

DISSIPATION OF MARITAL ASSETS

Things wasted or things hidden

By Frank A. Wisheart

The dissipation of marital assets doctrine 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."

The doctrine 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 negligent 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.

ELEMENTS OF DISSIPATION

A dissipated asset 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.

The first requirement is simply proving that the assets were lost, concealed, sold or conveyed away. Broader definitions include the destruction of an asset in part or in its entirety or deliberately reducing an asset's fair market value. 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 court should consider the costs associated with recreating what has been lost or destroyed.

The second requirement refers to the timing of the loss, generally those losses occurring upon or after the breakdown of the marriage. The exact timing of the marital breakdown is problematic. At what point is the marriage irretrievably broken? Courts have generally found that the date of separation is a consideration for application of dissipation doctrine. Claims of dissipation that occur after the divorce petition date are also generally accepted to be within the courts discretion.

The third requirement for dissipated asset claims is proof the guilty spouse had control over the asset at the time of loss. Conversely, losses that occur outside of the spouses control are not 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. Courts have viewed this provision generally, on a case-by-case basis. Specific evidence, and if possible, documentation are required to prove claims.

Courts have also held that a spouse is not chargeable for funds lost in business operations, if conducted in good faith. 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."



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REMEDIES FOR DISSIPATED ASSETS

Generally remedies fall 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 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. In practice, injunctions are not an effective remedy. Spouses who dissipate are motivated to deprive the marital estate of assets or to obtain an award to which they are not entitled. Injunctions are only useful to the extent to which they are complied with by the parties. As such, courts must look to other remedies.

RESCISSION OF FRAUDULENT CONVEYANCES

The remaining remedies constitute post-dissipation relief. Frequently this is the only relief available. Rescission 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 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.

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 is awarded fewer marital assets as a result of his or her conduct. This approach avoids complicating factors such as the rights of innocent third parties, family members, and difficult issues involving proof of claims.

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.

As a matter of deterrence, courts have awarded an amount in excess of the dissipated assets. If the dissipating spouse receives an award to which he or she was otherwise entitled had the dissipation not taken place, then no compelling reason exists to deter 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. This method gives a more complete remedy as dissipated assets can be identified, quantified and charged against the dissipating spouse.

By classifying the dissipated property as marital property, 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.

There is ample authority, statutory and case law permitting consideration of dissipation or diminution of assets subject to equitable distribution. For an award of dissipation to be considered, the loss must have occurred after some form of marital breakdown, within the control of

the dissipating spouse and adversely affecting the property rights of the other spouse. In addition, the innocent spouse must not have consented to the dissipation.



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