

Chicago Daily Law Bulletin®

Volume 160, No. 203

The conundrum involving dissipation of marital assets

The general purpose of a dissipation claim is to return value to the marital estate for something one of the spouses removed. Although dissipation is only one of 12 statutory factors a court is directed to consider in equitably dividing the marital estate (750 ILCS 5/503(d) (1-12)), a great deal of attention is focused on this factor.

Dissipation is often a profitable claim, as well as an emotional issue, particularly when related to an affair. Frequently, the courts add back the amount dissipated into the marital estate, and then that valueless add-back is given to the spouse who caused the dissipation as part of their share of marital property in the overall division. It thus amounts to a dollar-for-dollar recovery for the marital estate and the aggrieved party.

However, precedent does not suggest such a formula and, in fact, supports it being simply considered with all of the other factors. *In re Marriage of Tabassum and Younis*, 377 Ill.App.3d 761 (2d Dist. 2007).

Proving, as well as defending, a dissipation claim is often an expensive and difficult process. Dissipation may involve obvious major transactions, such as unusually large cash withdrawals disappearing from marital bank accounts or a spouse's buying very expensive gifts for a lover. Many dissipation claims, however, result from discovery fishing expeditions seeking recovery for any expenditures or cash withdrawals where the purpose is not facially clear.

After dissipation is claimed, the alleged dissipater must search through records and take substantial time in an attempt to present clear and convincing evidence that the expenditures were indeed for a marital purpose. *In re Marriage of Bush*, 209 Ill.App.3d 67 (1st Dist. 1991).

Until trial, the alleged dissipater does not know whether the court will find that the accuser has presented a prima facie claim, which would shift the burden of proof to the alleged dissipater to show, by

clear and convincing evidence, that there was no dissipation. *In re Marriage of Murphy*, 259 Ill.App.3d 336 (4th Dist. 1994).

Therefore, the alleged dissipater must not take claims lightly and should prepare a "clear and convincing" defense for trial. The time taken by both sides to discover, investigate and develop evidence to support what may be a relatively small claim involving numerous expenditures often results in fees and costs incurred near to, or in excess of, the value of the monetary claim.

Often, anger and emotion are the drivers of these claims, and they can take on lives of their own, becoming the tail wagging the dog, delaying disposition of the case.

Effective Jan. 1, 2013, the legislature amended 750 ILCS 5/503 (d)(2) to narrow and clarify dissipation claims. Although the amendment changed neither the definition nor the consequences of a finding of dissipation, it did establish new time frames during which dissipation may be claimed as well as a notice requirement intended to ensure that a claim could not be used as a surprise at trial to disadvantage the unprepared accused.

A party making a dissipation

claim must now give "notice of intent to claim dissipation." The NICD must include a specific date or period during which the marriage began undergoing irretrievable breakdown, the identity of property dissipated and the date and time period when the dissipation occurred.

With respect to the new time period within which the claim must be raised, although this requirement is well intended, it is not clearly written. The NICD is to be given the later of 60 days before trial or 30 days "after discovery closes."

This raises an important ques-

MODERN FAMILY



Donald C. Schiller is a senior partner at Schiller, DuCanto & Fleck LLP. He is a former president of the Illinois State Bar Association, chair of the ABA Family Law Section and chair of the ISBA Family Law Section. In addition to his active practice, he teaches Divorce Practice at the University of Chicago Law School. He can be reached at dschiller@sdfllaw.com

tion: What if there was no date for closure of discovery or if discovery closes just a few days before trial? The "later" date thus may give the accused party no time to prepare a defense unless the accused is granted a trial continuance and the right to seek additional discovery.

A dilemma arises: Should one incur more expense and delay trial to prepare a defense or risk a less-than-desirable defense to the claim? Clearly, the intent of assuring fair notice of a claim of

have known about the dissipation, that claim must be made within three years of such knowledge.

These time limits (effectively, a statute of limitation) will likely reduce the number of dissipation claims but seem inequitable if dissipation occurred five years and a day before the filing of the dissolution petition.

Moreover, these provisions force a party in a troubled marriage to decide to either file for divorce within three years of learning their spouse may have wrongly spent or given away an asset or forever lose the right to make the claim.

The amendment thus prevents the court in the foregoing circumstances from considering what could be a substantial loss to the marital estate and the innocent party and fails to provide a remedy to right this wrong.

Notably, although Section 503(d) directs courts to divide the marital estate considering the 12 relevant factors, the amended dissipation factor is the only one of the 12 expressly limited to a particular time period. The general language of Section 503(d) directing courts to consider "all relevant factors" does not grant the court authority to consider misconduct as a relevant factor if it has been otherwise excluded from consideration by other statutory language.

When considering making or defending dissipation claims, lawyers should advise their clients of the challenges and costs in litigating such claims. Where the dissipation is clear, claims should be made and the accused's counsel would be wise to consider the client conceding to minimize attention to the bad conduct.

Where the issue falls in a gray area, however, the complexities of the claim, the time needed to address the issue and the expense of pursuing and defending the claim must be weighed against the amount involved and the likely effect that the dissipation, if found, would have on the court's overall equitable division after its consideration of all of the statutory factors.

These time limits (effectively, a statute of limitation) will likely reduce the number of dissipation claims ...