Purpose of the Lifestyle Analysis

Numbers in Family Law Cases

Accounting is a topic that can frighten otherwise brave professionals. All the asset, liability, income, and expense talk can be overwhelming if the listener is not trained in the field of accounting. Even those who have taken a couple of accounting courses can get bogged down in the details and have a difficult time translating the numbers and determining what they really mean to a case.

The best forensic accountants are able to present financial issues in litigation so they can be understood readily. Attorneys, judges, and juries often lack an accounting or finance background, so being able to break down financial topics in a way that is easy to understand is essential for forensic accountants. The best expert witnesses are those who can relate to the judge and jury and who can make sense of even the most complex numbers.

Family law cases involving complex financial matters often require the assistance of a financial expert for the following issues:

- Preparing a financial disclosure, including creating a marital balance sheet
- Comparing balance sheets from period to period to evaluate changes in assets and liabilities and to determine the reasons for those changes
- Analyzing financial disclosures or affidavits prepared by the spouses to determine accuracy, completeness, and changes over time
• Calculating the historical income of the spouses
• Evaluating the prospects for future income of the spouses, including estimating future wages and business income
• Determining income (or the ability to pay) to calculate spousal support or child support
• Determining the standard of living (or the need for support) of the spouses and children
• Valuing business entities or other assets (such as real estate or pensions)
• Identifying assets and determining whether they are nonmarital (separate) or subject to division (marital or community)
• Tracing and finding funds or other assets
• Analyzing claims of dissipation, wasteful spending, or fraudulent conveyance
• Evaluating the income tax impact of various scenarios related to asset division and support payments
• Assessing the work of an opposing financial expert to determine its accuracy or to write a rebuttal report
• Providing other litigation assistance, such as assisting with drafting discovery demands and interrogatories or preparing for the depositions of individuals with financial information

In addition to these financial issues, an accounting expert could also play the following roles in family law cases:

• Assisting with settlement activities, evaluating the financial impact of a settlement offer, making certain calculations, and giving opinions on various settlement scenarios
• Mediating a divorce case with financial issues to help the parties reach a settlement
• Acting as a neutral expert in the divorce, providing an objective opinion on financial matters. The parties may agree together on the financial neutral, or the court may appoint the accountant.
• Participating in post-court activity and aiding in the evaluation of financial disputes, including things like allegations of fraud during the divorce process or motions for modification of support
Although a financial expert can be involved in family law cases in many different ways, this book focuses on determining income, determining the standard of living, identifying assets, and tracing and finding funds or other assets. The work may be done because of allegations of hidden income or assets, but many times it is done simply because of a need to determine income and expenses when the parties are unable to do so without the assistance of an expert.

Choosing a Financial Professional

There are a number of different types of financial professionals who might get involved in family law cases, including

- Certified Public Accountants (CPAs)
- Forensic accountants (who may or may not be CPAs)
- Accountants or bookkeepers
- Investment analysts or advisors
- Financial planners
- Business valuators
- Appraisers
- Actuaries

This book focuses on the work of forensic accountants because that is my field of specialty. In his book *Financial Forensics Body of Knowledge* (Wiley 2012), Darrell Dorrell defines forensic accounting as the “art and science of investigating people and money” (p. 6). This definition is simple but accurate. The other professionals listed above are perfectly capable of performing work in their areas of expertise. Nevertheless, the focus of this book will remain on the forensic accountant who works exclusively in the areas of litigation and fraud. Throughout this book I will refer to the professional doing a lifestyle analysis in a divorce as a forensic accountant, financial expert, or financial analyst, using the terms interchangeably.

What is so special about a forensic accountant? Accountants providing traditional services focus on things like income tax return preparation,
financial statement preparation, reviews and audits of financial statements, and general financial consulting. Forensic accounting builds on many of the core concepts and skills used in providing traditional accounting services but also requires effective use of investigative techniques to sort out complicated situations involving numbers. It is a specialty requiring an additional set of skills and investigative intuition.

