are no longer the only ones being taken to the proverbial cleaners. Good Morning America’s Joan Lunden irked some feminists in 1992 when she expressed ire over the $18,000 per month which she was told to hand over to Michael Krauss, 54, her husband of 14 years. A Westchester County judge also deemed that Ms. Lunden was also liable for the mortgage on the couple’s 10-room house, as well as property taxes, fuel, electricity, cable TV bills, and payments on his life and health insurance. Hardcore women’s libbers, who think that professional women should accept the spankings which sometimes come with professional territory, were miffed when the ordinarily good-natured hostess snarled, “This is a deplorable and shameful statement on how working women are treated.”

Feminist attorney Gloria Allred saw justice in the decision, telling People magazine, “If we want to make advances in women’s rights, we can’t deny men their rights.” But the National Organization for Women came to Lunden’s defense, saying she was the victim of “the judicial version of ‘Gotcha!’ ” Then, as if to pour salt on the wound, Lunden told Redbook magazine that she had sometimes superseded her ex-husband’s ego, even on trivial matters; “Michael always wanted the reservations in his name. But with my name we would call at the last minute and still get a good table at a busy restaurant. . . .”
Ms. Lunden’s remarks sparked responses from advocates for men’s rights in the 1990’s. Sidney Siller, founder and president of the National Organization for Men, a New York lawyer and the author of a men’s rights column for Penthouse magazine, told the San Francisco Chronicle, “The peal of anguish that went up from women after the Joan Lunden case smacked of hypocrisy. There’s not a level playing ground in the courts for men. . . . I’ve got one case on appeal, a man who is a disabled World War II veteran. His wife is working as an executive. For 40 years of marriage, she was always the main support, while he did work in houses they bought and sold. The judge denied him alimony because he had become an alcoholic. He would have been responsible for her, clearly, if the situation had been reversed.”

If the Joan Lunden case constituted a reversal, then consider the $10 million which aerobics empress Jane Fonda has handed over to California Assemblyman Tom Hayden, even though Hayden himself reportedly only earns about $50,000 annually (Ms. Fonda, now married to cable entrepreneur and Atlanta Braves owner Ted Turner, is worth between $60 million and $100 million); or contemplate the $75,000 Goldie Hawn paid to get away from hubby Gus Trikonis in 1976, only to turn about five years later and relinquish half of her assets to spouse number two, Bill Hudson.

Or take the 1991 divorce case of Jane Seymour. In May of that year, the Santa Monica Superior Court awarded her husband, real estate developer David Flynn, $10,000 a month through 1994, plus coverage by Seymour of $500,000 in debts owed by Flynn’s company and half the value of their $5 million Santa Barbara home, their furniture and their art.

Georgia beauty Kim Basinger is another wife caught up in the divorce courts’ new-found sense of equity. In 1988, afraid that her ex-husband would go to the tabloids with tales of what he termed her “flamboyant affairs,” she forked over to him $64,000 in support and the keys to their $700,000 Los Angeles home.

Likewise stung was designer Mary McFadden, 56, who in 1992 paid Kohle Yohannan, 26, her husband of a mere 22 months, $100,000 in alimony. According to Parade Magazine, things got nasty in that one when Yohannan claimed he had been “the victim of a much older, selfish alcoholic woman.” She bit back, calling him a “spaced-out delinquent,” a “known homosexual,” and alleging that he was unable to consummate their marriage.

The mud began to fly, too, in the early rounds of divorce proceedings between Roseanne and Tom Arnold, in 1994. She renewed claims of spousal abuse by Tom and provided photographs of bruises she said were inflicted by her husband; she also resubmitted documents she said she had earlier withdrawn because she was afraid of Arnold. As for Arnold, he followed the lead of Flynn, Yohannan and others when he declared that he was unemployed and would need $100,000 per month in support. He also alleged that Roseanne had “plundered” his belongings and thrown his wardrobe into the pool at their Brentwood mansion.

Excerpt from Lawsuits of the Rich and Famous by W. Kelsea Wilbur Eckert and Jeff Trippe, pp. 34–36. Used with permission.

DETERMINING ALIMONY

State alimony statutes set forth a list of criteria to be weighed by the judge in evaluating whether or not an award of alimony is appropriate. Although the court considers each statutory factor, it does not have to give each factor equal weight. The court may focus on any number of factors depending on the circumstances of the case.

The California and Florida statutes presented below outline an example of statutory criteria considered by the family courts in determining whether an alimony award is appropriate.
West’s Annotated California Civil Code

§ 4320. Determination of amount due for support; circumstances in ordering spousal support under this part, the court shall consider all of the following circumstances:

(a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following:

(1) The marketable skills of the supported party and the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.

(2) The extent to which the supported party’s present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.

(b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.

(c) The ability to pay of the supporting party, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living.

(d) The needs of each party based on the standard of living established during the marriage.

(e) The obligations and assets, including the separate property of each party.

(f) The duration of the marriage.

(g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.

(h) The age and health of the parties.

(i) The immediate and specific tax consequences to each party.

(j) Any other factors the court determines are just and equitable.

Florida Statutes Annotated (West)

61.08 Alimony

(1) In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. In any award of alimony, the court may order periodic payments or payments in lump sum or both. The court may consider the adultery of either spouse or the circumstances thereof in determining the amount of alimony, if any, to be awarded. In all dissolution actions, the court shall include findings of fact relative to the factors enumerated in subsection (2) supporting an award or denial of alimony.

(2) In determining a proper award of alimony or maintenance, the court shall consider all relevant economic factors, including but not limited to:

(a) The standard of living established during the marriage.

(b) The duration of the marriage.

(c) The age and the physical and emotional condition of each party.

(d) The financial resources of each party, the nonmarital and the marital assets and liabilities distributed to each.

(e) When applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.

(f) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, childcare, education, and career building of the other party.

(g) All sources of income available to either party.

The court may consider any other factor necessary to do equity and justice between the parties.

(3) To the extent necessary to protect an award of alimony, the court may order any party who is ordered to pay alimony to purchase or maintain a life insurance policy or a bond, or to otherwise secure such alimony award with any other assets which may be suitable for that purpose.

Statutory criteria are also important in negotiations. Lawyers will prepare with the statute in mind, looking at each factor in light of the facts under the particular client’s case. If the jurisdiction’s alimony statute does not enumerate criteria for determining alimony, it is important to check local case law. In considering an alimony award, the courts will examine the payor’s ability to pay versus the recipient spouse’s needs.
Balancing Need versus Ability to Pay

While Mr. Adkins, an attorney, clearly had the ability to pay, Mrs. Adkins failed to demonstrate her need for alimony to the court.

PAMELA S. ADKINS v. MILTON R. ADKINS
650 So.2d 61 (1994)
FLORIDA DISTRICT COURT OF APPEALS, THIRD DISTRICT

HUBBART, JUDGE.

This is an appeal by the wife, Pamela S. Adkins, and a cross-appeal by the husband, Milton R. Adkins, from an amended final judgment of marriage dissolution entered after a non-jury trial. For the reasons which follow, we affirm in part and reverse in part.

The wife on the main appeal raises a multitude of points which center around two general arguments containing a large number of related subpoints. . . . Second, it is urged that the trial court erred in failing to award the wife alimony and attorney’s fees. . . .

. . . I. In the instant case, the parties married in 1978; it was the second marriage for both parties. There were no children borne of the marriage and the husband filed for dissolution of the marriage in 1987. The trial court made the following relevant findings in the amended final judgment under review:

. . . Each party entered this marriage with substantial assets. The Husband has estimated his net worth to approximate Five Hundred Thousand Dollars ($500,000.00), and the Wife has estimated hers to approximate Two Hundred Fifty Thousand Dollars ($250,000.00). Among the assets owned by the Husband was his home located at 3502 Alhambra Circle, Coral Gables, Florida, its furnishings, various investment properties, and a pension plan.

During the course of marriage, the parties, by agreement, maintained separate bank accounts, separate accounting records, and separate business interests. The Wife inherited from family members, substantial assets consisting primarily of real estate and tillable farmland and having a net worth of approximately Two Million Dollars. During this marriage, the Wife managed her inherited property, churned her stock holdings profitably, and reinvested the profits of her labor in other property interests including income-producing property in North Carolina and a Shoney’s Restaurant in South Carolina. At no time did the Wife share with her husband the fruits of her labor or the profits resulting therefrom. In fact, the Wife requested that the Husband reimburse her for any and all expenses she incurred from which the Husband and/or one of his assets may have derived a benefit.

The Husband worked diligently during this marriage to provide the Wife with a comfortable lifestyle. She was provided with a maid five days a week, a beautiful home, and an environment which included trips to Europe and elsewhere. In return for his labor, the Husband asked the Wife to abide by her premarital promise to provide a “nest,” using the Wife’s words, to be his companion and friend, and to be there when he returned from work. Instead, the Wife, for reasons unexplained, chose to lead a singular and self-gratifying lifestyle. For example, she would disappear from the home without notice or explanation for days, weeks, or even for months at a time. She hesitated to be a homemaker in any of the traditional senses. Although these responsibilities are not required by today’s environment, they were the responsibilities that were promised by the Wife to the Husband and they were the reasons that he was induced to marry her in the first instance. He had hoped to marry at last and forever and expressed to his wife his need for a warm, comfortable, and stable homeplace. The Wife argues that she redecorated the home and was responsible for the addition of a porch during the course of the marriage. The Husband does not deny that the Wife practiced her hobby of decorating, but does deny that such enhanced the value of his premarital asset or in any way provided a “substantial contribution” during the course of this marriage. The Court finds that the labors of the Wife were insubstantial and not the cause of any enhancement in the value of the Husband’s home. As such, the Husband’s home and contents were and shall remain an asset owned solely by him free of any claim or encumbrance in favor or the Wife. . . .

. . . With respect to the denial of wife’s request for alimony, the trial court made the following relevant findings in the amended final judgment:

“The Wife has advanced a claim for the award of temporary, permanent, rehabilitative, and/or lump-sum alimony, in this cause. In support of her request, she states
that she has lost her job and is presently receiving unemployment compensation as a result. While receiving unemployment compensation, the Court finds that the Wife has a net worth in excess of Two Million Dollars. In fact, while completing the weekly form work required by the Bureau of Unemployment Compensation, the Wife has managed and maintained her stock portfolio, reinvested moneys received through the sale of a small portion of real estate, effected a tax-free exchange of her South Carolina assets for investment property in North Carolina, and has acquired an interest in a Shoney’s Restaurant. In short, the Wife is gainfully employed at this time, managing her substantial estate. The Court finds that the Wife fails to demonstrate the need or entitlement to receive alimony from the Husband. In fact, at no time during the long pendency of this case did the Wife request and receive alimony or support from the Husband.

Given the substantial wealth and income-producing property of the Wife, the relatively high earning capacity of the Wife, and the relatively short-term nature of this marriage, we see no abuse of the trial court’s discretion in denying the Wife’s request for alimony. For the same reason, we see no abuse of discretion in the trial court’s denial of attorney’s fees for the Wife. At the very least, reasonable people may differ as to the propriety of the trial court’s ruling in this respect (citations omitted).

RESOURCES FOR ALIMONY

Ability to pay involves an evaluation of the resources available to the payor spouse. The court looks at the following resources of a payor spouse:

- Income from principal employment;
- Income from any additional employment;
- Income from rental property;
- Investment income;
- Income from royalties, copyrights, patents, and trademark rights; and
- Pension income.

To determine the amount of resources available, the court looks at the payor spouse’s net income. Taxes, debts, and allowable expenses must be deducted from the spouse’s gross income. Gross income refers to sum of all available sources of income. Net income is the dollar amount remaining after allowable deductions have been subtracted. These amounts must be carefully scrutinized because manipulation of these figures may occur during the course of the dissolution action. Some spouses intentionally reduce their income during the pendency of the case. They may refrain from taking promotions or raises, purposely cut down hours, drastically reduce commissions, get rid of a part-time job, or seek employment where they are paid cash “under the table.” The payor spouse may also negotiate more fringe benefits from an employer for the purpose of showing less monetary compensation. The challenge for the payee spouse is to produce enough evidence to prove that the reduction in income was intentionally manipulated for the purpose of showing a smaller income. In this situation, it is essential that the discovery materials be reviewed carefully to determine whether the payor is living far beyond his or her means. Debts and expenses should also be scrutinized. Transfers to third parties, such as loans to family members and relatives, should also be looked on with suspicion. The question that must be asked is, was this debt or expense acquired in good faith?
DETERMINING SPOUSAL NEED

A spouse is entitled to an alimony award sufficient enough to support him or her in the standard of living to which he or she had grown accustomed during the marriage. If the office represents the spouse seeking alimony, instruct the client to keep a log of attempts to find work. It may be very crucial to preserve that information for trial later. Has spouse had difficulty finding work due to lack of marketable skills or age discrimination?

The client should also keep a log of all their expenses during the course of the divorce case. Later on, the paralegal may review and help clarify how much money the client needs to live. As stated earlier in this chapter, more and more frequently, women are perfectly able to reenter the workforce and become self-supporting. Family courts take this into consideration when making alimony awards. The trend is to award no alimony at all or alimony that is short in duration. The courts will also look at the property available for division between the spouses. If there is a sufficient amount of property to distribute, then the courts are less likely to award alimony.

Alimony may also be awarded where the payee spouse has custody of small children and cannot work full time. Because day care can be very expensive, it may make more economic sense for the courts to make an alimony award at least until the children have reached the age where they are in school full time. The custodial parent will then have more opportunities to seek employment outside the home.

An award of alimony is highly probable in the case of an older homemaker who lacks the skills to go into the workforce or in the case of a spouse who is in poor health. The courts want to prevent a spouse from becoming a “charge on the state;” that is, from having to apply for welfare and be supported by the taxpayers.

BALANCING PROPERTY DIVISION, CHILD SUPPORT, AND ALIMONY

Courts do not make alimony awards in a vacuum. Judges balance property division, child support, and alimony in order to reach an adequate resolution given the resources of the parties and their particular circumstances. Property awards divide the marital assets. Child support awards provide money paid to the custodial spouse for the benefit of the children. When there is an adequate amount of property, a property award may be more attractive especially if payor spouse’s income or employment is unstable. If a spouse is steadily employed and income is stable, alimony may be a better choice. Some jurisdictions have even codified consideration of the property award in their alimony statutes. A higher child support award may be preferable in certain cases because the custodial parent does not have to declare child support payments as income for tax purposes. On the other hand, child support terminates when the child reaches the age of majority. The spouse is then left only with the more modest alimony payment.
TYPES OF ALIMONY

The court may order alimony during the pendency of the divorce action and at the time that it renders its final orders at the divorce trial or other judgment. At the time of making the final orders, the court may award or the parties may agree to either permanent, rehabilitative, or reimbursement alimony. This section describes the different types of alimony with which the paralegal should become familiar.

