

# ***Dissipation of Marital Assets***

***By Frank A. Wisehart, CPA, CVA, CFE***

## *Background*

*Practitioners in Court call it SIDS or sudden income deficiency syndrome. Its symptoms are the apparent sudden poverty of a party to a divorce who previously enjoyed a lavish lifestyle. Assets previously enjoyed by both spouses mysteriously disappear from the Court mandated financial disclosures.*

More formally called the “Dissipation of marital assets doctrine” it can be applied in an equitable distribution proceeding when “one spouse has previously consumed, given away or otherwise transferred, mismanaged, converted, or otherwise adversely affected property that, had it been before the court, would have been subject to equitable distribution”<sup>1</sup>. Dissipation of marital assets is commonly applied in two forms:

- ✓ Concealment, and;
- ✓ Wasting of value of marital assets.

By concealing or wasting the value of marital assets the dissipating spouse is in effect obtaining or trying to obtain, whether intentionally or unintentionally, an unjust reward through reckless or fraudulent acts. Courts in an equitable distribution proceeding, where a spouse has engaged in conduct that has dissipated or diminished the value of the marital estate, may consider the dissipation as a factor in dividing the property. Upon finding that a spouse has concealed or wasted the assets, the court may award a disproportionate amount to the injured spouse.

## *Elements of Dissipation*

A dissipated asset (that was marital to begin with) can be classified as marital property if: (1) the asset was lost; (2) the loss occurred upon or after the breakdown of the marriage; (3) at the time of the loss, the asset was under control of the guilty spouse; and (4) the loss was not incident to the completion of a valid marital purpose<sup>2</sup>.

The first requirement is simply proving that the marital assets were lost, concealed, sold or conveyed away. Broader definitions include the destruction of an asset in part or in its entirety or deliberately reduced an asset’s fair market value.

Assets that have minimal economic value have been classified as dissipated assets. In re: Ferkel, 260 Ill. App. 3d 33 632 N. E. 2d 1133 (1994), the wife destroyed the husband’s personal photographs. The trial court refused to find dissipations reasoning that the economic value of the photographs was minimal. The appellate court reversed, finding that dissipation should not be tolerated merely because the asset in question had little value. This point is particularly true with regard to the photographs and other assets whose value is often more personal rather than economic. The case was remanded with instructions to order the wife to recreate the photographs from negatives if possible, and

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<sup>1</sup> Ohio State Law Journal Winter, 1991 52 Ohio St. L.J. 95

<sup>2</sup> “Here Today, Gone Tomorrow: Identification and Division of Dissipated Marital Assets, 1996 National Legal Research Group, Inc.

to make at least a nominal damages award for any photographs which could not be recreated<sup>3</sup>.

The second requirement refers to the timing of the loss. The timing of the loss for purposes of dissipation is generally viewed as those losses occurring upon or after the breakdown of the marriage. The exact timing of the marital breakdown is problematic in cases of dissipation claims. When marital problems originate and when they ultimately culminate in a petition for divorce leaves open the question of when the application of marital breakdown should be applied. At what point is the marriage irretrievably broken? This encourages the dishonest spouse to act before the marriage is completely broken. Courts have generally found that the date of separation is a consideration for pre-breakdown application of dissipation doctrine. As such, claims of dissipation that occur after the divorce petition date are also generally accepted to be within the courts discretion to consider.

The third requirement for dissipated asset claims in marital property is proof that the guilty spouse had control over the asset at the time of the loss. Conversely, losses that occur outside of the spouses control are not assets subject to claims of dissipation. Losses caused by third parties may still be deemed dissipation, especially where one party is a close family member.

The fourth consideration for dissipated marital assets is proof that the asset in question was not spent or otherwise lost as part of a valid marital purpose. For example, a valid marital purpose would be use of marital funds to pay medical expenses of the couples children. Courts have viewed this provision generally, on a case-by-case basis. Specific evidence, and if possible, documentation is required to prove claims.