Simply put, not every accountant can effectively provide forensic services. Traditional accountants and their firms are eager to provide forensic services, but it is important for the attorney to look into the professional’s level of experience in litigation and forensic work to be certain that he or she is qualified for the engagement.

One of the most important considerations in choosing a financial professional to assist with a family law case is his or her qualifications. Although family law cases fall under state laws, the Federal Rules of Evidence are instructive in evaluating the qualifications. Some states have adopted the Federal Rules of Evidence as they relate to expert witnesses or use variations strikingly similar to the federal rules.

Rule 702, Testimony by Expert Witnesses, of the Federal Rules of Evidence reads:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

The judge in the divorce case will decide if the financial expert meets these qualifications and is therefore permitted to testify as an expert witness.
A U.S. Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), is also instructive when evaluating a financial professional’s qualifications. In *Daubert*, the Supreme Court designated the trial judge as the gatekeeper for deciding whether an expert used reliable methodology. The judge applies the following factors in deciding the admissibility of the expert’s testimony:

(a) Whether the theory or technique has been tested or can be tested,
(b) Whether the theory has been subjected to peer review and publication,
(c) Whether there is a known or potential error rate of the theory or technique,
(d) Whether the theory has general acceptance by the relevant scientific community.

In lay terms, the question is whether the expert used recognized methodology in coming to his or her conclusions. Has the forensic accountant made the calculations in a way that other forensic accountants would agree is valid?

It is important for an expert witness to be aware of Rule 702 and *Daubert* if the court in which he or she is testifying adheres to the Federal Rules of Evidence. In the event that the court instead relies on state rules, the witness should familiarize himself or herself with the specific rules that will apply to his or her expert witness testimony.

Regardless of whether the court evaluates an expert witness under federal or state rules of evidence, the expert’s education, training, and certifications will be examined during the qualifications phase. This may include evaluation of the expert’s curriculum vitae (CV) outlining his or her education, credentials, work history, and relevant experience. Testimony may be taken from the expert to determine whether he or she has sufficient knowledge and experience in the area in which he or she is providing opinions.

In order for the expert to provide value to the case at the trial, he or she must be deemed an expert by the court. Anyone could call himself or herself an expert, but unless the court says someone is an expert in the case
at hand, the word *expert* means nothing. Thus, the qualifications phase is extremely important. The expert must be adept at demonstrating his or her training, skills, and experience and how they are relevant to the case at hand.

One important area often evaluated by the court is the credentials of the financial expert. A forensic accountant can possess a variety of certifications. It is important to evaluate these certificates and credentials to determine the substance behind them.

The most widely respected credentials in the field of forensic accounting include the following:

- **Certified Public Accountant (CPA)**—Most forensic accountants serving as expert witnesses have a CPA license. The CPA license is granted by each state after the candidate successfully completes a very difficult examination and practice requirements. In addition, most states require ongoing continuing education to maintain the license. The CPA license is a broad credential signifying expertise in accounting in general. It is not necessary for a forensic accountant to have a CPA license in a state in which he or she is testifying. However, a CPA license from any state will demonstrate that the expert has a certain level of skill in accounting matters.
- **Certified in Financial Forensics (CFF)**—This credential is offered by the American Institute of Certified Public Accountants (AICPA), the national organization open to CPAs. The credential is earned by passing an exam and meeting certain experience requirements. Annual continuing education is required to maintain the credential. The CFF designation indicates knowledge and experience related to fraud, forensic accounting, and litigation.
- **Certified Fraud Examiner (CFE)**—The CFE credential is awarded by the Association of Certified Fraud Examiners (ACFE), the largest antifraud organization in the world. It is earned by passing an exam and meeting experience requirements, and it requires annual continuing education credits. The CFE designation speaks to knowledge and experience in the areas of fraud and litigation.
- **Master Analyst in Financial Forensics (MAFF)**—The MAFF designation is awarded by the National Association of Certified Valuators and
Analysts (NACVA) to signify mastery of financial forensics techniques and concepts. The credential is earned upon meeting education and experience requirements and passing an exam.