PENDENTE LITE ALIMONY

*Pendente lite alimony* or temporary alimony awards are payments made during the pendency of the divorce with the purpose of providing temporary financial support for the spouse. In order for a court to make a temporary alimony award, the payor spouse must be served with notice, be physically present in court, and be given the opportunity to be heard and present his or her side of the case.

The Florida, Massachusetts, and Alabama statutes cited below are examples of the family courts’ statutory power to provide temporary support for spouses.
STATUTES

FLORIDA STATUTES ANNOTATED (WEST)

61.71. Alimony pendente lite; suit money
In every proceeding for dissolution of the marriage, a party may claim alimony and suit money in the petition or by motion, and if the petition is well founded, the court shall allow a reasonable sum therefor. If a party in any proceeding for dissolution of marriage claims alimony or suit money in his or her answer or by motion, and the answer or motion is well founded, the court shall allow a reasonable sum therefor.

MASSACHUSETTS GENERAL LAW'S ANNOTATED (WEST)

§ 17. Pendency of action; allowance; alimony
The court may require either party to pay into court for the use of the other party during the pendency of the action an amount to enable him to maintain or defend the action, and to pay to him alimony during the pendency of the action. When the court makes an order for alimony on behalf of a party, and such party is not a member of a private group health insurance plan, the court shall include in such order for alimony a provision relating to health insurance, which provision shall be in accordance with section thirty-four.

CODE OF ALABAMA

§ 30-2-50. Allowance for support during pendency of action.
Pending an action for divorce, the court may make an allowance for the support of either spouse out of the estate of the other spouse, suitable to the spouse's estate and the condition in life of the parties, for a period of time not longer than necessary for the prosecution of the complaint for divorce.

FINAL ORDERS

Permanent Alimony

Permanent alimony is the term applied to court-ordered payments that are to be made to a spouse on a regular and periodic basis and that terminate only upon the death, remarriage, or cohabitation of the other spouse or upon court order. Permanent alimony is awarded with less frequency today. Women have increasingly joined the workforce and developed marketable employment skills to help them become self-sufficient. If you recall the historical discussion regarding the extension of the husband’s duty to support after awarding divorce a mensa et thoro, you will see that the expanded role of women in the workplace has made permanent alimony a rare disposition in today’s divorce courts. Spouses who are more likely to receive permanent alimony awards are those who have been in long-term marriages, those unable to acquire marketable skills, and those who are ill or have a disability. It is highly unlikely for spouses in these cases to be able to go to work and earn enough to adequately support themselves.

Permanent Alimony to the Rescue

In the following case, the appellate court found that the wife was entitled to permanent alimony and remanded the case so that the trial court could determine the amount. The court again balances need versus the ability to pay and Mrs. Kirkland wins the balancing act.
Rehabilitative Alimony

The frequency of rehabilitative alimony awards reflects the current legal trend of providing short-term, financial support to a former spouse. Rehabilitative alimony is awarded for a limited period of time to give the spouse the opportunity to become self-sufficient. In determining whether this type of alimony is appropriate, the crucial question to be answered is whether this spouse has the ability to become self-sufficient. For the traditional housewife who finds herself divorced...
after many years of marriage, and has never worked outside the home, this may not be possible; nor is it feasible for a disabled or ill spouse. In many cases however, the spouse either has marketable skills or has the ability to obtain them within a reasonable period of time. Under these circumstances an award of rehabilitative alimony would provide the spouse with some financial assistance while she gets back on her feet.

**Tennis Wife Gets Rehabilitative Alimony**

The wife worked on more then her backhand in this marriage! In the end, Mrs. Evans had to join the workforce and establish a plan to become self-sufficient.

**FIGURE 5–3**

Judges can exercise their discretion when awarding rehabilitative alimony while the payee spouse gets back on his or her feet.
EDWIN E. Evans v. CYNTHIA S. Evans
559 N.W. 2d 240 (S.D. 1997)
SOUTH DAKOTA SUPREME COURT
GILBERTSON, JUSTICE.

FACTS AND PROCEDURE
Ed and Cyndy were married in June 1973, following completion of Ed's first year of law school. Cyndy had completed her college degree and worked full time from the beginning of the marriage until the parties moved to Sioux Falls in June 1997. At that time Cyndy was expecting her first child. She did not return to the work force.

The parties' lifestyle was such that they belonged to a country club, had household help, and dined out frequently. They generally took two family vacations a year. The record reflects Ed worked many hours, including evenings and some weekends, and was often required to be out of town for days to weeks at a time. Cyndy volunteered her time in community, church, and school-related activities.

The parties have two children, Ashley and Kelsey, who were ages 17 and 14, respectively, at the time of the divorce trial. They attend parochial school and participate in many school and extracurricular activities. They drive late model cars and wear the best brand-named clothing. Cyndy has largely been responsible for coordinating the children's activities. While Ed was not available as much as Cyndy, he too took an interest in their children, assisting them with their homework and driving them to out-of-town functions.

In 1990, the parties began construction of a new home in Sioux Falls which ultimately cost considerably more money than had been originally planned. Around this time, Cyndy discontinued her volunteer activities and devoted her time instead to tennis and other personal interests. The parties admit they had problems with communication; the marriage began to deteriorate. In 1993, Cyndy invited a twenty-seven year old male tennis friend to move into the family's residence without discussing it with Ed and without his knowledge. When Ed learned of his wife's houseguest, he left home for a few days but returned at the children's request. He attempted to improve his relationship with Cyndy, but she showed little interest in attempts and spent evenings out with her friends, returning home in the early morning hours. Ed moved into a separate bedroom to show his displeasure, but the couple did not discuss their problems. By the summer of 1994, Cyndy had ceased attending family vacations, preferring instead to spend time with her friends at Lake Okoboji, while Ed and the children took family vacations without her. In the fall of 1994, Ed learned Cyndy was having an affair with a man who owned a home in Lake Okoboji. Although Cyndy initially denied the affair, she eventually admitted it was true. Upon learning this, Ed moved out of the parties' home.

Ed and Cyndy attempted a reconciliation, Cyndy promising to discontinue the affair and Ed promising to spend less time at work and more time with Cyndy and the children. Ed returned home, bought Cyndy a new car that she wanted, planned a family vacation in Jamaica for Thanksgiving, and purchased tickets for a concert Cyndy wanted to attend in Minneapolis. Within four days of Ed's return home, Cyndy announced she did not intend to stop seeing other men. Ed left home for the last time.

He continued spending time with Cyndy, however, and the family went on the planned vacation and to the concert and shopping trips in Minneapolis. Ed continued to provide spending money and paid the household expenses. He reduced his hours at work. Ed sought counseling and encouraged Cyndy to attend counseling sessions with him, or alone. She refused. Ed eventually gave up trying to reconcile the marriage.

During this period of separation, Ed paid Cyndy $10,000 per month to support her and their children. She stated they could not live on this amount. Ed suggested she sell the house. Cyndy refused and Ed filed the divorce action.

The trial court heard the matter over a four-day period, October 30–31, 1995, and on December 12–13, 1995. The trial court determined issues involving child support, property division, alimony award, and attorney fees. On February 16, 1996, the trial court awarded Ed a divorce on grounds of adultery and dismissed Cyndy's counter-claim. Both parties appealed the judgment of the trial court.

Cyndy raises . . . issues as follows. . . .

. . . 3. Whether the trial court erred in determining the amount of alimony awarded?

Analysis and Decision
. . . 3. Whether the trial court erred in determining the amount of alimony awarded?

The trial court awarded Cyndy rehabilitative alimony of $2,500 per month for six months, and $1,000 per month for five years thereafter. Cyndy's vocational expert
opined, and the trial court found, that she would be able to earn $25,000 per year within three to five years, after retraining and reentering the work force. Cyndy appeals this award, arguing she is entitled to substantially more alimony. She bases her argument on her years of service to the marriage as a wife and homemaker and the vast discrepancy between earning capabilities of the parties.


A trial court is vested with discretion in awarding alimony and its decision will not be disturbed unless it clearly appears the trial court abused its discretion. Trial courts must consider the following factors when setting an alimony award: (1) the length of the marriage; (2) the parties’ respective ages and health; (3) the earning capacity of each party; (4) their financial situations after the property division; (5) their station in life or social standing; and (6) the relative fault in the termination of the marriage. A trial court’s findings on these factors must support its legal conclusions. As often stated, an abuse of discretion exists only where discretion has been “exercised to an end or purpose not justified by, and clearly against, reason and evidence.”

Additional factors must be considered when the trial court makes an award of rehabilitative alimony. Saint Pierre v. Saint Pierre, 357 N.W.2d 250, 252 (S.D. 1984). In awarding rehabilitative or reimbursement alimony, the trial court should be guided by “the amount of supporting spouse’s contributions, his or her foregone [sic] opportunities to enhance or improve professional or vocational skills, and the duration of the marriage following completion of the nonsupporting spouse’s professional education.” Id. An award of rehabilitative alimony must be designed to meet an educational need or plan of action whose existence finds some support in the record. Radi- gan, 465 N.W.2d at 486; Ryken v. Ryken, 440 N.W.2d 300, 303 (S.D. 1989) (Ryken I). “[T]he decision to award ‘reimbursement’ or ‘rehabilitative’ alimony, and, if so, in what amount and for what length of time, is committed to the sound discretion of the trial court. The purpose of rehabilitative alimony is to put the supporting spouse in a position to likewise upgrade their own economic marketability.” Studt v. Studt, 443 N.W.2d 639, 643 (S.D. 1989) (internal citations omitted).

A review of the record in this case demonstrates the trial court’s consideration of all the necessary factors, including Cyndy’s traditional role of homemaker [4] and the parties discrepancy in earning capabilities. [5] The trial court also considered Cyndy’s financial situation after the property division and her fault in the dissolution of the parties’ marriage and lack of cooperation in Ed’s efforts to save the marriage. In granting a divorce in favor of Ed on the basis of adultery, the trial court had before it numerous examples of uncontested marital misconduct by Cyndy upon which to base its finding of fault:

1. Moving into the family home a twenty-seven year old male tennis friend without Ed’s prior knowledge or consent;
2. Refusing to attend family vacations as in the past, but rather vacationing at Lake Okoboji with friends;
3. Having an affair with a man who owned a home at Lake Okoboji;
4. Refusing to stop seeing other men after Ed found out about the affair, and when Ed attempted reconciliation, and
5. Refusing to attend when Ed sought counseling and encouraged Cyndy to attend either with him or alone.

The trial court properly concluded that Cyndy’s fault was a factor to be taken into account in deciding alimony.

Following division of the marital property, Cyndy leaves the marriage with over one million dollars in assets. Approximately $400,000 of these assets are in the form of cash payments to be paid to Cyndy by Ed either immediately or over a period of the next five years at 7% interest on the unpaid balance. The trial court found that, through conservative investment, Cyndy’s liquid assets would provide annual income to her of $40,792, or 3,399 per month, without invading the principal. Following three to five years of wage-earning, this monthly income would rise to $4,782 per month. The trial court specifically noted that Cyndy would not be able to live in the luxurious lifestyle she enjoyed while married to Ed but, at the same time, should not be able to demand excessive long-term support from the husband to whom she did not wish to be married. The trial court concluded Cyndy should be able to live comfortably on the amount awarded. The court acknowledged Cyndy’s contribution to the family’s accumulation of wealth and her husband’s success, and further noted the award was justified due to Cyndy’s forgone employment opportunities during the parties’ twenty-two year marriage. We cannot say the trial court’s award was against reason and the evidence.

Regarding “educational need or plan of action” that must be evidenced from the record for an award of rehabilitative alimony, Radigan, 465 N.W.2d at 486, Cyndy presented herself for evaluation by the vocational rehabilitation specialist who testified on her behalf. Following his evaluation, which included a personal interview with Cyndy, taking her educational and work history, and submitting her to various vocational and personality-type testing, this expert concluded Cyndy’s best course of action for reentering the work force would be to complete approximately six months of select computer courses at a vocational school and begin work in an entry-level posi-
Reimbursement Alimony

As the following chapter illustrates, some jurisdictions have categorized a professional or advanced degree acquired during the marriage as marital property. This categorization has enabled the courts to put a monetary value on the degree and to award the nondegree spouse either money or other property for his or her contributions made during the marriage which enabled the other spouse to obtain the degree. Many jurisdictions however do not categorize a degree as property. This would leave the nondegree spouse uncompensated for the sacrifices endured in hopes that their family would have a better future. Courts, however, have responded to this injustice by creating the reimbursement alimony award. Here, the nondegree spouse may be “reimbursed” for his or her contribution to the student spouse’s attainment of the advanced degree, which results in an enhanced earning capacity. The nondegree spouse may have helped pay the student spouse’s tuition, supported the family while the student spouse was in school, or relocated or put off pursuing his or her own education in hopes that these sacrifices would later pay off in an increased standard of living. In these jurisdictions, the nondegree spouse is reimbursed for the monetary and nonmonetary efforts that enhanced the other spouse’s earning capacity. Reimbursement alimony awards are generally nonmodifiable and nonterminable so as to fully compensate the nondegree spouse.

I Don’t Want Alimony to End!

In Lalone, the Supreme Court found that the wife’s efforts did not increase her husband’s earning capacity, which did not entitle her to reimbursement alimony. In addition, the wife also sought to extend her award of alimony beyond the husband’s death and her remarriage. The Court however applied general principles of law and affirmed the lower court’s award of alimony in the amount of $1,500 per month for ten years.

IN RE THE MARRIAGE OF GARY L. LALONE AND SHARON M. LALONE

469 N.W.2d 695 (IOWA 1991)

SUPREME COURT OF IOWA

LARSON, JUSTICE.

Sharon Lalone’s appeal from decree of dissolution claims error in child support and alimony allowances, division of some of the parties’ marital assets, and the allowance of attorney fees. We affirm.

Our review of the evidence is de novo. Gary and Sharon were married in 1972. At that time, Gary had
graduated from college with a degree in business administration, and Sharon had attended college part-time. Following their marriage, both parties worked full time. However, since the birth of their first child in 1979, Sharon had worked only part-time, averaging less than $5,000 per year in income. Sharon has assumed the primary responsibilities for the home and child care and is not presently employed outside the home. The children of the parties, at the time of the dissolution, were seven and eleven years of age. Gary was forty, and Sharon was thirty-seven.

