Dissipation 101

By: Thomas DeCataldo and Jeb-Michael Harmon

Over 40 years ago, the Supreme Court of New Jersey created a three-step analysis for our trial courts to follow when distributing marital property. Rothman v. Rothman, 65 N.J. 219, 320 (1974). First, a family part judge must determine the specific assets eligible for distribution. Next, the court must determine the value of those assets for purposes of such distribution. Finally, the court must decide how such allocation can most equitably be made. Id. In order to apportion assets in equitable fashion, the Legislature requires that trial courts consider the sixteen factors delineated in N.J.S.A. 2A:34–23.1.

Despite this framework for equitable distribution, which survives to this day, in most New Jersey divorces issues relating to equitable distribution often receive mechanistic and mundane treatment, with most practitioners and courts taking the view that absent extraordinary factual circumstances, assets should be distributed equally between divorcing spouses. This result often leaves parties frustrated, feeling that he or she contributed more to the accumulation of the asset than the other spouse who will now receive an equal share.

A challenge facing matrimonial practitioners is how best to reconcile this oft-cookie-cutter approach with New Jersey's law regarding equitable distribution, which requires that in making an equitable distribution of marital property, the court consider, among other things:

> **"[t]he contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property, as well as the contribution of a party as a homemaker."** N.J.S.A. 2A:34–23.1(i).

Not only has our legislature required this to be considered by designating it as a factor in the equitable distribution statute as a mandatory consideration, but the Supreme Court of New Jersey has also authorized trial courts to recognize that the acquisition of certain property may be traced more directly to one partner than the other" Pascale v. Pascale, 274 N.J. Super. 429, 435 (App. Div. 1994), *aff'd in part, rev'd in part*, 140 *N.J.* 583 (1995).

But how much does this consideration really matter when assets are routinely distributed equally? Perhaps one way that this factor is counterbalanced is by the Legislature's inclusion of a rebuttable presumption in the equitable statute, which provides:

> "[i]t shall be a rebuttable presumption that each party made a substantial financial or nonfinancial contribution to the acquisition of income and property while the party was married." N.J.S.A. 2A:34–23.1.

While this presumption does not provide for an automatic equal division of marital assets, it may well be the reason assets are so often distributed equally.

However, the Supreme Court of New Jersey requires that trial courts consider each factor on a case-by-case basis and it has expressly rejected a presumption in favor of equally dividing assets. Rothman, 65 N.J. 219, 320 (1974).

As result, there are clearly occasions where it is appropriate to suggest that one spouse should be entitled to a greater share of an asset. One such area is when a spouse dissipates a marital asset.

In the context of evaluating a spouse's contribution to the value of a marital asset, one common battleground between spouses is distinguishing between a dissipation and marital spending. While the Legislature requires that a spouse's dissipation of a marital asset be considered when effectuating equitable distribution, it does not define the term dissipation. The Merriam-Webster's Dictionary describes dissipation as a "*wasteful expenditure*," and an "*act of self-indulgence*." This definition raises two difficult questions for our trial courts to answer. First, how does one distinguish between "marital spending," and wasteful and indulgent spending, and second, how does one safeguard against a spouse playing Monday morning quarterback to a family's historical utilization of money.

To further blur this distinction, a practitioner need only refer to the budgetary items promulgated by the Supreme Court of New Jersey on a Case Information Statement, a required filing in divorce matters. For example, should a spouse's extravagant spending on vacations, clothing, entertainment, alcohol or tobacco be considered a self-indulgent or wasteful dissipation, or simply the historical marital lifestyle of the family?

Our courts have recognized that there is a fine line between extravagant spending and dissipation, observing:

> When one party to a divorce proceeding spends marital funds extravagantly, or merely for his or her own benefit, that obviously diminishes the amount of property which is available for distribution by the divorce court. On the other hand, until such time as the parties are contemplating a divorce, they are generally vested with the authority to spend marital funds for their own enjoyment.... The question of dissipation of marital assets thus involves an attempt to accommodate these two conflicting interests in the marital estate." Kothari v. Kothari, 255 N.J.Super. 500, 506-07 (App. Div. 1992)

In a matrimonial matter, "dissipated funds are subject to equitable distribution, as if the funds were not dissipated at all." Wasserman v. Schwartz, 364 N.J.Super. 399, 414 (Law Div. 2001). In Kothari v. Kothari, 255 N.J. Super. 500, 506 (App. Div. 1992), the court noted that the Legislature did not define "dissipation" of marital property, but rather the term was "a plastic one, suited to fit the demands of the individual case."

As such, in determining whether a spouse has dissipated marital assets, attorneys trying to prove dissipation should focus on the following factors:

(1) the proximity of the expenditure to the parties' separation,

(2) whether the expenditure was typical of expenditures made by the parties prior to the breakdown of the marriage,

(3) whether the expenditure benefitted the "joint" marital enterprise or was for the benefit of one spouse to the exclusion of the other, and

(4) the need for, and amount of, the expenditure. Id. at 507 (App. Div. 1992)

"The question ultimately to be answered by a weighing of these considerations is whether the assets were expended by one spouse with the intent of diminishing the other spouse's share of the marital estate." *Ibid.*

While there are countless examples of what may constitute a dissipation, some examples will be easier to define as dissipation than others. In situations involving fraud, the Supreme Court of New Jersey warned that "any disposition of property in fraud of the other spouse could be promptly made the subject of appropriate judicial action." Painter v. Painter, 65 N.J. 196, 218 n. 6 (1974). In Monte v. Monte, 212 N.J.Super. 557, 567–68 (App.Div.1986), the court stated that an intentional dissipation of marital assets by one spouse would constitute a fraud on the marital rights of the other spouse.

In another situation, a husband incurred $227,850 in gambling losses pre-complaint. In finding that this constituted dissipation, the trial court relied on N.J.S.A. 2A:34–23.1(i) to conclude such gambling constituted dissipation of funds chargeable solely to husband without offset or credit, as the debt arose after the marriage was "irrefutably fractured." Siegel v. Siegel, 241 N.J. Super. 12, 14 (Ch. Div. 1990).

As with most situations in divorce litigation, this is a case-sensitive analysis which should be decided based upon it's the unique facts and circumstances before the court.