

# DISCOVERY ISSUES & FINANCIAL STATEMENTS

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## MAINE FINANCIAL STATEMENTS and DISCOVERY

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### Financial Statement Authority

Under Maine Rules of Civil Procedure, Rule 108(c) and (d)(1)(3), parties must file a financial statement in a divorce and/or judicial separation action if there is any dispute as to property, spousal support, or counsel fees. Specifically, the Rule states:

- (c) Financial Statements. In any divorce or judicial separation action in which there is a dispute about either a division of property or an award of spousal support or counsel fees, the parties shall exchange and file a financial statement showing the assets, liabilities, and current income and expenses of both parties and indicating separately all marital and non-marital property. **The financial statement shall be filed within 21 days of the Family Division Scheduling Order or before mediation, whichever is earlier.**

...

- (d)(3) Any financial statement or child support affidavit filed shall be kept separate from other papers in the case and shall not be available for public inspection, but shall be **available, as necessary, to the court, the attorneys whose appearances are entered in the case, the parties to the case, their expert witnesses, and public agencies charged with responsibility for the collection of support.**

The failure to file a timely financial statement, as required by the Rules, could result in an order of sanctions by the Court as set forth in M.R.Civ.P 37(b)(2).

### Discovery Authority

Maine Rules of Civil Procedure, Rules 26 through 37 and Rule 112, provide for the process by which parties may obtain information during the course of litigation – thus avoiding trial by ambush. Rule 26 specifically provides:

- (a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

- (b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
- (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

### **When to File a Financial Statement**

The Maine Rules of Court requires the financial statement to be filed within 21 days of the Family Division Scheduling Order or before mediation, whichever is earlier. A statement should be filed in any case when property is in dispute.

In cases in which there is no dispute as to real estate, personal property, spousal support, or attorney's fees, the parties are not required to file a financial statement. Instead, parties may submit a *Certificate in Lieu of the Financial Statement* to the Court.

Financial statements also must be updated prior to hearing or trial pursuant to the case's pretrial order.

### **Preparing a Financial Statement:**

Pursuant to Maine Rules of Civil Procedure, Rule 108(d)(2), each financial statement is a sworn statement. The affiant (the client) is attesting to the truth and accuracy of its content. Upon completion, the client signs the form under the following language:

*This Financial Statement is complete and is based on my personal knowledge, information, and belief, and to the extent it is based on information, I believe such information to be true.*

A client should be provided a blank financial statement at the initial consultation and be given specific instructions as to the information that will be necessary to properly complete the financial statement. The client will need time to gather the information and complete a draft.

Not all spouses have similar financial information. Many marriages have a "bookkeeper" of the relationship. Some clients are able to recite accounts, account balances, and even account numbers easily. Others are unaware of retirement accounts, balances on mortgage, or bank accounts.

A financial statement may need to be revised or updated during the course of the litigation. A general practice, labeling the first financial statement as a “preliminary financial statement” sets the stage that the better quality of information or detail may be discovered and supplemented at a later date.

Part II of the financial statement is a summary of all assets and debts. The assets and debts need to be a) identified; b) valued; and c) classified as either “marital” versus “non-marital” interest.

Part III of the financial statement includes a budget to evaluate income and expenses. While this is only required in cases in which spousal support is an issue, an attorney should recommend that this section be completed in all cases to evaluate the affordability of the current or proposed living arrangements.

The attorney should review the budget carefully to evaluate reasonableness. An overstated or an understated budget can be problematic.

### **Valuing Property**

Under Maine Law, Title 19-A, Section 953, marital property owned by either spouse shall be divided based upon an equitable distribution. The statute defines marital property, as well as the general presumptions that guide the Court in dividing marital property.

Each asset and debt must have a specific valued assigned to each. The failure to declare values will result in the Court’s assigning of values in order to make a just division of marital property as outlined by Section 953.

The values of property captured on a financial statement should be at the time the financial statement is completed, not a future date or based upon any contingencies. Macdonald v. Macdonald, 532 A.2d. 1046 (Me. 1987), *aff’d* on rehearing, 559 A.2d. 780 (Me. 1989). The value of an asset should not be adjusted based upon a contingency that may or will occur in the near future. For example, a real estate commission on a house to be sold in the future should not be deducted from the value of the asset unless the settlement or judgment will order that the sale be accomplished.