In 1982, Gary assumed a management position with a chain of retail clothing stores, advancing to the position of regional manager and manager of the local Storm Lake store. Gary's base salary is $37,200, and he receives family medical and dental benefits from his employer. In addition, a substantial yearly bonus is paid to Gary based on a percentage of the company profits. The bonus is paid each April. Gary's income had averaged in excess of $100,000 for the five years preceding the dissolution. In 1990, his gross income was $144,428.

The parties entered a pretrial stipulation regarding the disposition of some of their assets and agreed on custody and visitation. Sharon received physical care of the children, and Gary received liberal visitation. Physical care and visitation are not issues on appeal. . . .

. . . II. ALIMONY

The district court ordered Gary to pay alimony of $1500 per month for ten years. Alimony would terminate earlier upon the death of either party or Sharon's remarriage. Sharon contends that the court should not have placed any conditions on Gary's alimony obligation, although she does not challenge either the amount or the ten-year limit.

Sharon’s argument that she should have been awarded unconditional alimony is based on her argument that it was allowed as “reimbursement” alimony. See In re Marriage of Francis, 442 N.W.2d 59, 64 (Iowa 1989). Reimbursement alimony is predicated upon economic sacrifices made by one spouse during the marriage which directly enhances the future earning capacity of the other. Reimbursement alimony is not subject to modification or termination until full payment has been made, except that it will terminate upon the recipient's death. Id.

We do not agree that this is reimbursement alimony. This is not a case similar to Francis, in which the wife directly increased the husband’s earning capacity by assisting in his obtaining a medical degree. In this case, while Sharon worked part-time, her efforts did not directly increase Gary's earning capacity. Rather, the district court found, and we agree, that both Gary and Sharon contributed to the success of the family unit and were rewarded with financial success. We believe that the equal division of the marital property adequately compensated Sharon for any contributions made by her.

Sharon also contends that the alimony should continue beyond the time of her death. Gary responds that, because alimony is based on a need for support, this need would terminate on her death. And, although she contends it should be available for payment to the children, Gary points out that the decree required him to provide $500,000 in life insurance for the benefit of the two children. Further, under Internal Revenue Code section 71(b)(1)(D), periodic payments must cease on the death of the recipient in order to be considered alimony. We agree that alimony should cease on Sharon's death.

As to Sharon's contention that alimony should not terminate on Gary's death, it is the general rule that alimony will terminate upon the death of the payor. In re Marriage of Bornstein, 359 N.W.2d 500, 503 (Iowa 1984). Also, as previously noted, the decree provides for life insurance in a substantial amount for the benefit of the children. Inclusion of this amount of money in the family unit, as Gary contends, would substantially alleviate any financial problems arising from Gary's death.

Sharon also complains that the alimony would terminate on her remarriage. Under our law, even if a decree does not provide for automatic termination in remarriage, there is a presumption that alimony will cease in the absence of a showing of extraordinary circumstances. In re Marriage of Shima, 360 N.W.2d 827, 828 (Iowa 1985). If Sharon remarries and remains in need of financial assistance, the burden of showing a need for continued alimony should be on her to do so in an application to modify the decree.

We believe the provision terminating alimony on remarriage is reasonable and is in accordance with our existing law. . . .

. . . AFFIRMED
MODES OF ALIMONY PAYMENT

Alimony payments may be made on a periodic basis (i.e., weekly), or they may be made in one single payment, known as lump sum alimony or alimony in gross. Once a spouse receives an award of lump sum alimony, his or her interest has vested. This means that he or she is entitled to the entire amount. This amount may be made in installments, if agreed upon by the parties or ordered by the court.

MODIFICATION OF ALIMONY

Modification of alimony addresses the issue of whether alimony may be either increased or decreased after the original order has been entered. To change or “modify” an alimony award, the party seeking the modification must go back to court and request that the court modify the original order. The moving party must prove that a substantial change of circumstances occurred since the date of the original order and that the change was involuntary. Because the court made the original order, only the court can change the obligations of the parties. For example, pendente lite orders may be modified during the pendente lite phase as long as the moving party can satisfy his or her burden of proof.

EXAMPLE

John, who is employed at a factory, files for divorce. His wife Mary files a motion for pendente lite or temporary alimony. Based on her need and John’s ability to pay, she is awarded $100 a week. John loses his job and does not pay Mary for ten weeks. John owes Mary $1,000 in alimony arrearages or “back alimony.”

Upon losing his job, John should have immediately filed a motion for modification with the court. He would then be able to get the original $100 order modified because of a substantial change in circumstances, that is, the loss of his job. Once Mary stops receiving payments, she has the right to the arrearage, or amounts due by court order but unpaid. Mary may seek to enforce the original order by returning to court.

Final orders may also be modified upon a showing of a substantial change in circumstances. A party may request an order of one dollar of alimony per year. Obviously, this is only a nominal alimony amount; however, a request for such an award is necessary so the party may seek a modification after the entering of a final judgment. If no alimony is awarded to the spouse at the time the divorce decree is entered, he or she will be prohibited from coming back to court and seeking an alimony award in the future, because no basis exists for modifying it. The reason for the one dollar award is so that a nominal amount of alimony will leave the issue of alimony modifiable in the future in the event of a substantial change in circumstances.

Remember that an alimony award may be achieved in one of two ways: by agreement of the parties or by order of the court. When the parties are drafting an agreement, the modifiability of the alimony award must be addressed in the settlement agreement. While the parties may have agreed to the nonmodifiability of
alimony and included such a clause in the separation agreement, the court may not enforce such a provision if a spouse would have to go on public assistance and be supported at taxpayers’ expense.

Permanent alimony may be modified if there is a substantial change in circumstances. Remarriage automatically terminates permanent alimony in some jurisdictions, and in others, the party seeking the modification must do so through the court. When a former spouse remarries, the new spouse is legally obligated to provide spousal support. Cohabitation, which means unmarried parties living together, may also terminate alimony. While cohabiting parties do not have a legal obligation to support each other, sharing expenses may improve the financial position of the divorced spouse; in other cases, it may not. The court must look at requests for modification on a case-by-case basis.

**Cohabitation Nixes Alimony Award**

The Supreme Court of Connecticut upheld the trial court’s termination of the wife’s alimony award. The husband was able to prove that the wife’s circumstances substantially changed when she moved in with the handyman.

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**RITA A. LUPIEN v. HERVEY A. LUPIEN**

192 CONN. 443, 472 A.2d 18 (CONN. 1984)

SUPREME COURT OF CONNECTICUT

SPEZIALE, CHIEF JUSTICE.

The plaintiff appeals from the judgment to the trial court terminating her award of alimony. Because we hold that the trial court was not clearly erroneous in finding that the plaintiff was living with another person under circumstances that caused such a change of circumstances as to alter her financial needs, there is no error.

The parties were divorced on September 22, 1967, and the defendant was ordered to pay the plaintiff $150 per week periodic alimony. In 1980, the defendant moved to “modify the Judgment by reducing, suspending or terminating the alimony.” The defendant claimed, inter alia, that the plaintiff was living with another man under circumstances that caused a change in her financial needs.\(^1\)

Following a hearing on the motion, the trial court found that the plaintiff “is living openly with another man [and] receives support from this other man. . . .” The trial court modified the judgment of 1967 and ordered alimony terminated. The plaintiff appealed and alleges that there was insufficient evidence to find either that the plaintiff was living with another person or that her living arrangements had caused a change in her financial circumstances. We disagree.

To modify an award of alimony pursuant to General Statute § 46b-86(b), the trial court must find “that the party receiving the periodic alimony is living with another person under circumstances which the court finds should result in the modification, suspension or termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party.” (Footnote omitted). See Kaplan v. Kaplan, 185 Conn. 42, 440 A.2d 252 (1981). The trial court so found but the plaintiff argues that its finding was “clearly erroneous.”\(^2\)

The evidence before the court showed that Gilbert Poirier had been living in a room in the plaintiff’s home for two years. The plaintiff was paid $30 weekly for food by Poirier and he performed numerous handyman chores for her.\(^2\) These chores included roofing the garage, recon-

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\(^{1}\)The defendant also claimed that the plaintiff’s employment by Gilbert Poirier had caused a change in the plaintiff’s financial circumstances.

\(^{2}\)The plaintiff’s twenty year old son also resided in the house and paid $30 weekly to the plaintiff.
Rehabilitative alimony is generally nonmodifiable; however, some courts retain jurisdiction for the purpose of modification. Lump sum alimony awards are generally not modifiable. This means that the lump sum alimony award is not affected by remarriage or cohabitation and at the death of the payor spouse, the payee spouse may sue the payor’s estate for any payments due. Because reimbursement alimony is awarded on the basis of the amount contributed by the nondegreeed spouse, it is commonly nonmodifiable.

ESCALATION CLAUSES AND COST OF LIVING INCREASE CLAUSES

In drafting settlement agreement provisions regarding alimony, the parties may include an escalation clause or cost of living clause. An escalation clause provides for increases in the alimony payments due to the increase of payor’s income and an increase in the cost of living. The escalation clause obviates the need for the parties to go back to court for modifications, which will save parties time and money.

MEDICAL INSURANCE

Because alimony involves the support of a former spouse, this chapter would not be complete without a brief discussion of medical insurance. The Consolidated Omnibus Budget Reconciliation Act (COBRA), 26 U.S.C. sec. 4980B(f), is a federal law that enables a nonemployee spouse to continue his health insurance coverage provided by his spouse’s employer, for a period of three years after the divorce, as long as the nonemployee spouse pays the premium. The children of the marriage may also be covered under COBRA during their dependency on their parents. Either one parent or both will be responsible for providing medical insurance coverage for the children.

State laws also have an impact on medical insurance coverage. Some jurisdictions require a divorced spouse to provide coverage for former spouses who are not able to provide coverage for themselves.
Sometimes the COBRA payments are too high and a spouse may seek health insurance through their employer or other resource.

**Attorney’s Fees**

It is the responsibility of the respective parties to pay their attorney’s fees. A common myth still held by many women is that the husband is required to pay her attorney’s fees. The case of *Orr v. Orr*, 440 U.S. 268 (1979) declared this statutory requirement unconstitutional. Either party, however, may seek attorney’s fees from the other spouse. The standard the court applies in determining attorney’s fees is the need of one spouse and the ability to pay of the other spouse.

Most attorneys require clients to pay a retainer before taking on their divorce case and will later seek an award of attorney’s fees to reimburse their client. For those who cannot afford a retainer, some attorneys may motion the court at the beginning of the proceedings for an advance award of legal fees to represent the needy spouse. In these cases, it is advisable that the representation of the spouse be contingent upon the granting of the motion for attorney’s fees by the court and the receipt of payment. The rules of ethics require that an attorney’s fee must be reasonable. It is within the court’s discretion to determine what is reasonable. When defending the moving party’s motion for attorney’s fees, it is essential that an itemized bill be requested and that the charges be reviewed.

**STATUTES**

**Massachusetts General Laws Annotated (West)**

§ 34. Alimony or assignment of estate; determination of amount; health insurance. . . . When the court makes an order for alimony on behalf of a spouse, and such spouse is not covered by a private group health insurance plan, said court shall determine whether the obligor under such order has health insurance on a group plan available to him through an employer or organization that may be extended to cover the spouse for whom support is ordered. When said court has determined that the obligor has such insurance, said court shall include in the support order a requirement that the obligor exercise the option of additional coverage in favor of such spouse.

Sometimes the COBRA payments are too high and a spouse may seek health insurance through their employer or other resource.
TERMINATION OF ALIMONY

Remarriage

Alimony usually terminates on remarriage. The underlying policy is that upon remarriage, the new spouse has a duty to support. It would be unfair to allow a divorced spouse, who now has remarried, to receive support from two sources. In some states alimony automatically terminates upon remarriage and payor spouse simply ceases payments. In other states, the parties petition the court for termination of alimony.

Cohabitation

In some states, alimony may be modified when a recipient cohabits with a member of the opposite sex. The problem with cohabitation as opposed to remarriage is that a cohabitant has no legal duty to support. It is important when drafting the settlement agreement to specifically indicate what type of conduct gives rise to a modification.

Death

Alimony terminates on the death of either party unless otherwise stated in the settlement agreement or the divorce decree. If support is to be extended beyond death, it can be accomplished by an irrevocable insurance policy on the payor’s life, naming payee spouse as beneficiary. Lump sum alimony paid in installments and property division awards do not terminate on the death of the payor spouse.

Figure 5–4

Alimony may be modified if an alimony recipient decides to cohabit with a member of the opposite sex.
TAX CONSEQUENCES OF ALIMONY

Alimony payments to a spouse are considered a form of income to the spouse. Therefore, alimony is taxable to the recipient and deductible to the payor. The deductibility of alimony is advantageous to a payor spouse with high earnings. It is very important to obtain the Social Security number of the payor or recipient spouse so your client will have that information available at tax time. If your office is representing the recipient spouse, the attorney may encourage that spouse to pay quarterly estimated taxes to avoid a hefty tax burden at the end of the year.

THE IRS RECAPTURE RULE

In 1986, the Internal Revenue Service defined alimony as a payment made in cash or its equivalent pursuant to a court-ordered divorce agreement that terminates on death. In the past, lawyers would label property division as alimony for the purpose of deducting property distribution payments.

Property settlements are not deductible and by labeling these settlements as alimony, the payor spouse would deduct these payments from his income taxes. The IRS redefined alimony and limited the amount of alimony that can be deducted in the first three years after the divorce. If alimony payments total $15,000 or less per year, they are deductible. If they exceed $15,000, the payor must satisfy complex tax rules for this deduction. If the parties do not wish to have alimony taxed as income or deducted, then it should be indicated in the settlement agreement. This is known as the IRS recapture rule. The majority of property settlements in a divorce case are made in the first three years after the divorce. This is known as front loading. Lawyers were structuring property settlements by classifying them as “alimony.” By calling a property settlement “alimony” the payor client could deduct the amount from income taxes. The IRS monitors alimony payments for front loading. If the majority of payments are made in a period of years, at the year 3 mark, this will indicate that front loading has occurred. The IRS will then seek to recapture the tax deduction. To be safe, payments in year 1 should not exceed payments made in year 2 or year 3 by more than 15 percent.

FAMILY SUPPORT PAYMENTS VERSUS SEPARATE PAYMENTS OF ALIMONY AND CHILD SUPPORT

Family support payments is the term given to regular, periodic payments a payor spouse makes to the other spouse for the financial maintenance of both the ex-spouse and children. This amount is not delineated into a portion that comprises spousal alimony and a portion for child support, but rather one sum deemed “family support.” Care should be taken so that a reduction of the amount of the family support payment does not occur upon the happening of a child-support related event such as emancipation, employment, or the end of schooling.