- **Certified Valuation Analyst (CVA)**—The NACVA offers this designation to professionals who pass an examination and meet certain experience requirements. Continuing education is required each year to maintain the certification. The CVA credential indicates knowledge and experience in completing business valuations.

- **Accredited in Business Valuation (ABV)**—The AICPA offers the ABV credential to any qualified finance professional. Previously it was offered only to CPAs, but recently it was opened to other financial professionals who provide business valuations. Eligible professionals must meet certain requirements related to business valuation education and work and must pass an exam.

- **Certified Financial Planner (CFP)**—The CFP designation is issued by the Certified Financial Planner Board of Standards (CFP Board) to professionals who pass an examination and complete experience requirements. Annual continuing education is required to maintain the certification. The CFP credential signifies expertise in the area of financial planning, and CFPs may be qualified to render opinions related to pensions and investments.

- **Chartered Financial Analyst (CFA)**—A professional can obtain the CFA credential from the CFA Institute by completing an examination and meeting experience requirements. Annual continuing education is required to maintain the credential. The CFA designation indicates knowledge in investment analysis.

Individuals working in the areas of fraud, litigation, and business valuations may possess many other credentials; however, the substance behind these credentials should be carefully evaluated. Some certifications have few requirements, as holders of one or more of the certifications listed here may automatically qualify. Other certifications are really just marketing tools for the professionals. Many of the “credentials” offered today afford inadequate quality control, so those certifications mean little related to the expertise of a financial professional.
Why might an attorney want to use a professional with a “lesser” credential? Maybe the client cannot afford to hire a very qualified expert to do the financial analysis but still needs an unbiased third party to provide an analysis for the court. In this case, the attorney may select a professional with a credential other than the ones above.

Some of the other considerations the attorney may take into account when choosing a financial expert witness include:

• How the expert’s credentials enhance this specific case
• The expert’s strengths and weaknesses in these matters
• How this expert compares to or stands out from other forensic accountants
• Professional writing done by the expert (articles and books)
• Seminars presented by the forensic accountant
• How many times the financial expert has testified at deposition and trial
• Whether the expert’s testimony has ever been limited by a court
• If a business is involved, experience in its industry
• Any conflicts of interest related to the parties and the attorneys
• Whether the expert can meet the deadlines set forth in the case

These points may speak to the strength of the financial expert’s experience and how qualified her or she may appear.

It is important to inquire into whether an expert has been disqualified or had his or her testimony limited in any prior case. Experts who testify routinely may have been subject to Daubert challenges numerous times. Therefore, it is critical to find out whether the expert’s testimony was ever limited or excluded and why. Remember that it is possible the expert did nothing wrong but the testimony was limited due to unique issues of the case, conduct of the client, or other factors outside the expert’s control.

Family law attorney Miles Mason provides the following tips for discovering whether an expert was previously disqualified in a case:

There are a number of ways to determine whether an expert witness has been disqualified in a previous case or has had testimony limited by the trier of fact. Check Google, case law research, and the Daubert
Purpose of the Lifestyle Analysis

Tracker. The Daubert Tracker is a national database of appellate opinions where you can search cases by name. It is currently free to AICPA Forensic and Valuation Services Section members. Another good old-fashioned way is to ask around. Call competing expert witnesses. Call well-known family law attorneys likely to have opposed that witness. See if the gossip mill can turn up anything.

Don’t overplay your hand. Keep in mind that if an expert witness had some part of their testimony excluded, it could have just resulted from an overly exuberant trial attorney trying to push something past its logical course. Or, the trial judge might have simply wanted to limit testimony to quicken the pace of a lengthy hearing.