Not all assets can be straightforward to value. A few tips when valuing:

1. Real Estate - Under Maine law, property owners are competent to testify as to the fair market value of their property. In the event opposing party offers a different valuation based upon an expert opinion, the Court will have to independently review the evidence presented and establish an independent valuation of the property.

A real estate appraisal conducted by a certified real estate appraiser may be necessary. A previously completed appraisal beyond six months may be deemed outdated.

If there is a pre-marital interest to real estate, evidence as to the value of the real estate and equity as of the date of marriage will be necessary. Additionally, consideration must be given as to whether the value of the property appreciated due to marital effort (improvements and pay down of mortgage) and/or market forces.

2. Motor Vehicles - The current Kelley Blue Book value is traditionally accepted for current motor vehicle value. Kelley Blue Book values for virtually all motor vehicles can be found at <http://www.kbb.com>.
3. Bank Accounts and Retirement Accounts - Retirement accounts are generally held in the name of one party. Often, there is a non-marital component to the retirement account. Counsel should inquire whether the client has a copy of the retirement statement from the date of the marriage to sustain his/her burden of proof.

The type of retirement account and the plan name should be clearly identified so that it can be properly identified in a judgment or settlement agreement. Counsel should consider whether the retirement account is a qualified account (such as 401(k)) or a non-qualified account (such as an IRA).

4. Life and Disability Insurance - While not all insurance policies have a cash value or are considered as an asset, the existence of life insurance and disability policy is useful future stability of a spouse and can secure child support and spousal support.

There are two main types of life insurance policies: term and whole life insurance. Term life insurance vests when the insured becomes deceased, but does not have a cash value. Term insurance also has an ongoing monthly or yearly premium payment. Whole life insurance, on the other hand, is generally purchased as an asset in a lump sum or over time and has a "cash surrender value" which can be borrowed against or redeemed.

5. Business Interests - The current value of a business is not easily determined and may require an expert valuation. There are three approaches to value any business or business interest: (1) the asset approach; (2) the income approach; and (3) the market approach. A valuation must also distinguish personal goodwill from enterprise goodwill. Personal goodwill is based upon the earning capacity of the spouse resulting from his or her reputation, knowledge, and skill. Enterprise goodwill, on the other hand, is based upon the intangible factors, including reputation, customers, marketability, employees, etc. Professional goodwill is not a divisible asset (but could be useful in considering income for support). Enterprise goodwill, on the other hand, can be valued and treated as a marital asset for the purposes of an equitable division.

6. **Debts** - It is important to disclose all debts, as well as the name of the debtor. A credit report can verify any missing information or uncertainty. Spouses routinely obtain credit in the other person's name. A divorce judgment should carefully allocate debt in a way to protect the spouse for whom the debt is held. In the event the collateral is being set aside to one party, the loan will often have to be rewritten or refinanced to release the other party from legal liability.

### **Disclosing Income**

A financial statement must disclose all sources of income (i.e., employment wages, contract work, interest, bonuses, unemployment, stock options, disability, worker's comp, retirement income, etc.) must be disclosed.

### **When to Initiate Discovery**

In any family matter, a party may obtain discovery on financial issues. In cases where financial statements are required under Rule 108(c), discovery may be initiated only after the parties have filed and exchanged the financial statements. If the exchange does not occur, the party who has filed a financial statement may serve discovery after the time period has expired as provided in Rule 108(c).

Financial statements can have a major impact on the scope of discovery requests. For example, a complete financial statement identifies areas where more information is necessary. It also enables the tailoring of requests to be case-objective specific - which is both helpful as a practitioner and cost effective for the client.

On other issues, including parental rights and responsibilities, discovery may be served only by order of the court for good cause shown.

### **Depositions**

Depositions in a family matter are governed by Family Division Rule 112(c) and Maine Rules of Civil Procedure 27(A)(4), 30-32. Practically, and generally, depositions are used in four ways: to perpetuate testimony; to obtain and develop information from an expert; to obtain specific information by the use of a deposition subpoena; and to allow the attorney to form a subjective impression about a witness and how that witness might be received by a finder of fact. Although there may be a strategic or tactical reason for taking a deposition very early in the pretrial discovery process (e.g., when it is expected that a witness might not be available within the jurisdiction or there are health issues), depositions generally occur after interrogatories have been answered. Except in the rare occasion when there might be a court order to the contrary, depositions are not filed with the court, but are exchanged between or among the parties.