The problem lies in determining what is alimony and what is child support. The IRS watches unallocated family support payments carefully. If the unallocated support payment is reduced due to changes in a child’s age or needs, the IRS will
be able to determine how much has been allocated for alimony and how much has been allocated for child support. If previously, the payor spouse was deducting as alimony payments an amount greater than the IRS subsequent determination of what constituted alimony, the payor spouse will have to pay a back tax and possibly a fine. If a payee spouse claimed as income a lesser amount of the family support payment than was actually allocated for alimony, the payee spouse will owe the IRS back taxes and also probably be subject to a fine.

**Effects of Bankruptcy on Alimony, Child Support, and Property Division**

Alimony and child support awards are not dischargeable under federal bankruptcy law. Property awards, however, are dischargeable. If a bankruptcy action is being contemplated due to high debts, the recipient client should opt for alimony and child support payments instead of property division payments.

**Practical Tips for Clients**

- **Never make alimony or child support payments in cash.**
  The family attorney and/or the paralegal who has been working with the client should emphasize to the client that it is essential that alimony and child support obligations be paid with either check or money order to preserve proof that payments were actually made. If your client must use cash, tell the client that it is important to get a receipt. Receipt booklets may be purchased at any stationery store. The recipient client may receive alimony payments by being paid directly by the payor or through a wage execution where the alimony payment is deducted from the payor spouse’s paycheck, or an automatic transfer from payor’s bank account occurs.

- **Keep accurate and complete records of payments.**
  Clients should be told of the importance of record keeping. Both the payor spouse and the recipient spouse should keep good records for tax purposes, and may want to photocopy checks, money orders, or, if cash is tendered, request a copy of the receipt. The IRS can and may dispute deduction amounts or income received, therefore adequate record keeping is essential.

- **Recognize the need for lifestyle changes.**
  The financial reality for the recipient spouse is that alimony may not be enough to live on. It is important for the attorney or the paralegal to review a client’s financial information with the client to determine how much he or she will need to live on and whether adjustments need to be made to their lifestyles after the divorce. The client may have to sell assets or find part-time work in order to supplement income. The client may have to go on a budget or cut up credit cards and cancel them with the credit card company in order not to incur any further debt. Consumer credit counseling services may be a good resource for clients who are in over their heads. Displaced homemaker groups may also provide support and budget counseling to help the traditional homemaker through the transition.
ENFORCEMENT OF COURT-ORDERED PAYMENTS

When a party entitled to alimony payments pursuant to a court order is not paid, that party may commence a civil \textbf{contempt proceeding} to force the payor spouse to comply with the court’s order. This process begins with the recipient spouse filing the appropriate paperwork within that jurisdiction (e.g., a motion for contempt or a citation with an order to show cause). In the proper document, the recipient will state what was awarded in the original order, that the payor spouse has not paid since a specific date, and include a request that the delinquent spouse be found in contempt of court. These documents are served on the payor and filed in the court where the original alimony award was entered. A contempt is an extension of the divorce matter, therefore it is unnecessary to assert personal jurisdiction over the payor spouse. The only requirement is service, notice of the proceedings, and the opportunity to be heard.

Once the parties are in court, it is the payor spouse’s burden to prove that she has, in fact, kept up the alimony payments and has the canceled checks or receipts to prove it. If the payor spouse cannot provide such proof, the court will order the payor spouse to pay the arrearage. If the arrearage cannot be paid in a lump sum, the court will make the arrearage payable in installments. The payor will then find herself obligated to make weekly payments on the arrearage in addition to the weekly payments authorized by the original court order.

\textbf{FIGURE 5–5}
If the IRS decides to dispute alimony allocations, adequate record keeping becomes essential.
The filing of a contempt action by the recipient spouse or payee spouse will often precipitate the filing of a modification motion by the payor spouse. This is especially true in cases where the payor spouse has failed to discharge his or her alimony or child support obligation because of unfavorably changed financial circumstances.

EXAMPLE

On August 1, John is ordered by the court to pay $100 per week as alimony to his wife Linda. On October 1, John loses his job due to a layoff at the plant where he works. Four weeks pass and Linda is not paid her court-ordered alimony award. Linda files a contempt action. John is properly served. He meets with his lawyer who immediately files a modification on the basis that there has been a significant change in John’s circumstances since the entering of the original alimony order, i.e., John’s being laid off.

In this scenario, John will probably not be able to modify his obligation for the arrearage because in most jurisdictions, past alimony amounts due may not be increased or decreased retroactively. Some states do allow for retroactive modifications of arrearages, but they are the exception not the rule. Most courts, however, can always modify an alimony order for prospective payments. In John’s case, his substantiated showing of his changed circumstances and its negative financial consequences should be sufficient good cause for the court to lower his alimony obligation.

ATTORNEY’S FEES IN CONTEMPT ACTIONS

The recipient spouse, forced to bring a contempt action, may also demand attorney’s fees from the delinquent spouse. The recipient spouse will prevail if the payor is found to be in willful contempt. The court is likely to find willful contempt if the recipient spouse proves that the payor spouse has the means to make the payments but purposefully and deliberately fails to do so. The court may also find willful contempt if the recipient spouse demonstrates that although financial problems now prevent the payor from complying with the court-ordered alimony obligation, the payor, himself or herself, caused the financial setback either by spending too much, voluntarily leaving their employment, defrauding the recipient spouse, or engaging in some other type of irresponsible conduct.

REVIEW QUESTIONS

1. Define alimony.
2. What is the history of alimony?
3. Can a husband be awarded alimony?
4. Before a court awards alimony, what are the two interests the court must balance?
5. List the resources of a payor spouse that a court may consider in determining alimony.
6. How does a court determine spousal need?
7. What is pendente lite alimony?
8. Define permanent alimony and indicate the type of spouse most likely to be awarded this type of alimony.
9. What is rehabilitative alimony and what is its ultimate goal?
10. Define reimbursement alimony.
11. What are the two modes of paying alimony?
12. Under what circumstances may alimony be modified?
13. What is the purpose of an award of one dollar per year?
14. What are the tax consequences of alimony?
15. Explain the IRS recapture rule.

**EXERCISES**

1. Locate your state’s alimony statute and determine what factors the courts consider in making an alimony award.
2. Find your state’s statute regarding the determination of attorney’s fees in divorce cases. What factors do the courts consider in making such an award?
3. Is *fault* a factor the court may consider in awarding either alimony or attorney’s fees in your state? If so, find and brief a recent case where marital fault was considered.
4. Find the modification of alimony statute in your state and determine what criteria must be met before an alimony award is modified.
5. Locate the statute that enables a spouse to bring a contempt action against a delinquent spouse for failing to pay an award of alimony. What must be proven in order to satisfy the contempt statute? What defense may a payor spouse raise under the statute?
## KEY TERMS

<table>
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<th>Antenuptial agreement</th>
<th>Marital property</th>
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While the goal of alimony is to provide a needy spouse with support or “maintenance,” the goal of property and debt distribution is to fairly distribute the marital assets and debts between the spouses. Property and debt division are one of the most contested issues in modern divorce cases, second only to custody disputes. Spouses generally accumulate a myriad of assets and debts during a marriage which may take center stage at a divorce hearing where the central issue is “who gets what?” While asset accumulation is one of the goals of the married couple—especially the fulfilling of the American dream of home ownership—debts are unfortunately also part of the equation. In some marriages, distribution of debt may be the only financial issue to resolve.

This chapter focuses on the issue of property and debts and how they are divided at the time of divorce; therefore, an understanding of basic property principles is essential before proceeding any further.

**BASIC PRINCIPLES OF PROPERTY**

Property can be classified as either real or personal. **Real property** is land and anything affixed to it (examples: house, garage, barn, condominium). **Personal property** is anything other than real property that can be touched and is movable (examples: cash, automobiles, bank accounts, jewelry, furniture, clothing, stocks, bonds).

Property can be owned by an individual alone; this is known as **sole ownership**. Property also can be held by two or more persons together; this is known as **concurrent ownership** or **joint ownership**. A sole owner has the right to give, sell, will, encumber, and lease her property. In other words, a sole owner can do anything legal with her property without another’s approval. Concurrent owners have rights and responsibilities vis-à-vis each other that differ from jurisdiction to jurisdiction. The most common forms of concurrent or joint ownership are as follows:

- Tenancy in common,
- Joint tenancy with right of survivorship,
- Tenancy by the entirety, and
- Community property.

**Tenancy in Common**

Tenants in common each own an undivided interest in the property, have equal rights to use and enjoyment, and may dispose of their share by gift, will, or sale. At the time of a co-owner’s death, his share passes to his beneficiaries, if he left a
will, or to his heirs under the intestacy succession laws of his state if he dies without a will.

**Joint Tenancy**

Joint tenants own equal interests in property and at the death of one of the joint tenants, her interest automatically passes to the remaining joint tenant through what is known as the **right of survivorship**. A joint tenant also has the right to sell her interest in the jointly owned property. The sale of one co-owner’s interest destroys the right of survivorship; the new co-owner and the remaining tenant now hold the property as tenants in common.

**Tenancy by the Entirety**

Tenancy by the entirety is a form of co-ownership that can only exist between a husband and wife. It is similar to joint tenancy in that it carries with it the right of survivorship. The main difference, however, is that one tenant may not sever a tenancy by the entirety without the permission of the other co-tenant.

**Community Property**

In community property states, all property and income acquired during the marriage is deemed to be owned equally by both spouses, subject to certain exceptions. Community property is discussed in more detail later in this chapter.

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**PROPERTY AND DEBT DISTRIBUTION UPON MARITAL DISSOLUTION**

It is the responsibility of each party’s attorney to determine the extent and value of the property owned and what the client should be entitled to at the time of divorce. This process begins with the task of determining what property the client and his spouse own, either solely or jointly, regardless of how the property is titled. **Title** indicates a party’s ownership interest in property; that is, “whose name is the property in?” A list of property can be developed from information obtained from the client interview and through the formal discovery devices. The term **marital assets** refers to property acquired during a marriage. Here are some examples:

- antiques
- automobiles
- bonds
- clothing
- copyrights
- heirlooms
- jewelry
- marital gifts
- pending lawsuits
- professional degrees
- stocks
- trademarks
- appliances
- bank accounts
- business interests
- collectibles (stamps, coins, etc.)
- credit union accounts
- household furnishings
- judgments
- marital home
- pension plans (401K, SEP, IRA)
- profit-sharing plans
- tax refunds
- trailers
- artwork
- boats
- cash
- condominiums
- goodwill
- insurance
- lottery winnings
- mutual funds
- pets
- silverware
- time shares
- vacation homes
The next two cases presented in this chapter illustrate that marital property is not limited to traditional assets such as the marital home, bank accounts, and automobiles. Marital assets exist in many surprising forms. All it takes is a good legal eye to spot them and a good legal argument to toss them into the marital property pot. In Campbell, the court affirmed a long-standing rule defining lottery winnings as marital assets. In Keedy, it is the baseball collection that is up for grabs as the court rules that it is a marital asset.

KIMBERLY A. CAMPBELL V. TERRY M. CAMPBELL
213 A.2d 1027, 624 N.Y.S.2d 493 (A.D. 4 DEPT. 1995)
SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT

MEMORANDUM:
Plaintiff and 10 co-workers agreed that they would take turns purchasing a lottery ticket and that, if any one of them purchased a winning ticket, the proceeds would be shared in 11 equal shares. Plaintiff purchased a lottery ticket on at least one prior occasion, but it was not a winner. A co-worker purchased a winning lottery ticket on October 7, 1992. The jackpot prize was $4.5 million. Because of the policy of the New York State Lotto Commission to recognize only one winner per ticket, the co-worker obtained a Federal taxpayer identification number in the name of a trust and prepared a trust agreement for the disbursement of the lottery proceeds to all 11 co-workers. The trust agreement acknowledges the prior agreement of the parties, and all 11 co-workers executed the trust agreement.

Plaintiff commenced this action for divorce in 1993. Defendant counterclaimed for divorce and moved for an order enjoining and restraining plaintiff from spending or transferring her interest in the lottery proceeds. Defendant maintained that the lottery proceeds were marital property subject to equitable distribution. Supreme Court determined that the co-worker who purchased the winning lottery ticket was under no legal duty to share the proceeds. Moreover, there is no evidence in the record of donative intent. It is undisputed that the co-worker acted pursuant to the oral agreement.

Domestic Relations Law §236(B)(1)(c) defines marital property as “all property acquired by either or both spouses during the marriage and before commencement of a matrimonial action, regardless of the form in which title is held.” Thus, property acquired during the marriage is presumptively marital property, and plaintiff had the burden of showing that it was separate property. The agreement of the co-workers constituted a pooling arrangement, and plaintiff's share of the proceeds constitutes marital property. Thus, we modify the order on appeal by vacating that part denying defendant's motion and by determining that plaintiff's share of the lottery proceeds constitutes marital property.

Because the court determined that the proceeds were separate property, it did not consider whether plaintiff should be enjoined from transferring or otherwise disposing of the proceeds and whether the proceeds should be placed in escrow pending the distribution of marital property. We remit this matter to Supreme Court for determination of defendant’s motion.

Order unanimously modified on the law and as modified affirmed without costs and matter remitted to Supreme Court for further proceedings.
GRAY, JUSTICE.

The appellant, Michael Keedy, appeals from the property distribution of the Eleventh Judicial District Court, Flathead County, in this marital dissolution action. We affirm in part, reverse in part, and remand for further proceedings. . . .

. . . The appellant and the respondent, Carol Keedy, were married on May 27, 1973, in Lincoln, Nebraska. At the time of the marriage, Michael's education consisted of a bachelor's degree and a juris doctorate degree; Carol possessed a bachelor's degree in education. Two children were born to the marriage: a son, born on October 29, 1974, and a daughter, born on November 23, 1979.

Throughout the marriage, Michael has been employed as a lobbyist, attorney, legislator and for the past seven years, district court judge. During the marriage Carol worked primarily as a homemaker; she currently teaches at a private school.

The parties separated on April 1, 1989, and brought this matter before the District Court on April 30, 1990. The District Court entered its Amended Findings of Fact, Conclusions of Law, and Order on August 3, 1990. Michael appeals.

The first issue raised on appeal is whether the District Court erred in including the entire baseball card collection as a marital asset.

The baseball card collection consists of approximately 100,000 baseball cards. Michael testified that he began the collection as a boy in 1954 and continued to collect the cards up through 1963. He resumed his card collecting again in 1971 and continued collecting baseball cards after his marriage to Carol in 1973. At trial he introduced into evidence various lists of cards in an attempt to demonstrate which cards he had acquired prior to the marriage and which cards he had acquired after the marriage.

