
COMMON LAW MARRIAGE

1. Introduction

Common-law marriage is defined as the marital joinder of a man and a woman without the benefit of formal papers or procedures. *Nester v. Nester* (1984), 15 Ohio St. 3d 143, 145, 472 N.E.2d 1091. Once a common-law marriage is established, the parties are considered to be husband and wife to the same extent as if there had been a statutory and ceremonial marriage. *Industrial Com. v. Miller* (1934, App, Mahoning Co) 18 Ohio L. Abs. 244.

Presently, common law marriage can still be contracted in the following jurisdictions: Alabama, Colorado, the District of Columbia, Iowa, Kansas, Montana, New Hampshire (posthumously), Oklahoma, Rhode Island, South Carolina, Texas, and Utah. Common law marriage can no longer be contracted in the following states, as of the dates given: Alaska (1917), Arizona (1913), California (1895), Florida (1968), Georgia (1997), Hawaii (1920), Idaho (1996), Illinois (1905), Indiana (1958), Kentucky (1852), Maine (1652, when it became part of Massachusetts; then a state, 1820), Massachusetts (1646), Michigan (1957), Minnesota (1941), Mississippi (1956), Missouri (1921), Nebraska (1923), Nevada (1943), New Mexico (1860), New York (1933, also 1902-1908), New Jersey (1939), North Dakota (1890), Ohio (1991), Pennsylvania (2005), South Dakota (1959), and Wisconsin (1917).

Section 3105.12 of the Ohio Revised Code was amended in 1991 to prohibit common law marriages from arising in Ohio in the future. Thus, on or after October 10, 1991, common law marriages are prohibited and a marriage of a man and a woman may occur only if the marriage is solemnized. O.R.C. § 3105.12(B).

Common law marriages that occurred prior to that date remain valid. Common law marriages that satisfy all of the following remain valid on or after October 10, 1991:

- a) they occurred in another state or nation that recognizes the validity of common law marriages;

(dissipation of wrongful death settlement obtained while parties divorce complaint was pending).

In *Jump v. Jump*, the Montgomery County Court of Appeals affirmed the trial court's finding that the appellant had dissipated marital assets when, during the pendency of the divorce, he stopped making payments on the parties' equity loan and, instead, contributed to the rent and household expenses of his girlfriend. (Oct. 13, 1993), Montgomery App. Nos. CA 13714, CA 13965, 1993 WL 408017. In *Detlef v. Detlef*, the Lucas County Court of Appeals cited the *Jump* standard for financial misconduct with approval and affirmed the trial court's finding of financial misconduct in a case in which the appellant began withholding cash deposits from his business account and instead made large cash deposits to his personal account after his wife filed for divorce. (Dec. 14, 2001), Scioto App. No. L-00-1137, 2001 WL 1590095. "Similarly, in *Syslo v. Syslo*, we affirmed the trial court's finding of financial misconduct where, after the parties separated, the appellant gave the parties' tax refund checks to his brother and sold the bulk of the parties' marital property, valued at approximately \$75,000, at garage sales netting approximately \$7,400, the moving party establishes the alleged dissipating conduct occurred 'in anticipation of divorce' or at a time 'when the marriage was in serious jeopardy'." (Sept. 30, 2002), Lucas App. No. L-01-1273, 2002-Ohio-5205.

3. Behavior That Constitutes Dissipation of Marital Assets

A bright line rule demarcating certain acts as dissipation does not exist because courts hold that the outcome of the dissipation issue often depends on the particular facts and circumstances surrounding the conduct. Difficulties also arise in ascertaining what behavior constitutes dissipation because one person's financial lavishness could be another one's accustomed lifestyle. Cases do, however, demonstrate some behaviors are more likely than others to be characterized as dissipation of marital assets.

The following are a few examples of conduct that courts have tended to characterize as conduct constituting dissipation of marital assets.

a. Gambling

Generally courts hold that gambling can be a form of conduct in which dissipation of marital assets occurs. In *Reaney v. Reaney*, the husband squandered \$53,000.00 in Puerto Rico by gambling and giving a portion of the money to others subsequent to a divorce filing. 505 S.W.2d 338, 339 (Tex. Civ. App. 1974). The Texas Court of Appeals held that “excessive or capricious gifts,” including the amount spent gambling, is presumptively fraudulent and rises to the level of dissipation of marital assets. *Id.*