If the opposing expert has been disqualified, the family lawyer needs as many of the details as possible before digging in. Copy of the transcript? Findings of fact? Formal ruling on a motion in limine? Find out what’s what. If a financial expert witness has been disqualified at a trial, the reason why could be very important. For example, if an expert witness was disclosed past the expert witness disclosure deadline in a scheduling order, that is not the expert’s fault. It was the client’s trial attorney’s fault. But, if a financial expert was proffered as an expert witness to calculate the estimated value of a pension interest and the expert failed to request the pension’s summary plan description and misinterpreted the meaning of a financial figure in the annual benefits statement, that mistake is a big one. That can be argued to be a terrible error in judgment. Depending on the issue at hand, evidence of shoddy work can be devastating in all future testimonies (if there are any).

Professional Standards

Each credentialing body has its own set of professional standards to which members must adhere. The AICPA’s standards are the most common standards applicable to forensic accountants. Under Rule 201, General Standards, the professional should only accept engagements he or she can complete with competence. This means the forensic accountant should
know what specific skills or knowledge are necessary for an engagement and should accept that engagement only if he or she (or the firm) possesses the requisite skills and knowledge.

Rule 201 also specifies that the accountant must use due professional care in completing engagements, must properly plan and supervise the engagement, and must have sufficient relevant data to support the conclusions reached during the engagement. An expert should be able to articulate how the professionals performing services during the course of the engagement are competent to do those tasks and how they were supervised to ensure a quality work product.

Sufficient relevant data can become a sticking point in forensic accounting engagements. If documents are missing or if estimates need to be made, the financial expert must carefully consider whether there was sufficient data to come to a reasonable conclusion in the engagement.

Additional guidance on the performance of family law engagements may be found in the following AICPA special reports and practice aids:

- Litigation Services and Applicable Professional Standards—AICPA Consulting Services Special Report
- Communicating in Litigation Services: Reports—AICPA Practice Aid
- Engagement Letters for Litigation Services—AICPA Practice Aid
- Forensic Accounting—Fraud Investigations—AICPA Practice Aid
- Serving as an Expert Witness or Consultant—AICPA Practice Aid, 2nd Edition
- Introduction to Civil Litigation—AICPA Practice Aid, 2nd Edition

Conflicts of Interest

The family law attorney should consider whether a forensic accountant has any actual or perceived conflicts of interest in the engagement. This is important because the professional may not be considered credible if there is an apparent bias or conflict of interest. One example of a potential conflict
of interest is previously providing professional services for either spouse or for a business owned by or involving either spouse.

A previous engagement with the attorney will not constitute a per se conflict of interest. However, an expert witness may appear to be biased if he or she has performed numerous engagements for the retaining attorney. A lengthy financial relationship between the forensic accountant and the attorney does not necessarily mean that the expert lacks objectivity, but the issue may arise in court and may affect the perception of credibility.

It is important for the financial expert to be independent during the engagement. That is, he or she should have no financial interest in the outcome of the divorce proceedings. Of course, the expert has a financial interest of sorts, as he or she is compensated by the spouses for work performed. However, it is understood that professionals ought to be paid for their services, and receiving fair compensation for services performed does not impair the expert’s independence.

Consulting Versus Testifying

A financial professional can fill two distinct roles in family law cases. He or she can be a consultant who provides analysis and opinions privately to the attorney and client. In this case, the consulting expert’s work and conclusions are not intended to be presented in court but are intended to be advisory. The other role is that of a testifying expert, alternately called an expert witness. The testifying expert must be disclosed in the event that the case goes to trial.

The services of a consulting expert may include any of the following:

- Explaining financial topics to the attorney and client
- Providing opinions and advice on financial matters, including the value of assets and liabilities, the taxability of settlement scenarios, and the strengths and weaknesses of the financial portion of the case
- Helping to develop a litigation strategy
- Devising a strategy for presenting financial issues to the court
- Evaluating a testifying expert’s work as a “second set of eyes,” which may help identify weaknesses or opportunities in the testifying expert’s work
- Scrutinizing the work of a financial neutral appointed in the divorce
- Evaluating the work of a financial expert retained by the opposing party to find deficiencies in the work
- Helping the attorney prepare for depositions that may include financial questions

The work of the consulting expert, including his or her notes, communications, calculations, e-mails, letters, and other documentation, is typically protected as attorney work product. Accordingly, the knowledge, opinions, and files of the accountant are not discoverable by the opposing party.