Carol hired an appraiser who estimated the value of the entire collection at $208,000. Michael testified that he believed the collection to be worth $100,000. After struggling with the evidence before it, the District Court abandoned its attempt to determine which cards were brought into the marriage or to place a value on the baseball cards. The court required Michael to divide the collection into two equal piles and allow Carol to select one pile of cards.

Michael argues, first, that the District Court erred in including in the marital estate those baseball cards he brought into the marriage. He also contends that the current value of such cards is not a product of contribution from the marital effort and should be excluded from the marital estate as his separate property.

This Court has repeatedly held that distribution of marital assets by a district court, where based upon substantial credible evidence, will not be overturned absent a clear abuse of discretion (citation omitted).

Section 40-4-202(1), MCA, requires the courts to, [e]quitably apportion between the parties the property and assets belonging to either or both, however and whenever acquired. . . . In dividing property acquired prior to the marriage; . . . property acquired in exchange for property acquired before the marriage. . . ; [and] the increased value of property acquired prior to marriage; . . . the court shall consider those contributions of the other spouse to the marriage, including:

(a) the nonmonetary contribution of a homemaker;
(b) the extent to which such contributions have facilitated the maintenance of this property; and
(c) whether or not the property division serves as an alternative to maintenance arrangements. (Emphasis supplied)

The District Court properly determined that the baseball card collection was a marital asset, however, it erred in not crediting Michael with the value, at the time of the marriage, of the cards he brought into the marriage.

The value of the premarital cards at the time of the marriage was undisputed between the parties. Michael testified that the value of the collection at the time of the marriage, or shortly thereafter, was approximately $5,000. Carol herself proposed in her Trial Memorandum, that in order “to equitably divide the property, the [District] Court should award $5,000.00 to the Petitioner to represent the value of the baseball card collection that he brought into the marriage.”

In considering the factors presented in § 40-4-202(1), MCA, it becomes apparent that the value of the premarital cards is not properly a part of the marital estate. The undisputed amount of $5,000 could not have been contributed to in any way by Carol.

However, the appreciation in value of the cards, including the premarital cards, properly could be included in the marital estate under §40-4-202(1), MCA, if the evidence supported spousal contribution to that appreciated
Dog Visitation?

Enforcement and supervision of pet visitation clauses would open the floodgates to litigation over pet-related problems. Traditionally, the courts have held that pets are personal property and will award the pet to either spouse at the time of the dissolution.

Value. Michael argues that the increase in value of the premarital baseball cards was not related to any marital contribution from Carol. We disagree.

In the present case, substantial credible evidence exists to support the finding that Carol contributed to the maintenance and growth of the collection. Evidence shows that she encouraged Michael to collect the cards, participated in the collection by buying foods associated with particular cards, and on at least one occasion, protected the cards from a flood while Michael was away from home. Testimony also indicated that Michael's card purchases strained the family budget at times, with the family sacrificing other items in order to build the collection.

It was not erroneous, under these circumstances, for the District Court to find that Carol contributed to the maintenance and growth of the card collection and, therefore, that she is entitled to share in the postmarital appreciation in value.

Thus, we hold that it was proper to include the baseball card collection as part of the marital estate, but that the District Court erred in failing to credit Michael with the undisputed value of $5,000 for the baseball cards he brought into the marriage.

... Affirmed in part, reversed in part, and remanded to the District Court for further proceedings consistent with this opinion.

TURNAGE, C.J. and HARRISON, HUNT, McDOUGUH, and WEBER, JJ., concur.

TRIEWEILLER, Justice, concurring in part and dissenting in part.

**Ronald Greg Bennett v. Kathryn R. Bennett**

655 So. 2d 109 (Fla. App. 1 Dist. 1995)

District Court of Appeal of Florida, First District

WOLF, Judge.

Husband, Ronald Greg Bennett, appeals from a final judgment of dissolution of marriage which, among other things, awarded custody of the parties’ dog, “Roddy.” The husband asserts that (1) the trial court erred in awarding the former wife visitation with the parties’ dog, and (2) the trial court erred in modifying the final judgment to increase the former wife’s visitation rights with the dog. We find that the trial court lacked authority to order visitation with personal property; the dog would properly be dealt with through the equitable distribution process.

A brief recitation of the procedural history will demonstrate the morass a trial court may find itself in by extending the right of visitation to personal property. The parties stipulated to all issues in the final judgment of dissolution of marriage except which party would receive possession of the parties’ dog, “Roddy.” After a hearing, the trial court found that the husband should have possession of the dog and that the wife should be able to take the dog for visitation every other weekend and every other Christmas.

The former husband contested this decision and filed a motion for rehearing alleging that the dog was a premarital asset. He also filed a motion for relief from final judgment and an amended motion for rehearing. The wife replied and filed a motion to strike former husband’s amended motion for rehearing and a motion for contempt. The former wife requested that the trial court transfer custody of the dog because the former husband was refusing to comply with the trial court’s order concerning visitation with the dog.

A hearing on these motions was held on September 27, 1993. The wife’s counsel filed an ore tenus motion requesting the trial court to change custody, or in the alternative, change visitation. The trial court denied the former husband’s motion for rehearing and granted the former wife’s ore tenus motion to change visitation. Thus, the trial court’s ruling on visitation now reads:
Debts are also part of the marital acquisition equation and must be identified as well as assets. Marital debts are the liabilities incurred by either spouse during the marriage. Examples of marital debts are as follows:

- assessments
- court judgments
- credit card balances
- loans
- mortgages
- tuitions
- unpaid taxes
- unreimbursed medical expenses

Credit Card Crazy

In Szesny, the husband incurred debt of $82,000 as a result of his out-of-control spending. The Appellate Court of Illinois found no error with the lower court’s ruling imposing the entire debt to the husband.

While several states have given family pets special status within dissolution proceedings (for example, see Arrington v. Arrington, 613 S.W.2d 565 (Tex. Civ. App. 1981)), we think such a course is unwise. Determinations as to custody and visitation lead to continuing enforcement and supervision problems (as evidenced by the proceedings in the instant case). Our courts are overwhelmed with the supervision of custody, visitation, and support matters related to the protection of our children. We cannot undertake the same responsibility as to animals.

While the trial judge was endeavoring to reach a fair solution under difficult circumstances, we must reverse the order relating to the custody of “Roddy,” and remand for the trial court to award the animal pursuant to the dictates of the equitable distribution statute.}

WEBSTER and MICKLE, J.J., concur.
mortgage against the house, also held by the bank where Respondent worked.

Petitioner testified that after they purchased the house, their standard of living went down; they did not go out as often and went to “cheap places.” Petitioner testified that she told Respondent that their credit cards should be destroyed and she destroyed several of them herself. Respondent testified that he opened new charge accounts and took the cash off all charge accounts. Petitioner testified that she did not sign for these credit cards although some of them bore her name.

Respondent testified that their standard of living did not abate, and in fact their living expenses increased dramatically. Their consumer debt jumped from nothing to $40,000 in 1984, with $20,000 owed on charge cards at the end of 1985, $43,000 owed at the end of 1986, and over $70,000 owed at the end of 1987. The current debt is approximately $82,000. Respondent testified that various loans were taken out in an effort to retire some of the debt. He also admitted to “playing the field” with their joint checking account, by hoping that deposits would arrive in time to cancel overdrafts.

Petitioner testified that she would attempt to “force the balance” of their checking account registers at the end of each month, but this was difficult because Respondent would not record all transactions, would use counter checks instead of those provided for their account, and would not report deposits. When Petitioner questioned Respondent about the entries, they would argue and he would beat her. Respondent admitted that he did not always tell Petitioner about a deposit but testified that he always made a notation in the check register, and that Petitioner would ask him about them when reconciling the checkbook.

. . . Respondent’s first argument is that the trial court inequitably distributed the marital assets and debts by granting all assets to Petitioner and assessing all debts against Respondent. The trial judge found no appreciable marital assets, that Petitioner possessed only a triply-refinanced 1984 Mazda and a vanity which had been a gift from Respondent, and that Respondent retained what little marital property remained. Respondent argues that this decision is arbitrary and an abuse of the trial court’s discretion.

. . . However, in the case here the trial court specifically found that Respondent was solely responsible for the over $82,000 in debt. There was testimony that after they purchased the marital home, Petitioner drastically reduced her expenditures while Respondent maintained or increased his. The trial court noted that Respondent would go out at night without his wife and child; that he belonged to a health club; that Respondent opened charge accounts without Petitioner’s knowledge or permission; that Respondent spent money on clothing for himself and at fine restaurants; that he gave money to his mother; that Respondent borrowed money but did not use it to reduce the marital debt; and that he “in effect kited his account in consumer debts.” The trial court also found that Petitioner spent minimal amounts on clothing, ate in fast food restaurants, and in one year was responsible for less than one-twelfth of their total expenses.

Dissipation can occur prior to dissolution. (Partyka, 158 Ill. App. 3d at 549, 110 Ill. Dec. at 503, 511 N.E.2d at 680.) The key is whether one spouse uses marital property for his or her own benefit for a purpose unrelated to the marriage. (Malters, 133 Ill. App. 3d at 181–182, 88 Ill. Dec. at 469, 478 N.E.2d at 1077.) When one party is charged with dissipation, he must prove by clear and convincing evidence that the questioned expenditures were made for a marital purpose (citations omitted). . . . Unsupported statements that the funds were used for marital purposes are insufficient (citation omitted).

The trial court here noted that Respondent claimed to have spent the money for family expenses but that he could produce only a few credit card statements for insignificant amounts. The court also noted that Respondent opened credit card accounts without Petitioner’s permission, even though her name was used, and that Respondent retained total control of these accounts, having the statements sent to his mother’s house. Where one spouse has sole access to funds or incurs debt without the knowledge of the other, that spouse can be held to have dissipated marital assets and can be held responsible for the entire debt (citations omitted). Here Respondent had sole access to the credit cards used to incur the debt, and for that reason the trial court properly found that he alone would be held responsible.

. . . We affirm the distribution of marital debt as ordered by the trial court.

THE DISTINCTION BETWEEN SEPARATE AND MARITAL PROPERTY

Once a list of a client’s property and debts has been prepared, the next step is to divide the property into two categories: separate property and marital property. Separate property is property acquired by a spouse prior to the marriage or after the marriage
by a gift, inheritance, or will, designated to that particular spouse alone. **Marital property** can be defined as property and/or income acquired during the marriage.

**Hey . . . That’s My Parent’s Money**

A common struggle in many divorce cases involves the down payment on the marital home. Kind parents who sometimes give money for the purchase of the home may find themselves in the middle of the separate versus marital property dilemma.

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**SHIRLEY R. COHEN V. HAROLD L. COHEN**

474 P.2d 792 (1970)

SUPREME COURT OF COLORADO

**GROVES, JUSTICE.**

This proceeding arises out of a divorce action brought by the wife. The parties appear here in the same order as in the trial court and are referred to as plaintiff and defendant. The alleged error relates to the division of property and the award of alimony and attorney’s fees to the plaintiff. We affirm . . .

. . . The plaintiff’s principal contention is that the court erred in finding that a monetary gift made by the defendant’s parents was a gift to the defendant rather than to the plaintiff. Prior to the marriage the defendant’s father executed two checks payable to the plaintiff in the respective amounts of $6,000 and $5,000. The defendant’s parents specified that the proceeds were to be applied towards the purchase of a home to be occupied by the parties, and the money was so applied. After executing the checks the father gave them to the defendant, who presented them to the plaintiff. The plaintiff endorsed the checks to the defendant and returned them to him. The defendant’s father testified that he made the checks payable to the plaintiff on the advice of his accountant, who apparently thought this might cause a saving of gift tax. (The gift tax of $11,000 was later declared to the taxing authorities as having been made to the defendant.)

The court found that this was a gift by the defendant’s parents to the defendant and that the plaintiff was not entitled to any portion of the $11,000 in the property division. The testimony was in conflict, but there is ample evidence to support the finding of the trial court as to the intent with respect to the gifts, and we should not and will not disturb that finding . . .

Judgment affirmed.

HODGES, KELLEY and LEE, JJ., concur.

Remember that the definition of marital property excludes separate property. The issue of title or “whose name is property in” is unimportant. For instance, if the marital home was purchased during the marriage but title is solely in the wife’s name as evidenced by the deed, it is still considered marital property. Both wife and husband have an interest in the home, regardless of whose name is on the deed. The family courts have statutory power to award property in a divorce matter regardless of the title interest.

The underlying policy behind the judicial authority statutes is that marriage is a **partnership**. In a business partnership, the partners pool their expertise, efforts, and resources to make the business operative and profitable. Similarly, during a marriage, the efforts and personal and financial resources of the parties are pooled for the benefit of the marital partnership. When the marriage has ended, each spouse has an interest in whatever has accumulated during the course of this partnership.

The task of defining separate and marital is an important part of the divorce process. The court will award separate property to the spouse entitled to its own-
ership. Once the separate property is parceled out to respective spouses, the marital property becomes one of the focal points of the divorce litigation. Whatever goes into the marital property pot is up for grabs. In some states, like Connecticut, the court may award any of the spouses’ property, separate or marital, in the course of the divorce proceedings to either spouse, regardless of whether the property is separate or marital.


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S T A T U T E S

Relief is also provided in jurisdictions that make distinctions between separate and marital property, if doing so would result in an unjust or unfair result.

CONNECTICUT GENERAL STATUTES ANNOTATED (WEST)

§ 46B-81.

(a) At the time of entering a decree of annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the superior court may assign to either the husband or wife all or any part of the estate of the other. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either the husband or the wife, when in the judgment of the court it is the proper mode to carry the decree into effect. . . 

(c) In fixing the nature and value of the property, if any, to be assigned, the court, after hearing the witnesses, if any, of each party, except as provided in subsection (a) of section 46b-51, shall consider the length of marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.

Frequently it is easy to determine what property belongs in the separate property category and what belongs in the marital property category; in other instances, the distinctions are not as clear. Separate property loses its separate classification and attains the marital property distinction when it is

- Titled jointly,
- Used for the purpose of supporting the marriage,
- Becomes so commingled with marital property that its separate origin cannot be traced.

This transformation of separate property to marital property is known as transmutation. The process of determining when the asset was acquired by tracking its origin is called tracing. Tracing helps determine whether the property is separate or marital property. Tracing is not as easy as it sounds. The determination of what is separate or marital property may depend on who your office is representing, and may ultimately have to be decided by the courts if the parties cannot agree.

Whenever separate property is transmuted, the attempts at making a solid distinction between separate and marital property become blurry and tracing will be
problematic. Determining when a separate asset exactly makes the transition to marital property may be very difficult. When a couple marries, it is usually their intent to share their resources and work in unison for the benefit of the marital partnership. Marriages are not entered into with the intent of tracking and recording every penny or every hour of labor performed in the acquisition of those marital assets. Therefore, the issue of whether a questionable asset is classified as separate or marital property may have to be resolved by the family court.