Some courts, however, hold that gambling alone, does not constitute dissipation without evidence establishing additional conduct rising to the level of dissipation of marital assets. *In Re Marriage of Williams*, 927 P.2d 679, 683 (Wash. Ct. App. 1996). In Washington, the court held that a wife did not dissipate marital assets although she admitted to spending an average of \$10,000.00 to \$12,000.00 per year gambling. *Id.* The Washington Court of Appeals held insufficient evidence of dissipation existed because the wife worked three separate jobs which provided additional income. *Id.* This additional income helped balance out her excessive spending habits. *Id.*

b. Failure to Preserve Assets

If a party fails to make mortgage or tax payments ultimately leading to foreclosure, courts have held this failure constitutes dissipation of marital assets. *Schlessner v. Schlessner* (May 9, 2001), Summit App. No. No. 20291, 2001 WL 489995, Similarly, if a party has considerable assets at the time of separation, but can no longer account for them at the time of trial, a court is likely to find that dissipation of marital assets has occurred a sufficient justification for the diversion of assets is proven. *See Contino v. Contino*, 719 N.Y.S.2d 892 (N.Y. App. Div. 1988); *In re Marriage of Petrovich*, 507 N.E.2d 207 (Ill. App. Ct. 1987).

c. Alcohol or Drug Related Expenditures

Excessive drinking and drug-related expenditures may constitute dissipation. For example, in *Cuenot v. Cuenot*, the court held that eighty thousand dollars of marital assets has been dissipated by the appellant over a period of eight years to support his addiction to drugs. (April 12, 1999), Stark App. No. 1998-CA-00205, 1999 WL 254484, *2.

To constitute dissipation substantial amounts of money must be spent on the drug related activity or alcohol purchases. *In re Marriage of Adams*, 538 N.E.2d 1286, 1291 (Ill. App. Ct. 1989). The Illinois Court of Appeals in *In re Marriage of Adams* held that the husband did not dissipate marital assets, however, because although he drank alcohol and he was able to accurately document a majority of his expenses. *Id.* This accounting effectively established that the amount husband spent on alcohol was not substantial. *Id.*

d. Expenditures Related to Extramarital Affairs

If evidence establishes that substantial amounts of money were spent on gifts or other expenses, including vacations, hotels, etc., a court is likely to hold the conduct constitutes dissipation of marital assets. *See generally, In re Marriage of Kaplan*, 500 N.E.2d 612 (Ill App. Ct. 1986); *Zeigler v. Zeigler*, 530 A.2d 445 (Pa. Super. Ct. 1987).

4. Preliminary Injunction Against the Dissipation of Assets

Dissipation of marital assets prevents courts from having the ability to distribute all assets in the final decree. One easy way to attack this problem is by limiting the authority of each spouse to convey away property during the divorce proceeding. In order to impose such a limit, one or both spouses often request the court to issue a preliminary injunction against dissipation of marital assets.

Ohio Civil Rule 75(I) governs the issuance of temporary restraining orders in divorces, annulment and legal separation actions.

(1) *Restraining order: exclusion.* The provisions of Civ. R. 65(A) shall not apply in divorce, annulment, or legal separation actions.

(2) *Restraining order: grounds, procedure.* When it is made to appear to the court by affidavit of a party sworn to absolutely that a party is about to dispose of or encumber property, or any part thereof of property, so as to defeat another party in obtaining an equitable division of marital property, a distributive award, or spousal or other support, or that a party to the action or a child of any party is about to suffer physical abuse, annoyance, or bodily injury by the other party, the court may allow a temporary restraining order, with or without bond, to prevent that action. A temporary restraining order may be issued without notice and shall remain in force during the pendency of the action unless the court or magistrate otherwise orders.

Many, if not most, domestic relations courts in Ohio have adopted local rules which allow a party to submit an *ex parte* motion, supported by an affidavit, for temporary restraining orders restraining the other spouse from, *inter alia*, defeating the interests of the movant in marital property through conveyance, concealment, dissipation, etc.

For example, the Montgomery County Domestic Relations Court will approve the following restraining orders *ex parte* upon motion supported by the movant's affidavit without bond:

1. **Property**: Defendant hereby is restrained from damaging, moving, selling, giving away, transferring, disposing of or encumbering any existing or later-acquired interest of either party in any real or personal property, except Defendant's clothing, tools of trade, and personal effects.
2. **Vehicle**: Defendant hereby is restrained from interfering with Plaintiff's use of the vehicle currently used primarily by him, to wit: the [identify the vehicle]. **Funds & Businesses**: Defendant hereby is restrained from selling, giving away, withdrawing, transferring, or encumbering any funds, account, share, stock, bond, or other existing or later-acquired interest of either party in any asset, business, corporation, partnership, employer, pension fund, bank trust, or financial institution.
3. **Credit**: Defendant hereby is restrained from incurring any debt or making any credit card purchase in Plaintiff's name or on any joint account.
4. **Utilities**: Defendant hereby is restrained from terminating, modifying or changing the basic utility service (gas, electric, water, phone and trash) to the marital premises.