However, it is important to recognize that the consulting expert could later become a testifying expert. In that case, the materials developed during the consultation process will likely become discoverable. Thus, the consultant should carefully maintain his or her files in the event that the work product is someday discoverable, even if this possibility is remote.

A forensic accountant retained as a testifying expert may do many of the same things as the consulting expert. Opinions on the value of assets or liabilities, analysis of the tax impact of various settlement scenarios, calculation of the “lifestyle” of the divorcing parties, or evaluation of the financial issues in the case may be done. In addition, the expert witness may be required to testify in depositions or at trials, explaining his or her work, file materials, opinions, and conclusions. Remember that the file of the testifying expert will be discoverable.

As discussed previously, the objectivity of the testifying expert will be carefully scrutinized. The expert witness is expected to evaluate evidence and come to independent conclusions that are not biased. The witness must be careful to avoid the appearance of being a “hired gun” in the case.

### Reasons for Hiring an Expert

Some family law attorneys are reluctant to retain forensic accountants. Money may be a factor, but sometimes the need for an outside expert is
not clear. Even though law firms may have paralegals or attorneys on staff who are very knowledgeable about financial issues, the outside forensic accountant offers the following advantages:

- Experience in financial investigations means the work can be completed quicker and more efficiently. The results are often presented better because experts regularly present their results in court and they are used to making financial matters understandable for non-accountants. It is often more cost-effective to have a forensic accountant perform the preliminary work on the numbers even though a paralegal or legal assistant may have a much lower billing rate. The expert’s familiarity with numbers leads to efficiencies and often a lower overall cost.
- An outside expert can testify, whereas law firm personnel cannot. Even though the family lawyer might not intend for the case to go to trial, it is always a possibility; therefore, it pays to have a financial professional who could testify if necessary.
- An outside expert is generally perceived as more objective. Ethical forensic accountants attempt to be independent and objective in their opinions, which bolsters the credibility of the calculations.
- Forensic accountants have experience finding red flags and issues. Their analysis is often more thorough, and their ability to spot problems is often more developed. This can be invaluable for finding red flags and issues that were previously unknown.
- Having a strong financial expert on your team could push the case toward resolution. The other side knows you are serious about sorting out the financial issues and finding details relevant to your client’s case. There is power in having a strong team and being prepared.

**Accountants and Attorneys Working Together**

The expert’s assistance with the discovery process can be invaluable to the family law attorney. By virtue of the expert’s familiarity with personal and business financial documents, the financial expert can play an important role in the discovery process. He or she can help with the following:
• Determining which documents should be requested or subpoenaed
• Identifying the individuals or companies most likely to possess those documents
• Drafting discovery requests, using the common names of the financial documents in conjunction with descriptions that may be important in the event that the person or company uses a different name for the documents or reports
• Evaluating documents produced in discovery to determine if they are responsive to the requests or subpoenas
• Drafting follow-up requests either to reiterate or reword the original requests or to create additional requests or demands
• Helping with wording for motions to compel financial discovery
• Explaining the documents and data to the attorneys
• Assisting with the preparation for depositions of individuals who have financial information relevant to the family law case
• Attending depositions of parties with financial information to provide the attorney with suggested lines of questioning

The forensic accountant may also assist the family lawyer with the development of strategy for the financial portion of the case. The expert’s financial and business experience may aid the attorney in understanding and litigating the issues related to the finances of the family.