**VALUATION OF ASSETS**

Once the property has been classified as either separate or marital property, the next step is to determine its value; that is, what is the marital property worth? What is the property’s fair market value? **Fair market value** is the price a buyer is willing to pay a seller in exchange for the property.

Several methods are available to determine the value of marital property. Sometimes the parties are in agreement with the value of an asset and will mutually agree to a monetary figure. This consensus is very common with automobiles and the marital home. While many family homes are owned outright, others have outstanding mortgages and taxes due. Here, it is important to determine how much **equity** the parties have in the property. **Equity** is the fair market value of the property minus any encumbrances (i.e., mortgages, taxes, and liens).

**FIGURE 6–1**
A family home is often part of the marital property and attorneys need to determine how much equity the parties have in it.
EXAMPLE

John and Mary are married and they own a four-bedroom house. The fair market value of the marital home is $250,000. The outstanding mortgage due is $125,000, and property taxes due are $5,000. The equity is determined as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>FMV</td>
<td>$250,000</td>
</tr>
<tr>
<td>(less) Outstanding Mortgage &amp; Property Taxes</td>
<td>$130,000</td>
</tr>
<tr>
<td>Equity</td>
<td>$120,000</td>
</tr>
</tbody>
</table>

The paralegal can verify the equity portion of the property by obtaining a release from the client authorizing the office to obtain information from the client’s bank. Bank records can also help determine the value of various bank accounts. The values of stock, bonds, mutual funds, and other investments can be obtained from reviewing The Wall Street Journal or other financial publications.

RETAINING EXPERTS FOR VALUATION OF PROPERTY

If the parties cannot agree or are unable to determine the value of a marital asset, an expert can be retained. A family practice should always keep at its disposal a list of experts commonly used in family matters. The paralegal may assume the responsibility of maintaining a file folder on each expert, which should include an up-to-date résumé, list of fees, and area of expertise. Experts include accountants,

FIGURE 6–2
Expert witnesses can help settle disputes about the value of marital assets.
appraisers, actuaries, bank counselors, domestic violence counselors, financial planners, pension valuers, social workers, psychiatrists, and psychologists.

If an expert is needed, either spouse or both should file a motion for appointment of an expert with the court. If the parties are in agreement, they can present the agreement to the court and put it on the record.

If they are not in agreement, the court will decide. The court will order the appointment of a disinterested expert, identify the specific property to be assessed, determine who will pay the expert, and how the expert will be paid.

EFFECT OF PRENUPTIAL AGREEMENTS ON PROPERTY DISTRIBUTION

Prior to marriage, the parties may have determined their respective property rights in a written document called a prenuptial, premarital, or antenuptial agreement (see Chapter 4). This is a contract entered into by the prospective spouses regarding their rights during the marriage and in the event of a divorce. It is essential to determine whether a client has entered into one of these agreements and to obtain a copy. Most courts will enforce these agreements provided that certain conditions existed at the time of their execution and circumstances have not substantially changed since the signing of the agreement. Premarital agreements must be in writing. There must be a full disclosure of all assets. This means that the parties must disclose the full extent and current values of all assets. The parties must also have an adequate opportunity to seek independent counsel before signing a premarital agreement.

In the absence of a premarital or prenuptial agreement, divorcing spouses are free to negotiate between themselves how property is to be distributed, and then enter into a mutually consensual agreement regarding the division of their marital assets and marital debts, as well as child custody and support, alimony, visitation, and attorney’s fees. If the parties are unwilling to negotiate, or if negotiation on some or all aspects of the marital dissolution fails, the court will decide the outcome of the unresolved issues.

RESOLVING THE ISSUE OF PROPERTY DISTRIBUTION: CONTESTED OR UNCONTESTED

When the parties are able to negotiate a plan they find mutually acceptable, a settlement agreement or separation agreement is drafted and signed by both parties, thus obviating the need for a long court battle. Courts prefer agreements because the parties are more likely to be content with a settlement they have voluntarily negotiated and crafted. The court will not change or question an agreement unless it appears to be unfair or against public policy. The court will generally approve the agreement upon determining that it was entered into voluntarily and that it is fair and equitable. Courts also prefer agreements because it keeps the court docket moving by disposing of cases without protracted judicial proceedings and thus conserves judicial resources.

When the parties are unable to reach an agreement, it is up to the court to resolve the property dispute. Trial courts have great discretion in their decision-making powers. A trial court is in the best position to observe the demeanor of
the parties. A trial court’s decision will not be reversed on appeal unless the ap-
pellant can convince the higher court that the trial court abused its discretion by
either misapplying the law or by making erroneous rulings regarding the admis-
sion of evidence.

When resolving disputes over the division of property, the courts will first
make an award of separate property to the owner spouse. The definition of sepa-
rate versus marital property may be one of the first areas of contention in the trial.
Once the marital property pot has been defined, the court will divide the property
according to the jurisdiction’s property distribution statute. Family law paralegals
must become familiar with their jurisdictions’ statutes and the case law interpret-
ing those statutes.

JURIDISCTIONAL APPROACHES TO PROPERTY DISTRIBUTION

In the United States, two systems are used to dictate the division of marital prop-
erty upon the dissolution of marriage: equitable distribution and community property
distribution.

Equitable Distribution

As mentioned in earlier sections of this book, our system of jurisprudence is based
on the English common law. The English common law system was also the ap-
proach used to determine the division of marital property upon dissolution of a
marriage. Upon marriage, a husband and wife merged into a single legal entity—
the husband. This was known as the unity of spouses. At common law, married
women had no separate legal identity. A married woman could not own or man-
age her own property, she could not sue or be sued, nor could she control her
wages. As time passed, and attitudes toward married women changed, state legis-
latures in the United States, toward the end of the 1800s, enacted the Married
Women’s Property Acts. These statutes removed the common law disabilities that
prevented married women from owning and managing their own resources.

Although these statutes made it possible for women to own their own prop-
erty, the divorce law did not change along with the new status of married women.
Property acquired during the marriage was divided on the basis of who supplied
the funds to purchase the property and possessed title. Traditionally married
women did not work outside the home. Husbands bought the property, retained
title and ownership, and upon divorce, walked away with the lion’s share of the
assets. While jointly held property was divided between the spouses, the courts
had no power to award property solely owned by one spouse to the nontitle
spouse. States legislatures eventually saw the inequity and harshness of this
method of property division and enacted statutes allowing family courts to dis-
tribute property acquired during marriage on the basis of equity or fairness, as op-
posed to ownership. This is known as the equitable distribution system of di-
viding marital property. Family courts in equitable distribution states, in
determining how property is to be divided between a divorcing couple, must eval-
uate each spouse’s interest in the marital property on an individual or case-by-case
basis. Equitable distribution state statutes enumerate statutory factors that the
courts must consider in the division of marital assets and debts. The courts, how-
ever, are not required to give equal weight to each factor, and have the discretion to make decisions based on the merits of the particular case before them.

Most jurisdictions in the United States follow the equitable distribution system of property division. However, several states, particularly those located in the American Southwest, and originally settled by Spanish and French colonists, adhere to the distribution system known as community property.

**COMMUNITY PROPERTY**

In community property jurisdictions, property acquired during the marriage belongs equally to each spouse, unless it has been excluded as separate property. California’s property division statute provides that the court will “equally” divide the community estate of the parties.

**STATUTES**

**California Civil Code Annotated (West)**

§ 2550. MANNER OF DIVISION OF COMMUNITY

Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this division, in a proceeding for dissolution of marriage or for legal separation of the parties, the court shall, either in its judgment of dissolution of the marriage, in its judgment of legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally.

The community property arrangement is based on Spanish and French concepts of marital property as codified in the *code civil* or *civil code*, the system of law existing on the European mainland, as opposed to the common law system of England.

The nine states that use the community property system are mostly situated in the West and Southwest region of the United States. The community property states are (see Figure 6–3):

- Arizona
- California
- Idaho
- Louisiana
- Nevada
- New Mexico
- Texas
- Washington
- Wisconsin

The community property system assumes that both husband and wife contribute to the accumulation of marital assets. This concept valued the work of the husband who traditionally worked outside the home as well as that of the stay-at-home spouse who took care of the home and the children. The husband, however,
had the right to control the community property, until such statutory provisions were found to violate the Equal Protection Clause of the U.S. Constitution. Upon acquisition of any asset or income during the marriage, both spouses acquire an equal interest in the property, regardless of who supplied the funds for its acquisition. Because each spouse is deemed to have contributed to the acquisition of the marital assets (and also the marital debts), the assets and debts are divided on a 50/50 basis upon divorce. The various community property states allow for deviations or application of the equitable distribution system after the property has been divided on a 50/50 basis.

STATUTES

Arizona and California also recognize what is known as quasi-community. If a married couple acquires property in a noncommunity property state and then moves to a community property jurisdiction, upon divorce, the property is considered community property. Therefore, community property carries its distinctiveness over state lines.

NEVADA REVISED STATUTES ANNOTATED

ALIMONY AND ADJUDICATION OF PROPERTY RIGHTS; AWARD OF ATTORNEY’S FEE; SUBSEQUENT MODIFICATION BY COURT. Except as otherwise provided in NRS 125, 155 and unless the action is contrary to a premarital agreement between the parties which is enforceable pursuant to chapter 123A of NRS:

1. In granting a divorce, the court: . . .
   (b) Shall, to the extent practicable, make an equal disposition of the community property of the parties, except that the court may make an unequal disposition of the community property in such proportions as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition.

2. Except as otherwise provided in this subsection, in granting a divorce, the court shall dispose of any property held in joint tenancy in the manner set forth in subsection 1 for the disposition of community property. If a party has made a contribution of separate property to the acquisition or improvement of property held in joint tenancy, the court may provide for the reimbursement of that party for his contribution. The amount of reimbursement must not exceed the amount of the contribution of separate property that can be traced to the acquisition or improvement of property held in joint tenancy, without interest of any adjustment because of an increase in the value of the property held in joint tenancy. The amount of the reimbursement must not exceed the value, at the time of the disposition of the property held in joint tenancy for which the contribution of separate property was made. In determining whether to provide for the reimbursement, in whole or in part, of a party who has contributed separate property, the court shall consider:
   (a) The intention of the parties in placing the property in joint tenancy;
   (b) The length of the marriage;
   (c) Any other factor which the court deems relevant in making a just and equitable disposition of that property.

As used in this subsection, “contribution” includes a down payment, a payment for the acquisition or improvement of property, and a payment reducing the principal of a loan used to finance the purchase or improvement of property. The term does not include a payment of interest on a loan used to finance the purchase or improvement of
If you are a practicing paralegal in a community property state, it is essential that you become familiar with the intricacies of the community property laws in your state, as they differ from jurisdiction to jurisdiction.

THE NOT-SO-OBVIOUS ASSETS OF MARRIAGE—GOODWILL, PENSIONS, AND PROFESSIONAL DEGREES

Introduction

It is important that all marital assets be identified. The client must inform his or her attorney regarding all actual or potential assets so that the client’s attorney can determine what rights, if any, the client may have in the asset. Some marital assets are not so obvious because they are not present in tangible form, i.e. something we can see and touch. These intangible assets however may have substantial value and it would be considered legal malpractice not to identify, valuate, and seek a fair division for the client. Some of the major intangible marital assets include goodwill, pension and the professional degree.
Goodwill

**Goodwill** is a term used to describe the ability of a business or professional to attract future customers and repeat business due to a good reputation in the community. A dollar value on goodwill can be determined by an expert. Many states identify goodwill as marital property if a business or career has been enhanced during the marriage. A spouse who assists the other spouse in achieving that reputation may be entitled to share in the enhanced earning capacity that reputation will bring. Even where a spouse has stayed at home as a traditional homemaker, her contribution to the marital partnership has enabled her husband to pursue his business endeavors and create the goodwill that has enhanced his business reputation in the community. Therefore, in many states, she is entitled to a portion of the goodwill value of the business.

In calculating goodwill, it is essential that an expert be obtained to valuate this asset. Exhibit 6–1 illustrates a letter from an accounting firm enlisted to calculate the celebrity goodwill of comedian Jim Carrey. The letter details the documents necessary to make such a calculation. Other states are not as willing to define goodwill as marital property because reputation is not an “asset.”

**The Goodwill of Bethany Foot Clinic**

In this case of first impression, the Supreme Court of Oklahoma held that the goodwill of a medical sole proprietorship was a marital asset and its value subject to division by the family courts.

**FIGURE 6–4**

Goodwill that results from having run a successful business is considered marital property in some states.
Husband first takes issue with the trial court considering the goodwill of his medical practice as marital property. He testified that there was no goodwill because he was the reason the patients came to the Bethany Foot Clinic and “not very many” of the patients would stay at the Bethany Foot Clinic with a new doctor if Husband sold it. The professional practice of one spouse is an appropriate element of the marital property to be divided between the parties where it is jointly-acquired property. Ford v. Ford, 766 P.2d 950 (Okla. 1988); Carpenter v. Carpenter, 657 P.2d 646 (Okla. 1983). The issue before us is whether goodwill of Husband’s podiatry practice may be considered in determining the value of the practice.

. . . Pursuant to 60 O.S.1991, §§315 and 316, goodwill of a business is defined as “the expectation of continued public patronage,” and is considered property transferable like any other property. See also Freeling v. Wood, 361 P.2d 1061, 1063 (Okla. 1961). (“The ‘good will’ value of any business is the value that results from the probability that old customers will continue to trade with an established concern. . . . [Such] good will of a business may be sold.”) (Emphasis supplied); Travis v. Travis, 795 P.2d 96,97 (Okla. 1990) (quoting Freeling); Mocnik v. Mocnik, 838 P.2d 500, 504 (Okla. 1992) (quoting Travis) . . .

In determining the value of the Bethany Foot Clinic, the expert witness consulted the Goodwill Registry, “an accumulation of information concerning sales of medical related practices by experts.” From this publication, the expert determined that of the most recent purchases of podiatry clinics, an average of thirty-two percent (32%) of the podiatry patients stay with the clinic after it is sold to a new doctor. The range from which he obtained the average was 21% to 44% of clients staying. Noting that the traditional method used in valuing a medical practice is the previous year’s gross income, the expert then took the previous year’s gross income at the clinic ($324,201.51) and multiplied it by the 32% figure to arrive at a goodwill value of $103,744.00. Adding this to the value of the remaining business assets, the expert found the total value of the Bethany Foot Clinic to be $152,605.44. The trial court accepted this valuation and used it in determining how much alimony in lieu of property division to award.

