

DISSIPATION OF MARITAL ASSETS

1. Dissipation – A Form of Financial Misconduct

O.R.C. § 3105.171(E)(3) states, “[i]f a spouse has engaged in financial misconduct, including, but not limited to, the dissipation of assets, the court may compensate the offended spouse with a distributive award or with a greater award of marital property.” A finding of financial misconduct is subject to review based on the weight of the evidence supporting that finding. *Babka v. Babka* (1992), 83 Ohio App.3d 428, 436. The court’s decision to compensate the offended spouse with a distributive award or with a greater award of marital property is subject to review for an abuse of discretion. *Berish v. Berish* (1982), 69 Ohio St.2d 318, 319.

2. What is Dissipation?

a. Definition of Dissipation

Dissipation in its simplest form occurs when a party conceals, conveys or wastes marital assets during the dissolution proceeding or in anticipation of divorce. Brett R. Turner, *Equitable Distribution of Property* § 6.30 at 467 (2d ed. 1994 and 2004 Supp.). The Illinois Supreme Court, a court that has elaborated extensively on dissipation of marital assets, defines dissipation as “the use of marital property for the sole benefit of one of the spouses for a purpose unrelated to the marriage at a time the marriage is undergoing an irreconcilable breakdown.” *In re Marriage of O’Neill*, 563 N.E.2d 494, 498-499 (Ill. 1990). Several courts, following Illinois’ lead, adopted variations of this definition. *See, e.g., Smith v. Smith*, 444 S.E.2d 269, 272 (Va. Ct. App. 1994). For example, in *Booth v. Booth*, the Virginia Court of Appeals held that dissipation occurs “in anticipation of divorce or separation for a purpose unrelated to the marriage and in derogation of the marital relationship at a time when the marriage is in jeopardy.” 371 S.E.2d 569, 572 (citing to *In re Marriage of Smith*, 448 N.E.2d 545 (Ill. App. Ct. 1983)). Other courts, however, established their own working standard in determining whether a party dissipated assets. In *Ward v. Ward*, the Tennessee Court of Appeals first adopted

the definition of dissipation found in Black's Law Dictionary and quoted it as "to destroy or waste, as to expend funds foolishly." *Ward v. Ward*, 2002 WL 31845229, *2 (2002) (quoting Black's Law Dictionary 473 (6th ed. 1990)). Unlike the courts mentioned above, no Ohio court has chosen to specifically define the term "dissipation."

The Tennessee Court of Appeals has established a part objective and part equitable standard in determining whether dissipation occurred. *Id.* at *2. The court established a two-prong test, requiring an inquiry into: 1) whether the evidence presented at trial supports the alleged purpose of the various expenditures, and if so, 2) whether the alleged purpose equates to dissipation under the circumstances. *Id.* After creating a working definition of what dissipation comprises, the court held that in determining whether the evidence presented supports the alleged purpose, an equitable determination requires an inquiry into numerous factors including: "1) the typicality of the expenditure to this marriage; 2) the benefactor of expenditure, namely, whether it primarily benefited the marriage or primarily benefited the sole dissipating spouse; 3) the proximity of the expenditure to the breakdown of the marital relationship; and 4) the amount of the expenditure." *Id.*

b. The Requirement of Intent

Courts generally require the moving party to show the dissipating spouse intentionally depleted the marital estate; most courts agree that negligent mismanagement of marital property does not constitute dissipation of marital assets. J. Thomas Oldham, *Divorce and Separation of Property* § 13.02[1] at 13-19 (2005); *see also, Mikhail v. Mikhail* (Jan. 28, 2005), Lucas App. No. L-03-1195, 2005-Ohio-322.

A review of Ohio appellate case law reveals that unsuccessful marital investments and allegations of financial misconduct go hand in hand. In *Jacobs v. Jacobs*, the Fourth Appellate District addressed the issue of financial misconduct and erratic stock trading and poor investments. *Jacobs v. Jacobs* (June 26, 2003), Scioto App. No. 02CA2846, 2003-Ohio-3466. After stating that O.R.C. § 3105.171(E)(3) should only apply when a spouse engages in some type of "wrongdoing[.]" the court found that "[t]here must be a clear showing that the offending spouse either profited from the alleged misconduct or

intentionally defeated the other spouse's distribution of assets.” *Jacobs*, 2003 Ohio 3466, at ¶ 23 (citing *Wideman v. Wideman* (April 11, 2003), Wood App. No. WD-02-30, 2003-Ohio-1858, at ¶ 34). The court then noted “that investing, even poor investing, is neither wrongdoing nor financial misconduct and [they would] not construe the statute so broadly as to include investment mistakes.” *Id.* at ¶ 23.

The moving party has the burden of establishing intent, but does not carry the burden of producing an accounting detailing what happened to the specific assets to establish use for a nonmarital purpose. *Brosick v. Brosick*, 974 S.W.2d 498, 502 (Ky. Ct. App. 1998). Instead, all that must be proven is a clear intent by the dissipator to deprive the spouse of marital assets. *Id.* In *Brosick*, the movant presented evidence establishing the dissipator had intent to divorce in the near future and failed to account for monies in two accounts held with his mistress. *Id.* The Kentucky Court of Appeals held the movant properly established that the husband dissipated marital assets without requiring an accounting. *Id.* “Once the party alleging dissipation establishes a prima facie case, the burden of proof shifts to the party charged with the dissipation to produce evidence sufficient to show that the expenditures were appropriate.” *Id.* Because the wife presented evidence showing that the husband had a joint account with his mistress in which regular deposits were made and the deposited amount was in excess of the mistress’s income with no other persons depositing monies into the account, the wife presented sufficient evidence demonstrating dissipation of marital assets. *Id.* It was up to the husband to account for the funds as appropriate. *Id.*

c. Timing

“The time frame in which the alleged misconduct occurs may often demonstrate wrongful scienter, i.e., use of marital assets or funds during the pendency of or immediately prior to filing for divorce. See *Babka v. Babka* (1992), 83 Ohio App.3d 428, 615 N.E.2d 247 (account liquidated ‘just prior to the parties’ divorce’); *Gray v. Gray* (Dec. 8, 1994), Cuyahoga App. No. 66565, 1994 WL 695328 (transferring or withdrawing funds during separation period in order to secret them from the other spouse); *Spychalski v. Spychalski* (1992), 80 Ohio App.3d 10, 608 N.E.2d 802

(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).