These restraining orders are commonly served with the restraining orders. In some counties (e.g., Greene County), the issuance of *ex parte* restraining orders against one party operates as mutual restraining orders so that the moving party is restrained from those actions as well.

If restraining orders are required in addition to those authorized *ex parte* under the local rules, the party must file a motion supported by an affidavit and request a hearing on the matter.

Some states have enacted specific statutes authorizing or even requiring the entry of a preliminary injunction against dissipation.¹ *See, e.g.*, W. Va. Code Ann. § 48-7-301; Colo. Stat. Ann. § 14-10-107(b)(I)(A); Me. Rev. Stat. Ann. tit. 19-A, § 903. In the absence of a specific statute, courts generally hold that the power to grant such an injunction exists either at common law or under specific statutes or rules regarding preliminary injunctions generally. An injunction against dissipation should be granted only where the party seeking the injunction proves that the irreparable harm is likely to result if the injunction is not issued. *See generally, In re Marriage of Centioli*, 781 N.E.2d 611 (1st Dist. 2002). In practice, this means that the spouse seeking the injunction must prove some likelihood that the other spouse will dissipate marital property if the injunction is not entered.

The threshold for showing a likelihood of dissipation is generally not high. To obtain an injunction, the requesting spouse must be able to point to some fact which demonstrates that dissipation is more than a speculative possibility. *In re Marriage of Centioli*, 781 N.E.2d at 618. In most of the cases finding a likelihood of future dissipation, the court has relied upon episodes of past dissipation or statements of intent to dissipate in the future. *See, e.g. Bansal v. Bansal*, 748 So. 2d 335 (Fla. Dist. Ct. App. 5th Dist. 1999) (husband had forged wife's signature in unsuccessful attempt to transfer \$8 million in property out of the country); *Gooding v. Gooding*, 602 So. 2d 615 (Fla. Dist. Ct. App. 4th Dist. 1992) (wife introduced checks showing that husband had diverted \$22,800 in company funds to his own personal use; funds had disappeared and could not

¹ Mandatory injunction statutes are uncommon, perhaps because they pose significant constitutional issues. In *Messenger v. Edgar*, 623 N.E.2d 310 (1993), the court struck down an Illinois statute which established an automatic injunction on the filing and service of a divorce complaint. The injunction prevented any transfer of any property owned by either spouse other than in the normal course of business. The court found that the statute deprived the parties of a property interest, and that it would violate substantive due process unless there was some rational basis for the deprivation. Because the injunction applied to non-marital as well as marital property, the court found this rational basis lacking, and thus held the statute to be unconstitutional.

be accounted for); *Sandstrom v. Sandstrom*, 565 So. 2d 914 (Fla. Dist. Ct. App. 4th Dist. 1990) (husband previously dissipated real property by giving it to his girlfriend); *In re Marriage of Schmitt*, 321 Ill. App. 3d 360, 254 Ill. Dec. 484, 747 N.E.2d 524 (2d Dist. 2001) (husband avoided service of process, removed some property to an unknown place, told wife he had no money, and threatened to declare bankruptcy); *In re Marriage of Petersen*, 319 Ill. App. 3d 325, 253 Ill. Dec. 144, 744 N.E.2d 877 (1st Dist. 2001) (husband threatened to liquidate retirement account); *Kroteya v. Kroteya*, 170 A.D.2d 371, 566 N.Y.S.2d 265 (1st Dep't 1991) (husband admitted his intent to return to Central African home country and give substantial marital assets to his relatives; husband had also used marital property for secret purchases of property located outside the court's jurisdiction; error to dissolve injunction); *Taft v. Taft*, 156 A.D.2d 444, 548 N.Y.S.2d 726, 727 (2d Dep't 1989) (husband had threatened on "numerous occasions" to transfer assets to girlfriend, although he had apparently never actually done so).

A minority of states allow the court to grant a preliminary injunction even if there is no likelihood of future dissipation. See *Solomon v. Solomon*, 224 A.D.2d 331, 637 N.Y.S.2d 728 (1st Dep't 1996) (awarding injunction without any showing that dissipation was more than a speculative possibility); *Casale v. Casale*, 167 A.D.2d 983, 562 N.Y.S.2d 4 (4th Dep't 1990); *Girardi v. Girardi*, 140 A.D.2d 486, 528 N.Y.S.2d 397 (2d Dep't 1988); *Leibowits v. Leibowits*, 93 A.D.2d 535, 462 N.Y.S.2d 469 (2d Dep't 1983).