### **Requests for Admissions**

Although not commonly used in family law cases, requests for admissions can be very useful to narrow issues in dispute in preparation for a trial. M.R.C.P. Rule 36 governs requests for admissions regarding relevant facts and genuineness of documents and signatures. The opposing party's response to requests for admissions is due within thirty days. Unlike

interrogatories or document requests, requests for admissions are filed with the court. If no response to the request is filed with the court within thirty days, then the requests shall be deemed admitted.

### **Sanctions**

Maine Rules of Civil Procedure 26(g) governs discovery motions. If counsel has a discovery dispute, they must first enter in good-faith efforts to resolve it. Failing resolution, the moving party shall request a hearing from the court and in a letter succinctly describe the nature of the impasse and the relief requested. The court will then decide the issue or schedule a conference and issue an order thereafter.

Sanctions for failure to comply with a discovery request and subsequent order are governed by Maine Rules of Civil Procedure Rule 37. While there are moderately different sanctions that may be applied depending on the nature of the discovery request, generally the sanctions will involve imposition of attorney's fees, a finding of contempt, an order prohibiting the offending party from introducing evidence, and allowing the facts to be established pursuant to the claim of the party obtaining the responses. 37(b)(1) governs failure to respond to a question at a deposition after being court ordered to do so.

### **Protective Orders and Motions to Seal**

Protective orders are governed by Maine Rules of Civil Procedure 26(c). An individual, whether or not a party, from whom discovery is sought may ask the court to issue an order curtailing the scope of the discovery request. The Rule lists 10 discrete but unrestricted types of orders the court may issue for good cause to protect are individual from annoyance, embarrassment, oppression, undue burden, or expense.

A party's financial statement is filed under seal pursuant to Maine Rules of Civil Procedure 108(d)(3). Rule 26(c)(6) and (8) allow the court to seal deposition transcriptions and documents or information. The court can also order that any hearings occur in a setting limiting attendance by anyone other than parties or witnesses.

### **Supplementation of Responses**

Pursuant to Rule 26(e), a party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to information acquired, except as follows: the party is under a duty seasonably to supplement his response with respect to a question concerning the identity and location of persons having knowledge of discoverable matters and the identity of each person expected to be called as an expert witness at trial. A party is also under a duty to amend a prior response if the party knows the response was incorrect when made or he knows the response though correct when made is no longer true.

## Practical Tips

- The final product must be true and accurate, as well as complete.
- It is the attorney's responsibility to perform his or her due diligence in order to ensure that the information is accurate and reliable. The attorney's role is to support the client in identifying his/her assets and debts, gathering back-up documentation, and accurately capturing financial information. A careful review and analysis of information reported by the client is necessary before signing and filing
- The client may often refer to outside documents and statements, such as bank documents, mortgage statements, retirement account statements, deeds, etc. in preparing the financial statement. A client should return the statement in draft along with the supporting documentation used to complete the draft financial statement. Any incomplete information can be easily obtained and verification can be offered to opposing counsel should any questions arise.
- Attorneys preparing financial statements should air on the side of inclusive, rather than exclusive. While the actual forms are limited in space, the electronic version can be expanded upon to include additional detail. Financial statements lacking adequate detail generally result in the opposing party serving discovery requests, which are burdensome and time consuming to prepare and respond.
- Discrepancies in the financial statements of the opposing party should be examined closely. At times, the discrepancy may be an accounting error; other times it could be more significant. It is recommended that the discrepancy is discussed with opposing counsel as soon as it is found. If counsel is unable to offer a plausible explanation, more detailed discovery may be needed.
- Even though a financial statement is sworn to be true and notarized, the client may need to revise previously filed financial statements. A general practice, labeling the first financial statement as a "preliminary financial statement" sets the stage that the better quality of information or detail may be discovered and supplemented at a later date. Whereas divorce litigation may continue upward of 12 months, information does frequently change and require updates. If a later-filed financial affidavit differs from an earlier one, it is important to explain the differences. The client should be prepared to explain the changes or discrepancy at hearing.
- A Guardian *ad litem* can obtain past medical and mental health records of a party or a child and can order current mental health evaluations and psychological work-ups. Because a discussion of these records will be used in the Guardian's written report, the need for the request of non-financial discovery is mitigated when the case involves the services of a Guardian ad litem.