It is important that the financial expert not be afraid to point out weaknesses and errors in the financial case, perhaps guiding the attorney to a better understanding of the financial issues and an alternative, more viable approach. For example, the client may have calculated historical expenditures including certain items that may not be recurring. The expert can identify those items, point out the fact that such expenses will not be incurred in the future, and adjust the expense budget accordingly. The attorney and client retain the financial expert presumably because of financial knowledge. It is up to the expert to be proactive in helping the attorney understand the issues and know early on about potential roadblocks in the case.
The Lifestyle Analysis

This book focuses solely on the lifestyle analysis in the family law case, although other services from a financial professional may also be needed in a case. The financial goal in a divorce is an equitable arrangement in which the assets and liabilities are divided and the future income is potentially shared via support orders. The lifestyle analysis is the process of tabulating and analyzing the income and expenses of the parties. The lifestyle analysis is then used to determine the standard of living of the parties, which will influence support calculations, and possibly property division.

Calculating the lifestyle of the spouses prior to separation can provide insight into the lifestyle the married couple enjoyed and the cost of that lifestyle, as well as the income that was or is required to fund the lifestyle of the married couple. The results may be used to prove a spouse’s financial needs following divorce. In other words, a detailed analysis of the spending during the marriage can be the basis to calculate the funding the spouse needs to maintain a similar lifestyle after divorce.

The lifestyle analysis may also help confirm or refute income claims made by a spouse. If a spouse has declared income that is well below the cost of the lifestyle he or she is leading, the lifestyle analysis may suggest that undisclosed sources of income exist. It may also help identify previously undisclosed assets, which may have a substantial impact on the property division.

Investigating historical income and expenses is a process of working backward from the present time to see how the couple achieved their current financial status. For each financial transaction in which a party is involved, there are multiple pieces of documentation and evidence. Part of the forensic analysis may be trying to locate multiple sources of evidence that help prove the flow of funds. This is particularly true if a document or representation may be unreliable. When confirming or refuting income claims made by a spouse, searching for alternative sources of income can help clarify the issue.
The lifestyle analysis is typically used to sort out the numbers post-separation, but it may also be used to evaluate the finances of each party at the time of a prenuptial agreement. If a party did not make a full and accurate disclosure prior to the signing of the premarital agreement, the spouse may attempt to have the agreement set aside. A prenuptial agreement can also be instrumental in the forensic accountant’s work post-separation, as it provides a point at which to start tracing funds or assets.

**Determining Support**

The lifestyle analysis can be a key component in the determination of support, including both spousal support (also called alimony or maintenance) and child support.

The following four types of spousal support are typical in divorces:

- **Temporary support** is paid on a short-term basis. It may also be called rehabilitative support. This type of spousal support is awarded for a limited period of time, as the recipient is expected to be working toward becoming self-sufficient. It is typical to award temporary support when a spouse is returning to school, receiving job training, or working on career development. Usually temporary support is modifiable if there is a change in circumstances.

- **Long-term spousal support** can also be called permanent support and is generally intended to be paid to the spouse for the remainder of his or her life. In addition to terminating upon death, permanent support may also be terminated if the spouse remarries or has a change in circumstances. A change in circumstances could also cause the amount of permanent support to be modified. Common reasons to modify permanent support include significant health issues, changes in income (for either of the parties), or changes in need.

- **Reimbursement support** is meant to compensate the recipient for expenses paid during the marriage. For example, if one spouse used nonmarital funds to put the other spouse through medical school, the
divorce may include reimbursement support for the cost of the education. Reimbursement support could also cover things like real estate taxes on separate property paid with marital funds.

- Lump sum support is paid as a specific amount up front. This type of support generally arises out of a settlement agreement during a divorce. It may be helpful to one or both of the parties because it brings certainty to the situation right away.

Spousal support and child support can be calculated using a number of different factors, including:

- The actual earnings of each person, including wages, investment income, and other sources of income (retirement, disability, trusts, etc.)
- Present earning capacity of each party, both independently and relatively
- Future earning capacity of the parties
- The value of the assets divided and the ability of those assets to produce income
- The cash flow of each party
- The length of the marriage or relationship
- The ages of the individuals
- The needs of the spouses or parties and the needs of the children
- The ability of the parties to pay support
- The standard of living (or lifestyle) established during the marriage
- Impairment of earning capacity due to devoting time to domestic duties, delaying education or employment, forgoing career opportunities during the marriage, and the like
- Contributions to the other party’s education, training, or career
- The effect that parenting arrangements may have on a party’s ability to seek or maintain employment
- Income taxes that will be incurred by each party
- Short-term and long-term expenses expected to be incurred
- Valid agreements of the parties
- Other factors that a court finds to be just and equitable under the circumstances
Most of these factors have a great deal of “gray area.” Reasonable people can disagree on how to calculate them or how significant a role they should play in the calculation of support. Consider, for example, the following issues:

- Actual earnings—What should be included or excluded from this calculation? Are there certain types of earnings that are nonrecurring or so uncertain as to make it unfair to include them in a calculation of ongoing earnings?
- Earning capacity—What is the spouse’s true earning capacity? What if the spouse cannot find employment within his or her area of expertise? What if the spouse no longer wishes to work in the area of expertise? What if the spouse needs or wants to work less than full-time? What if the spouse quits a job to start a business, and that business will not create income for a period of time? What if a spouse decides to take early retirement?
- Value of assets divided—The parties may disagree on the value of assets being divided, as well as how much income will be derived from those assets in the future. They may also disagree on whether a spouse should sell an asset to generate funds. The sale of assets to fund current expenses could have a dramatic long-term impact, particularly for a spouse who does not have the ability to generate income or save additional money for future needs.
- Cash flow—Cash received from work and business activities is not necessarily the same thing as income from those activities. For example, income-producing real estate often has higher cash flow than the income reported on a tax return. How heavily should the cash flow be considered? Is it more or less indicative of the need for support or the ability to pay than some other factor?
- Needs of parties—What is truly “needed” by the parties following the divorce? Should the post-divorce lifestyle include all of the things that were enjoyed during the marriage? Were portions of the lifestyle “excessive”? If so, should they not be considered a true need? What if the parties lived very frugally during the marriage? Should the spouses be required to continue to live in a frugal fashion?
• Ability to pay—Which items of income or cash flow should be included when calculating a spouse’s ability to pay? Should certain funds or earnings be excluded? What if certain income is used to start or grow a business venture? If the earnings invested into a business are excluded from support calculations, should the future earnings from that business venture be included in support calculations at some point? Should a spouse be allowed to save certain funds, rather than have them considered income on which support is calculated?
• Standard of living—Jurisdictions vary regarding how standard of living is defined. Chapter 2 will discuss this in detail.
• Impairment of earning capacity—How impaired is the earning capacity? Whose fault is the impairment, and should this affect support calculations? How can we fairly estimate what the earning capacity could have been without the impairment or what it will be in the future?
• Contributions—How do we value and weight the contributions of one party to the other party’s career?
• Short-term and long-term expenses—Which expenses should be considered, and how heavily should they be weighted? Should any expenses be excluded because they are discretionary?

Of course, states vary in the factors to be considered regarding support or maintenance. For example, the Illinois Marriage and Dissolution of Marriage Act, Section 504, currently states that temporary or permanent maintenance will be paid based on a consideration of the following relevant factors:

1. the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance as well as all financial obligations imposed on the parties as a result of the dissolution of marriage;
2. the needs of each party;
3. the realistic present and future earning capacity of each party;
4. any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having forgone or delayed education, training, employment, or career opportunities due to the marriage;
5. any impairment of the realistic present or future earning capacity of the party against whom maintenance is sought;
6. the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment;
   6.1. the effect of any parental responsibility arrangements and its effect on a party's ability to seek or maintain employment;
7. the standard of living established during the marriage;
8. the duration of the marriage;
9. the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and the needs of each of the parties;
10. all sources of public and private income including, without limitation, disability and retirement income;
11. the tax consequences to each party;
12. contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse;
13. any valid agreement of the parties; and
14. any other factor that the court expressly finds to be just and equitable.

The list of factors to be considered in support calculations provided earlier in this chapter is a bit more generic, whereas the list of factors from Illinois gets a bit more specific. Be aware that the guidance in state law can and does change routinely. The Illinois statute had substantive changes between the first and second editions of this book.