We find that the trial court did not err in considering the goodwill of the Bethany Foot Clinic as a factor in determining the value of the clinic as marital property. The goodwill of the Bethany Foot Clinic is distinct from the personal reputation of Dr. Traczyk. Although many of Dr. Traczyk’s patients would not continue to patronize the Bethany Foot Clinic were Dr. Traczyk to sell to another podiatrist, competent evidence indicates that many would stay. Indeed, Dr. Traczyk may use the goodwill as a selling point to potential purchasers.

“If goodwill is to be divided as an asset, its value should be determined either by an agreement or by its fair market value. Both of these methods are widely accepted for valuing goodwill. See annotation, 78 A.L.R.4th 853, 860–71 (1987). Mocnik, 838 P.2d at 505.” . . .

. . . Husband further argues that by both allowing goodwill to be divided as marital property and awarding support alimony, the trial court has charged him twice for his future income. We first reiterate that the goodwill of the Bethany Foot Clinic is not properly characterized as future income. Rather, it is an asset of the clinic.

Husband, though, disagrees with the distinction between future income and assets. He asserts two cases cited in Travis resolve the issue of “double-dipping” into his future income. However, we find these cases, Holbrook v. Holbrook, 103 Wis. 2d 327, 309 N.W.2d 343 (1981) and Beasley v. Beasley, 359 Pa. Super. 20, 518 A.2d 545 (1986), allocatur denied, 516 Pa. 631, 533 A.2d 90 (1987), unpersuasive because, as Travis indicates, they both concerned the goodwill of law practices where such goodwill was related to the reputation of the lawyer. In other words, Holbrook and Beasley are distinguishable because they did not involve a professional practice with transferable goodwill as the case at bar did.

The goodwill of the Bethany Foot Clinic was valued as an asset and was a factor in determining the total value of the business for property division purposes. This goodwill was part of the property which should be divided between the parties; Wife had a right to receive her share of the property. 43 O.S.1991, §121. On the other hand, the award of support alimony was a separate determination based upon Husband’s ability to pay and Wife’s demonstrated need. Johnson v. Johnson, 674 P.2d 539 (Okla. 1983). Although the property division is permanent and irrevocable, the award of support alimony is subject to modification upon a showing of substantial change in circumstances, i.e. Husband’s ability and/or Wife’s demonstrated need. 43 O.S.1991, §134; Clifton v. Clifton, 801 P.2d 693 (Okla. 1990).
Next to the marital home, a pension may very often be the largest asset available for distribution upon divorce. A pension is a retirement benefit acquired by an employee. At the time of retirement, the employee is entitled to receive the pension funds, either by periodic payments or in a lump sum. Pension may be funded either through contributions from the employer, employee, or a combination of both. A spouse seeking a portion of the employee spouse’s pension is only entitled to the portion of the pension acquired during the marriage.

A pension is either vested or nonvested. While an employee is entitled to walk away from her job with the contribution made by her during her period of employment, she will only be entitled to the funds contributed by the employer if her pension has vested. A vested pension entitles the employee to the employer’s contribution portion provided that the employee has worked for the employer for an enumerated number of years. Once the employee has reached the specific benchmark, her right to the employer contribution attaches and she is entitled to the pension. If she leaves her employment with an unvested pension, the right to the employer portion of the funds has not yet attached. In a divorce case, a vested pension should be considered marital property. An unvested pension represents a future expectancy interest. If an unvested employee leaves her employer before the vesting period, a divorcing spouse may only be entitled to a portion of the employee spouse’s contributions.

Whether your office is representing the employee spouse or the nonemployee spouse, it is necessary to obtain the following information, either through discovery or the client interview:

1. Name, address, and telephone number of the plan administrator,
2. Copy of the pension plan, and
3. A computer printout of monies paid into the plan by the client.

A pension must be valuated. This means that the value or worth of the pension must be determined. Valuation will provide the attorney with a dollar amount attached to the pension so that the client’s interests in marital property can be adequately protected. Numerous pension valuation services are available to family law attorneys. Many advertise in professional publications directed at the family bar. These services employ experts trained at valuing pensions and determining their fair market value. If the parties wish to forego the valuation of the pension because of the added expense, a clause in the settlement agreement...
indicating that the valuation was waived is essential to protect the attorney from a malpractice claim.

Once a pension has been valuated, the attorneys for the parties must determine how this asset will be divided. This will depend on what other types of marital assets are available for distribution. If there is very little cash or other assets to distribute, the parties may seek to obtain a Qualified Domestic Relations Order (QDRO). This is a court order served on the pension administrator ordering the plan to distribute a specified portion of the pension funds to the nonemployee spouse. Appendix B includes two QDROs prepared in the divorce of comedian Jim Carrey and his wife, Melissa.

While state law dictates property division, federal law controls retirement benefits. When addressing the distribution of pension funds, employers must comply with the Employee Retirement Income Security Act (ERISA). ERISA is a federal statute passed in 1974 to protect employees and their pensions in case an employer declares bankruptcy or goes out of business. This law governs retirement pay and pension benefits. ERISA was amended by the Retirement Equity Act (REA) of 1984. This federal statute determines the manner in which states may divide a pension at the time of divorce and its requirements must be complied with in order for the QDRO to be valid. If the QDRO is invalid, the plan will not release any funds.

Pensions, either through an employer or self-directed (i.e., an IRA a spouse may have started on his own at a local bank), are tax deferred. This means that taxes on the income produced by the pension will not be paid until the monies are withdrawn at the time of retirement. If these funds are withdrawn prior to retirement, tax penalties will be imposed. An accountant should be consulted to determine the tax liability of liquidating any deferred compensation plan. The tax liability should be determined in advance so as to negotiate a payment of taxes due between the spouses. If the tax consequences are overlooked, the employee spouse could be in for a big surprise come tax time.

An employee spouse may not wish to have her pension distributed. If there are ample funds, the parties may agree to a buyout. In this scenario, the pension will be valuated, and the employee spouse will give cash to the nonemployee spouse, in exchange for any interest he may have in her pension. This would allow the employee spouse’s pension to remain untouched. The parties may also agree to offset the pension with other assets. For example, the employee spouse may agree to transfer her interest in the marital home or other marital assets in exchange for the full ownership of her pension benefits.

Federal law requires that the employee spouse name the nonemployee spouse as a beneficiary of his retirement benefits. Once the marriage has been severed by a court, the client should be advised to change the beneficiary designation immediately. A certified copy of the judgment or certificate of dissolution complete with a court seal should be filed with the pension plan along with any necessary form required by the particular plan.

The Garbage Man’s Disability Pension

In 1991, the New York Court of Appeals held that a portion of a Department of Sanitation worker’s disability pension was marital property and have subject to equitable distribution.
On this appeal, plaintiff-husband challenges the Appellate Division’s affirmation of Supreme Court’s determination that a portion of his ordinary disability pension received from the New York City Employee’s Retirement System is marital property and thus subject to equitable distribution pursuant to Part B Section 236 of the Domestic Relations Law. We conclude that inasmuch as a portion of that ordinary disability pension represents deferred compensation related to length of employment occurring during the marriage, it constitutes marital property subject to equitable distribution. Thus, there should be an affirmance.

The parties to this litigation were married on July 23, 1966. Three children were born of the union. In 1969, plaintiff became employed by the New York City Department of Sanitation. Nine years later he injured his back when he fell from a sanitation truck. He could not work at all for approximately five weeks and was unable to perform his normal work routine when he returned to work. Eventually, he was retired on an ordinary disability pension pursuant to Section 13-167 of New York City Administrative Code, effective April 17, 1980. At the time of his retirement, he had accumulated approximately eleven years of service with the Department of Sanitation, thus entitling him to pension benefits of $811.84 per month from the New York City Employee’s Retirement System. He subsequently became employed by Marist College where he then enrolled as a full-time student.

. . . The court concluded that 47.62% of plaintiff’s ordinary disability pension was marital property subject to equitable distribution and that the remaining 52.38% was disability payment, and thus, was separate property not subject to equitable distribution. In order to determine the allocation between retirement benefits and disability benefits, the court compared the pension benefit plaintiff would have received had he retired normally with the allowance plaintiff received under the ordinary disability retirement provision. If plaintiff had had fifteen years of service, he would have had vested regular pension benefits (see, NYS Admin Code §13-173.1) computed under the formula for determining normal retirement allowances, and his pension would have been considerably less—it would have equaled 47.62% of what he received under the ordinary disability plan. Supreme Court concluded that 47.62% of the ordinary disability was pure pension, and thus was marital property of which defendant was entitled to 50%. The court also determined that defendant was entitled to 23.81% of any future increase in the monthly pension payment as well as retroactive pension payments from the date of the commencement of the action.

The Appellate Division affirmed Supreme Court’s determination in all respects concluding that because the ordinary disability pension benefits plaintiff was receiving has a ten-year service requirement, such benefits were not solely compensation for injuries but were, in part, an award for length of service. It also concluded that the method used by Supreme Court to determine defendant’s award was proper (—AD2d—). For reasons set forth below, we affirm.

The New York Legislature has determined that marital property shall include “all property acquired by either or both spouses during the marriage and before the execution of a separate agreement or the commencement of a matrimonial action” (Domestic Relations Law §236 [B][1][d]). This Court has previously determined that pension benefits or vested rights to those benefits, except to the extent that they are earned or acquired before marriage or after commencement of a matrimonial action, constitute marital property (see, Majauskas v. Majauskas, 61 NY2d 481, 490). That determination was consistent with the intent of the Legislature as embodied in DRL §236(B)(5)(d)(4) and accords with our understanding that a pension benefit is, in essence, a form of deferred compensation derived from employment and an asset of the marriage that both spouses expect to enjoy at a future date (Damiano v. Damiano, 94 AD2d 132, 137). Allowing one spouse to share the pension benefit the other obtains through employment and considering such benefits to be marital property is also consistent with the concept of equitable distribution which rests largely on the view that marriage is, among other things, an economic partnership to which each party has made a contribution (id. at 138).

However, any compensation a spouse receives for personal injuries is not considered marital property and is not subject to equitable distribution (DRL §236 [B][1][d][2]). Thus a number of courts in this state have distinguished a “retirement pension” from a pure “disability pension” noting that the former is subject to equitable distribution whereas the latter, received as compensation for personal injuries, is not (see Mylette v. Mylette, 163 AD2d 43m revg, 140 Misc 2d 607; West v. West, 101 AD2d 834, after remittur, 115 AD2d 601; Newell v. Newell, 121 Misc 2d 586).
Plaintiff argues that his disability pension should not be subject to equitable distribution. He points to the fact that he was not eligible to receive a normal retirement pension because he had not been employed a sufficient number of years to be vested. Thus, had he retired without a disability in April 1980, he would have received no pension benefit. He contends that the pension benefits he receives are based merely upon his disability and should not be considered Marietta property. These arguments are unavailing.

Plaintiff was retired pursuant to the retirement for ordinary disability provision of Section 13-167 of the New York City Administrative Code, which entitles a member of the city civil service to receive an ordinary disability pension if he or she “is physically or mentally incapacitated for the performance of duty and ought to be retired,” provided he or she “has had ten or more years of duty-service and was a member or otherwise in city-service in each of the ten years next preceding his or her retirement” (NYC Admin Code §13-167 [a][1]). Thus, an employee may receive an ordinary disability pension even if the disability was not the result of a job-related accident, provided the employee satisfies the length of service requirement.

By contrast, a civil service member qualifying for a pension for “accident disability” does not have to satisfy a length of service requirement. Rather, the only requirement for entitlement to an “accident disability” pension is that the employee be “physically or mentally incapacitated for the performance of city-service, as a natural and proximate result of such city-service,” and that the “disability was not the result of willful negligence” on the part of the employee (NYC Admin Code §113-168). Thus, the statutory scheme distinguishes between eligibility for “regular,” “ordinary disability” and “accidental disability” pensions on the basis of length of service; entitlement to a “regular” pension vests upon 15 years of service (NYC Admin Code §13-173.1) and an “ordinary disability” pension upon 10 years of service (NYC Admin Code §13-167[a][1]), while there exists no length of service requirement for an “accidental disability” pension.

As indicated previously, it is firmly established in our jurisprudence that an employee’s interest in “pension rights,” the rights commonly accorded an employee and his or her spouse in a pension plan, except to the extent that [that interest] is earned before marriage or after commencement of a matrimonial action, is marital property” (Majauskas v. Majauskas, 61 NY2d 481, 490, supra), the pension benefits constituting a form of deferred compensation derived from employment (West v. West, 101 AD2d 834, supra). In the typical pension plan, the employees’ rights are incremental in that for each month or year of service, the employee receives credit which will enter into the computation of what the pension plan will pay to the employee (Majauskas v. Majauskas, supra at 490).

It is clear from the length of service requirement for the ordinary disability pension at issue here that plaintiff is being compensated for his length of service to the Department of Sanitation in addition to being compensated for the injuries he sustained. Indeed, implicit in the service requirement for this ordinary disability pension is the desire to provide employees whose injuries have prevented them from working until normal retirement age with some form of compensation for their injuries while also awarding them a portion of the deferred compensation to which they would have been entitled but for the injuries (see e.g. Mylette v. Mylette, 163 AD2d 463, 465 supra). Thus, to the extent plaintiff’s ordinary disability pension represents deferred compensation, it is indistinguishable from a retirement pension and therefore, to that extent, is subject to equitable distribution (see e.g. Mylette v. Mylette, 163 AD2d 463, 463 supra; West v. West, 101 AD2d 834, supra; Newell v. Newell, 121 Misc 2d 586, supra; see generally, Annotation, Pension or Retirement Benefits as Subject to Award or Division by Court in Settlement of Property Rights Between Spouses, 94 ALR3d 176 §13).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Order affirmed with costs. Opinion by Judge Alexander. Chief Judge Wachtler and Judges Simons, Kaye, Titone, Hancock, and Bellacosa concur.

**Professional Degree**

In a marital partnership, spouses often make sacrifices of time, energy, and financial resources for the future good of the partnership. One of the sacrifices often made is putting a spouse through school. Many spouses who make the decision to seek a professional degree or license do so with the commitment and support of the other spouse. This decision may require moving to another city or town or sometimes another country. It also can involve the decision of the nonstudent spouse to give up, either permanently or temporarily, his or her own professional goals while the student spouse pursues his or her goals. It can involve the nonstudent spouse work-
ing as the sole breadwinner in order to allow the student spouse time to focus on scholastic endeavors. It can also involve a drastic change in lifestyle in which the student spouse devotes a majority of his or her time on studies at the expense of spending quality time with the family. It can also involve financial sacrifices in terms of money needed for books, tuition, and debt incurred for academic loans. These sacrifices are made in hopes that a professional or advanced degree will provide the family unit with a more prosperous future in which homes and other assets may be purchased, children educated, and retirement plans funded.