Courts have also held that a spouse is not chargeable for funds lost in business operations, if the operations were conducted in good faith<sup>4</sup>. The concealment of funds, fraudulent conveyance of assets or destruction of marital property in which the sole benefit is derived by the transferring or destroying party is considered to be lost as part of a non valid marital purpose. Although the courts do not require the claiming party to prove intent, the doctrine is applied "where the conduct in question has been engaged in with intent to deprive the other party of rights in equitable property distribution<sup>5</sup>". For example, if the husband transfers marital real estate to a third party for less than Fair Market Value, the Court will inquire as to the reasons for the apparent dissipation of marital assets. Where the sale was due to a pending foreclosure, the Court may rule that the transfer was proper.

### *Overcoming Claims of Dissipation*

Generally, dissipation that occurs before the marital breakdown is not subject to dissipation doctrine. In addition, in cases where the (claiming) spouse consents to the non marital purpose dissipation, no subsequent claim thereon may be made. It would be inequitable to hold the expending spouse responsible under dissipation doctrine for an expenditure to which the other spouse consented. This applies to implied and express consent circumstances. Failure to object to expenditures may in fact imply consent.

### *Remedies for Dissipated Assets*

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<sup>3</sup> "Here Today, Gone Tomorrow: Identification and Division of Dissipated Marital Assets, 1996 National Legal Research Group, Inc.

<sup>4</sup> Andrews v. Andrews 677 S. W. 2d 171 175 (Tex Ct. App. 1984) & Peters v. Skalman, 27 Wash. App. 247, 251, 617, P. 2d 448, 452 (1980)

<sup>5</sup> Ohio State Law Journal Winter, 1991 52 Ohio St. L.J. 95

Various remedies have been applied by courts to address this issue. The application of remedies generally falls into four categories: injunctive relief, rescission of fraudulent transfers, unequal division of assets and constructive classification.

In some cases, compensatory damages have been awarded against the dissipating spouse. Ohio statutory provision provides that where a spouse has engaged in “financial misconduct, including but not limited to, the dissipation, destruction, concealment, or fraudulent disposition of assets, “the court may make a distributive award<sup>6</sup>.” Ohio Code further clarifies the reward. Under §3105.17 “the court may compensate the offended spouse with a distributive award or with a greater award of marital property.”

#### *Injunctive relief*

Injunctive relief against dissipation, in theory, prevents dissipation from occurring. In practice, injunctions are not an effective remedy. Spouses who dissipate are motivated to deprive the marital estate of assets or to obtain a marital award to which they are not entitled. Injunctions against dissipation are only useful to the extent to which they are complied with by the parties. As such, courts must look to other remedies when dissipation occurs despite the injunction seeking to prevent the same.

#### *Rescission of Fraudulent Conveyances*

The remaining remedies for dissipation constitute post-dissipation relief. Frequently this is the only relief available to adequately address the dissipation of marital assets. Rescission<sup>7</sup> of fraudulent conveyances is an effective relief because the dissipated asset can be restored to the marital estate. Unfortunately, application of rescission is difficult for courts to impose. This remedy frequently involves reaching out to third parties who may or may not be innocent to the action undertaken by the dissipating spouse and proof of claims issues. In the case where the husband unloads marital property to a disinterested third party at a fire sale price, the court would find it difficult to order a rescission. This is distinguished from the case where assets are transferred to parents or siblings for nominal consideration.

#### *Unequal division*

Courts can more easily administer relief under the two remaining remedies for dissipation, unequal division of marital assets and classification as marital property. Under unequal division, the dissipating party to a divorce proceeding is awarded fewer marital assets as a result of their conduct. This approach avoids complicating factors and difficulties such as the rights of innocent third parties, family members, and difficult issues involving proof of claims. Cases using unequal division as a remedy include Oberhansly 798 P. 2d 883 (Alaska 1990) (awarding wife \$78,000 and husband only \$38,000 ; husband’s failure to make house payments caused bank to foreclose on mortgage); In re Ebel, 874 P. 2d 406 (Colo. Ct. App. 1993) (proper to award wife 56% of assets, where husband improperly removed funds from marital golf course business); Albritton v. Albritton, 109 N.C. App. 36, 426 S.E. 2d 80 (1993) (unequal division to husband not error; wife had hidden marital funds and given generally untruthful financial testimony at trial).