Post-divorce budgets play a huge role in determining spousal support and child support. One of the most basic uses of a lifestyle analysis is creating budgets, especially for parties with very high incomes. By analyzing historical expenditures of the parties, a more precise budget for future expenses can be created. This is not simply a matter of tabulating historical spending. The forensic accountant needs to be skilled in spotting irregularities in the numbers that may suggest missing documents, expenses that haven't
been accounted for, or other problems with the figures. Certain adjustments also may need to be made to past expenses to include or eliminate certain items. The financial expert should develop a basis for those adjustments and be ready to articulate it.

For example, consider a case in which the parties were living rent-free in a residence owned by the wife’s parents during the marriage. Following the separation, one or both of the parties may need to pay for housing, and this must be added to the budget. Conversely, consider a case in which the parties had a large expense for an anniversary party for themselves. Since they will be divorced, this expense will not occur again in the future, so it should likely be removed from the budget. A budget developed using only historical expenses without adjustments for items like these would be inaccurate in estimating future spending.

Evaluating historical spending and creating budgets is covered in detail in Chapter 8, where we discuss considerations in assessing these figures.

**Tax Law Changes**

The Tax Cuts and Jobs Act of 2017 (TCJA) made significant changes to federal income tax filings for individuals. The provision relevant to the material in this book relates to how spousal support payments are treated for tax purposes. For divorce or separation instruments executed before 2019, the payer of spousal support deducts the payments from his or her income, and the recipient includes the payments in his or her taxable income.

Divorce or separation instruments executed after December 31, 2018 have a different set of rules. Payment of spousal support is not deductible by the payer, and the recipient of the support payments does not include them in taxable income. Since the payer of spousal support is most often the party with higher earnings (and therefore sometimes a higher tax rate), the law change effectively increases the total tax burden of the couple.

This may be seen as a win for the party receiving spousal support. The recipient spouse receives the income tax-free, which seems to be a benefit. But the reality is that he or she will likely receive less money each month to factor in the tax impact of this change.
Separate Property

Jurisdictions vary in their definitions of separate property and how a party must prove or document the separateness of the property. Regardless of a jurisdiction’s rules, a lifestyle analysis can be used to trace assets, how those assets were acquired, the source of funds used to acquire the assets, whether the assets were maintained separately during the marriage, and the use of the proceeds of sales of the assets. The lifestyle analysis can be instrumental in proving (or disproving) that an asset was acquired with separate funds and was kept separate throughout the duration of the marriage. In Chapter 10, we cover the issue of separate property in more detail.

Hidden Income

The lifestyle analysis can be used to uncover hidden sources of income. In Chapter 9, we discuss how income is defined and a number of the common complications that can arise in calculating it. We also discuss common ways that sources of income are hidden and commonly used methods to uncover them.

When income is difficult or impossible to calculate because documents are not being produced or financial information is being obscured, a lifestyle analysis may be used circumstantially to prove the level of income of a party. If the level of spending of that party can be proven or reasonably estimated, an inference can be made that sufficient income exists to fund that spending.

Naturally, the other side of the case will likely challenge the lifestyle analysis and say the income calculated is speculative. The goal is to gather as much information and evidence as possible to make reasonable calculations and estimates. Remember that these calculations would not be necessary if the spouse was forthcoming with documentation and disclosures. While estimates and circumstantial evidence of income are not ideal, sometimes they are the only alternative in a case in which a party is concealing information.
Hidden Assets

The lifestyle analysis can also be used to uncover hidden assets. It is often difficult to find assets around the world with a “wild goose chase” by a private investigator, especially if the spouse is adept at hiding things. Tracing funds can sometimes uncover those assets, however. Undisclosed assets can be found because of a transfer of money or the payment of a bill that indicates the existence of an asset. We discuss hidden assets in detail in Chapter 10, including how to identify and classify assets, methods used to hide assets, and techniques used to uncover hidden assets.