Despite these high hopes and dreams of a higher standard of living, many non-student spouses upon graduation have found themselves served with divorce papers while the student spouse embarks on a new career, with newfound friends and, sometimes, new romantic love interests! Some states have classified a professional degree as marital property if it was obtained during the marriage. In these jurisdictions, a nonstudent spouse who makes monetary and nonmonetary contributions that enhance the other spouse’s earning potential may claim a portion of the value of the professional degree as marital property. An expert can provide a monetary figure representing the value of a professional degree. The court will then award a portion of the value to the nonstudent spouse pursuant to the state’s property division laws. Other jurisdictions have refused to recognize the professional degree as a marital asset. Courts have even extended the professional degree as property theory to any artistic or athletic skill developed during the marriage which enhances the participant spouse’s earning capacity. To compensate the nonstudent spouse, however, some states have awarded reimbursement alimony to the nonstudent spouse for his or her efforts and contributions toward the attainment of the spouse’s enhanced earning capacity.

**FIGURE 6–5**
Some jurisdictions consider an advanced degree to be marital property if it was obtained during the marriage.
Wife’s Slam Dunk

In *Marriage of Anderson*, the court held that an NBA player’s contract signed by the husband for the 1988–1989 season was marital property and subject to equitable distribution.

**IN RE THE MARRIAGE OF BERNADETTE K. ANDERSON AND RICHARD A. ANDERSON**

811 P.2d 419 (Colo.App. 1990)

COLORADO COURT OF APPEALS, DIV. II.

**OPINION BY JUDGE ROTHENBERG.**

In this dissolution of marriage action, Bernadette K. Anderson (wife) appeals from permanent orders entered relating to distribution of property and maintenance. We reverse and remand with directions.

The principal issue on appeal is whether husband’s player contract with a professional basketball team constitutes marital property subject to division.

At the time of the decree on March 1, 1989, husband was currently under a three-year contract with the Portland Trail Blazers for the 1988–89, 1989–90 and 1990–91 seasons. According to the contract, he was to receive three yearly lump-sum payments totaling 1.5 million dollars. On October 5, 1988 and December 1, 1988, he received the first payment which totaled $267,000 after taxes. Remaining payments of $475,000 and $575,000 were payable December 1989 and December 1990, respectively.

The NBA player contract in issue was never made part of the trial court record, but testimony of both husband and his attorney-agent indicated that the contract guaranteed payment: (1) if he died; (2) if he sustained injury during an NBA game or an official practice session; (3) if he had a mental breakdown or disability; (4) if he was terminated for lack of skill; or (5) if he was traded or waived by the team. Payment was not guaranteed if he sustained a physical disability from an injury unrelated to an NBA game or practice, or if he failed to pass a physical exam at the beginning of each season.

Husband testified that he used part of the $267,000 received to pay marital debts, child support maintenance and mortgage payments on the parties’ townhouse. At the time of the permanent orders, however, he still had $150,000 in treasury securities and $14,000 in his checking account.

The trial court ruled that husband’s NBA contract including the $267,000 payment already received by husband was not marital property, but was income belonging to the husband for husband’s future services. On appeal, wife argues that husband’s NBA contract is marital property, and she relies heavily on cases holding that a spouse’s compensation which is deferred until after the dissolution, but fully earned during the marriage, is marital property (citations omitted). . . .

. . . In our view, the money already received by husband during the marriage is not future income. It is cash on hand and therefore marital property subject to division. Accordingly, we hold that the money paid under the contract for the 1988–89 season and not expended for marital purposes as of the date of the dissolution is marital property subject to equitable distribution, and the trial court erred in ruling otherwise.

However, as to the final two years of husband’s contract, we hold that those payments to be received for the 1989–90 and 1990–91 seasons do not constitute property; rather, they constitute future income. See *In re Marriage of Faulkner*, supra.

Section 14-10-113, C.R.S. (1987 Rel.Vol.6B) requires a trial court to consider three separate issues regarding the equitable distribution of assets in a dissolution: (1) It must characterize the asset and determine whether it is property; (2) it must then allocate the asset as separate property of one spouse or as marital property; and (3) finally, it must distribute the property equitably (citation omitted). . . .

On remand, the court should consider all relevant factors in distributing the marital property here including the contribution of each spouse during the marriage, the fact of their separation, and any dissipation of marital property (citation omitted). . . .

. . . The judgment as to maintenance and division of property is reversed, and the cause is remanded to the trial court for further proceedings not inconsistent with the views expressed herein.

TURSI and HUME, J.J., concur.
Division of the marital debts is as important as division of the marital assets. Many failed marriages have no assets, but only debts to parcel out between the parties. A debt is a sum of money owed to a party called a creditor. The party responsible for the debt is called a debtor.

Debts must be identified and classified as either separate or marital debt. Then the obligation to pay is imposed on the respective spouses according to state law. Like separate property, debts incurred by a spouse prior to marriage belong to that spouse. A creditor in this case may only attach separate property to satisfy a debt incurred before the marriage. If no separate property exists, the creditor may then seek to attach marital property for satisfaction of the debt.

Debts incurred during the course of the marriage are considered marital debts. Just as spouses are jointly entitled to share in the fruits of the marriage, they will also be jointly responsible for the debts incurred during the marriage, regardless of whether the debt was incurred by one spouse or both. During the course of the marriage, couples will incur debts for necessaries such as food, clothing, shelter and medical care. As long as a debt for necessaries is incurred during the marriage, both spouses are responsible for the debt. This obligation to provide for the necessaries of the family was historically imposed on the husband. Today, both husbands and wives are mutually responsible for providing the essentials to their families. A creditor due an obligation regarding a necessary may seek an attachment of marital property. Note that in the Szesny case, illustrated earlier in this chapter, the husband was held responsible for debts incurred during the marriage that were not classified as necessaries. Husband had dissipated the marital assets and it would have been unfair for the court to hold the wife responsible for the husband’s wrongdoing.

During the divorce process, the parties are free to negotiate regarding which spouse will assume a particular debt. If there is no dispute, a separation agreement will be drafted and the debt clauses will specify the debts to be assumed by the respective parties. The debt section should also include a hold harmless clause. A hold harmless clause indicates that a particular spouse will be responsible for a debt incurred during the marriage, that he will be solely responsible for its payment, and that the other spouse shall be free and clear of any obligation regarding that debt. This agreement, however, is not binding on a creditor. A creditor who is due a debt incurred during the marriage may sue one or both spouses regardless of what the separation agreement indicates. The hold harmless clause allows the spouse who got “stuck” paying the debt to turn around and seek repayment from the spouse initially obligated under the separation agreement. Remember also that, although the creditor may only sue the spouse who incurred the debt during marriage, if judgment is granted in favor of the creditor, the creditor may seek to enforce the judgment against the marital assets of the marriage, assets in which the other spouse has an interest. After a divorce, a creditor can still seek to satisfy the debt by pursuing the spouse most able to pay the debt.

If the court must determine the allocation of debts, the spouse’s ability to pay and assets available will be considered.
DISSIPATION OF MARITAL ASSETS

Just as each spouse during the period of a marriage may contribute to the acquisition, enhancement, preservation, and appreciation of the marital estate, so either or both spouses may dissipate or waste away marital assets. Dissipation or depletion of the marital assets can occur in one or more of the following ways:

- Overspending during the course of an intact marriage.
- Overspending in contemplation of divorce.
- Overspending upon formal or informal notice of impending divorce.
- Destroying, giving away, or selling a spouse’s property.

Activities that constitute dissipation include running up credit card debt, depleting or closing out joint checking and savings accounts, making suspicious loans to relatives, purchasing “big ticket” items with cash, gambling, and making high-risk or highly speculative investments.

When making property distribution awards in a dissolution proceeding, the court will take into consideration each spouse’s role in and responsibility for the dissipation of marital assets. The court may punish the wrongdoing spouse by requiring the spouse to compensate the other spouse for the waste. This may be accomplished either by awarding the innocent spouse a larger percentage of the marital property or by ordering the wrongdoing spouse to pay to the other spouse an amount of cash equal to the monetary value of the assets depleted.

Motorcycle Madness

Let’s discuss the Click case. In defiance of a court order, Mr. Click took the Clicks’ Gold Wing motorcycle and had an accident, which left him comatose. The Gold Wing was destroyed in the accident, leaving Mrs. Click to argue that her husband had dissipated a marital asset.

IN RE MARRIAGE OF WANDA CLICK AND ROBERT CLICK


JUSTICE UNVERZAGT DELIVERED THE OPINION OF THE COURT.

Petitioner, Wanda Click, appeals from the property distribution portion of an order entered by the circuit court of Kane County dissolving her marriage to Robert Click. While petitioner’s action was pending, Robert was critically injured in a motorcycle accident. He has been in a coma since May 4, 1986. The trial court consolidated the dissolution action with an action by Robert’s mother, Jacquelyn Click, to have Robert adjudicated a disabled adult and to have a guardian appointed for him. Jacquelyn was subsequently appointed guardian of Robert’s person and estate, and she participated in the property division portion of the dissolution proceeding on his behalf.

Wanda initially sought to enforce a settlement agreement which she alleged the parties had reached before Robert’s accident. The court rejected that claim,
During the pendency of a divorce or dissolution action, each spouse may have some access to the marital assets. During that period, each spouse has the right to use some portion of marital funds to pay for legitimate expenses including the payment of reasonable legal fees in conjunction with the divorce action. Divorcing spouses may also use marital funds to pay certain personal expenses which they always paid from the funds during the course of the marriage. Such expenses may include individual property tax bills for each spouse’s automobile, automobile insurance and health insurance premiums, expenses for unexpected, emergency home repairs, dental work, reasonable expenses of the minor children, and, of course, reasonable expenditures for necessaries such as food, clothing, and shelter.

On appeal, Wanda alleges that: . . . (2) the evidence demonstrated that Robert had dissipated a marital asset by destroying the Gold Wing motorcycle. . . .

. . . Petitioner next contends that the court erred in rejecting her claim that Robert dissipated a marital asset when he took the Gold Wing motorcycle in contravention of a court order and then destroyed it in the accident that left him comatose. Dissipation of marital assets is generally defined as “the use of marital property for the sole benefit of one of the spouses for a purpose unrelated to the marriage at a time that the marriage is undergoing an irreconcilable breakdown” (citations omitted). While petitioner correctly asserts that courts have occasionally found a dissipation of assets where the dissipating spouse has derived no personal benefit from his or her actions (see, e.g., In re Marriage of Siegel (1984), 123 Ill. App. 3d 710, 719, 79 Ill. Dec. 219, 463 N.E.2d 773), we know of no authority, nor has petitioner cited any, which would permit a party to be held accountable for a dissipation which is not only detrimental to both parties, but purely unintentional as well. Robert violated a court order in taking the motorcycle — conduct which would ordinarily have resulted in the court’s imposition of contempt sanctions against him. (See generally In re G.B. (1981), 88 Ill. 2d 36, 41, 58 Ill. Dec. 845, 420 N.E.2d 1096 (regarding a court’s inherent contempt power).) There was no evidence to suggest that his injury and the destruction of the motorcycle were anything other than accidental, however, and we therefore conclude that the court correctly found that he did not dissipate a marital asset . . .

. . . Judgment affirmed.
NASH and REINHARD, JJ., concur.
FIGURE 6–6
A spouse may be required to replace monies dissipated during the course of a marriage dissolution action.
June 30, 1994

Brenda A. Beswick, Attorney at Law
Trope and Trope
12121 Wilshire Boulevard
Suite 801
Los Angeles, CA  90025

Re:  Marriage of Carrey

Dear Brenda:

The following is a list of the initial documents and
information which we will need to begin our work regarding the
calculation of goodwill for the above-stated matter:

JAMES CARREY


2. All contracts, agreements, and related amendments in effect
from the date of marriage through the most current date
available, except those previously provided, as follows:
a. "Night Life"
b. "Peggy Sue Got Married"
c. "Earth Girls are Easy"
d. "Jim Carrey Special"
e. "Doing Time on Maple"
f. "Ace Ventura"
g. "The Mask"
h. "In Living Color"
i. "Dumb and Dumber"
j. United Talent Agency contract dated March 12, 1993

3. Listing of all written, published, produced and/or performed
works including date written and/or started, date completed
and compensation received beginning August 29, 1984 through
the most current date available.

JIMMY-GENE, INC.

3. Corporate tax returns for the period beginning August 29,

4. Financial statements for the period beginning September 1,
1993 through the most current date available.
5. All contracts, agreements, and related amendments in effect from August 29, 1984 through the most current date available, except those previously listed in #2 above.

PIT BULL PRODUCTIONS, INC.

6. Financial statements for the period beginning January 1, 1994, through the most current date available.

7. All contracts, agreements, and related amendments in effect from December 13, 1993, through the most current date available, except those previously listed in #2 above.

AGENTS

8. Schedule of all meetings or telephone discussions regarding television, film or other projects whether or not offered or accepted. The schedule should include dates and terms of compensation beginning March 28, 1987 through the most current date available.

This request is not intended to be an all inclusive list of documents necessary to perform our work. Review of the above information may reveal items which warrant further inquiries and documentation in order to complete our assignment.

Please contact me with any questions you may have.

Sincerely,

Phoebe H. Shaw

PHS:tgw:L063094
REVIEW QUESTIONS

1. Define real and personal property.
2. What are the most common forms of concurrent or joint ownership?
3. What is title?
4. Explain the difference between separate property and marital property.
5. Define transmutation and the three circumstances in which separate property is transmuted.
6. What is tracing?
7. How are marital assets valued? How is equity determined?
8. Explain the effect of premarital agreements on property distribution.
9. Explain the main difference between equitable distribution states and common law states.
10. What were the Married Women’s Property Acts and how did they change the property rights of married women?
11. Name the nine community property states.
12. Explain the difference between a vested pension and a nonvested pension.
13. What is a QDRO?
14. How are marital debts distributed in a divorce action?
15. Define the dissipation of marital assets.

EXERCISES

1. Find your state’s property distribution statute and determine whether you live in a community property distribution or equitable distribution jurisdiction.
2. Does your state’s property distribution statute distinguish between separate and marital property or may both estates be considered by the courts in making a property award?
3. How does your state define separate property and marital property?
4. List the statutory factors the courts must consider in making a property distribution award. Is fault a consideration?
5. Review your state’s statutory and case law and determine how your jurisdiction treats the professional degree. Is it considered marital property or is yours a reimbursement alimony state?