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<sup>6</sup> Ohio Rev. Code Ann. § 3105.171(E)(3) (Anderson Supp. 1990)

<sup>7</sup> To declare a contract void at its inception and to put an end to it as though it never were. Black’s law dictionary.

Although unequal division of assets is an easy concept for courts to apply, it does have limitations. Unequal division is effective only to the extent of available marital funds to satisfy the innocent spouse. An award of 100% to 0% in favor of the innocent spouse may not adequately result in complete relief.

Simply what are the consequences? If stealing resulted in simply a return of the merchandise stolen, no effective deterrent exists. In *Sands v. Sands*, 192 Mich. App. 698, 482 N.W. 2d 203 (1992), the Michigan Court of Appeals held that to deter further dissipations, assets dissipated with actual fraudulent intent should be awarded 100% to the innocent spouse. If the attempt to deprive the innocent spouse of marital assets is successful, the guilty spouse would be in no worse a position having not attempted to gain a distributive award advantage to which they are not entitled. These issues, as in *Sands v. Sands*, permit an award greater than the amount of damages actually suffered in order to deter future dissipation.

### *Classification as Marital Property*

Another effective after-the-fact remedy for dissipated assets is to simply classify them as marital property for the purposes of distribution to the dissipating spouse. This method gives a more complete remedy as dissipated assets can be identified, quantified and charged against the dissipating spouse. There are many cases that use this form of relief treating dissipated assets as part of the marital estate, *Manaker v. Manaker*, 11 Conn. App. 653, 528 A. 2d 1170 (1987); *In re Smith*, 128 Ill App. 3d 1017, 471 N.E. 2d 1008 (1984); *Dahl v. Dahl*, 225 Neb. 501, 406 N. W. 2d 639 (1987); *Mauser v. Mauser*, 75 N.C. App. 115, 330 S. E. 2d 63 (1985); *Harrell v. Harrell*, 120 A.D. 2d 565, 502 N.Y.S. 2d 57 (1986). Furthermore, some courts have recognized this result by adjusting the date of classification of marital assets so that it comes before the date of dissipation, in *re Hunter*, 196 Mont. 235, 639 P. 2d 489 (1982); *Spychalski v. Spychalski*, 80 Ohio App. 3d 10, 608 N.E. 2d 802 (1992).

By classifying the dissipated property as marital property, the dissipation is effectively ignored and the asset is treated as part of the marital estate. Subsequently, it is awarded to the dissipating spouse's share of the marital estate. The proper remedy is to subtract the entire amount of dissipation from the guilty spouse's share of the marital estate, *DiLacqua v. DiLacqua*, 88 Ohio App 3d 48, 623 N.E 2d 118 (1993). *Conclusion*

### *Summary*

When faced with allegations of spousal dissipation of marital assets, the forensic expert must look at the facts of the case in formulating his/her opinion.

1. Were the subject assets marital assets?
2. Were they under the exclusive control of one spouse?
3. Is the spouse attempting to conceal the assets?
4. Has the spouse transferred the asset for less than fair market value?
5. Has the spouse destroyed or otherwise dissipated the asset?
6. Was there consent of both spouses?
7. What is the most equitable manner for the Court to make the injured spouse whole?
  - a. Rescission of the transaction
  - b. Injunction preventing the transfer
  - c. Unequal division
  - d. Classification as Marital Property

Frank A. Wisehart CPA, ABV, CVA, CFE

*Frank A. Wisehart is a Certified Fraud Examiner, Certified Public Accountant and Certified Valuation Analyst for Wisehart & Wisehart, Inc., an accounting firm specializing in forensic accounting, fraud, divorce, probate, business valuation, and expert testimony. Frank is also a MBA candidate at Cornell University.*