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**DISSIPATION OF MARITAL ASSETS AND  
PRELIMINARY INJUNCTIONS: A  
PREVENTIVE APPROACH TO  
SAFEGUARDING MARITAL ASSETS**

## **I. Introduction**

In an ideal world, the phrase “as long as we both shall live” means a newlywed couple remains married to the same person for their entire lives and the term divorce does not exist. In an ideal world, even if divorce exists, the couple walks away amicably with divorce papers in one hand and the settlement agreement in another.

Unfortunately, this idyllic world does not exist and a dissolution proceeding is often wrought with contentious litigation including custody battles and property disputes involving parties hiding assets, failing to disclose all marital assets in which one spouse is unaware of, or selling or conveying marital property unbeknownst to the other party. In the real world, the law defines such conduct as dissipation of marital assets in which recognition, preliminary preventive orders, and post-dissipation remedies are awarded when such conduct exists.

In a dissolution of marriage proceeding, a court must take into consideration wasted assets to provide both parties with a fair result. “Just as a court may consider positive contributions to the marriage in making an equitable distribution award, it can also consider ‘negative’ contributions in the form of squandering and destroying marital resources. . . . To allow one spouse to squander marital property is to make an equitable award impossible.”<sup>1</sup>

This article first focuses on the court-adopted definitions of dissipation and types of conduct arising to the level of dissipation of marital assets. Part III of this article then directs attention to recent measures taken by state legislatures to prevent dissipation from becoming an issue in dissolutions. Whether a statute authorizes an automatic injunction upon filing or enables a party to file

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<sup>1</sup> Booth v. Booth, 371 S.E. 2d 569, 572 (Va. Ct. App. 1988).

a pendente lite motion, both preventive mechanisms create substantial litigation involving overly broad statutory constructions and injunction orders.

## II. What Is Dissipation?

In the last two decades courts have shifted from the mere recognition of dissipation of marital assets to furnishing specific definitions and standards, examples of behavior constituting dissipation, post-dissipation remedies, and more recently, preventive measures for parties in a dissolution proceeding.

Dissipation in its simplest form occurs when a party conceals, conveys or wastes marital assets during the dissolution proceeding or in anticipation of divorce.<sup>2</sup> 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.”<sup>3</sup> Several courts, following Illinois’ lead, adopted variations of this definition.<sup>4</sup> For example, in *Booth v. Booth*,<sup>5</sup> 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.”<sup>6</sup>

Other courts, however, established their own working standard in determining whether a party dissipated assets. In *Ward v. Ward*,<sup>7</sup> the Tennessee Court of Appeals first adopted the definition of dissipation found in *Black’s Law Dictionary*<sup>8</sup> and quoted it as “to destroy or waste, as to expend funds foolishly.”<sup>9</sup> The

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<sup>2</sup> BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* § 6.30 at 467 (2d ed. 1994 and 2004 Supp.).

<sup>3</sup> *In re Marriage of O’Neill*, 563 N.E.2d 494, 498-499 (Ill. 1990).

<sup>4</sup> See, e.g., *Smith v. Smith*, 444 S.E.2d 269, 272 (Va. Ct. App. 1994).

<sup>5</sup> 371 S.E.2d 569 (Va. Ct. App. 1988).

<sup>6</sup> *Id.* at 572 (citing to *In re Marriage of Smith*, 448 N.E.2d 545 (Ill. App. Ct. 1983), as the source of the definition which was the adopted definition in Illinois prior to *In re Marriage of O’Neill*, 563 N.E.2d 494 (Ill. 1990).

<sup>7</sup> No. W2001-01078-COA-R3-CV, 2002 WL 31845229 (Tenn. Ct. App. Dec. 19, 2002).

<sup>8</sup> *BLACK’S LAW DICTIONARY* 473 (6th ed. 1990).

<sup>9</sup> *Ward v. Ward*, 2002 WL 31845229 (2002) (quoting *BLACK’S LAW DICTIONARY* 473 (6th ed. 1990)).

Tennessee Court of Appeals then set out to establish a part objective and part equitable standard in determining whether dissipation occurred.<sup>10</sup> 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.<sup>11</sup> 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.”<sup>12</sup>

A. *The Requirement of Intent: “use of marital property for sole benefit of one of the spouses and unrelated to marriage”*<sup>13</sup>

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.<sup>14</sup>

In *Stock v. Stock*,<sup>15</sup> the husband argued that the wife dissipated assets when she conveyed marital property to her mother.<sup>16</sup> The wife argued that although the property was a marital asset at the time of the conveyance, the conveyance did not constitute dissipation because she transferred the property in exchange for forgiveness of a debt which the marital couple owed

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* The Court adopted this standard from Lee R. Russ, Annotation, *Spouse’s Dissipation of Marital Assets Prior to Divorce as a Factor in Divorce Court’s Determination of Property Division*, 41 A.L.R. 4TH 416 (1985).

<sup>12</sup> *Id.*

<sup>13</sup> *O’Neill*, 563 N.E.2d at 498-499.

<sup>14</sup> J. THOMAS OLDHAM, *DIVORCE, SEPARATION AND DISTRIBUTION OF PROPERTY* § 13.02[1] at 13-19 (2005).

<sup>15</sup> 693 So. 2d 1080 (Fla. Dist. Ct. App. 1997).

<sup>16</sup> *Id.* at 1084.

to her mother.<sup>17</sup> Moreover, the debt that was forgiven exceeded the equity in the property.<sup>18</sup> The Florida Court of Appeals emphasized that if she had not transferred the property, the husband's liability share would have exceeded the value of his interest by about \$11,000.00.<sup>19</sup> The court held, however, the issue of dissipation does not turn on whether the conduct worked to the party's advantage, but rather whether the conduct was an "intentional dissipation, waste, depletion, or destruction of a marital asset."<sup>20</sup> The wife did not dissipate assets because she did not convey the property with the intention to dissipate marital assets and mere mismanagement does not rise to the level of the dissipation where no evidence of misconduct is produced.<sup>21</sup>

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 non-marital purpose.<sup>22</sup> Instead, all that must be proven is a clear intent by the dissipator to deprive the spouse of marital assets.<sup>23</sup> In *Brosick v. Brosick*,<sup>24</sup> 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.<sup>25</sup> The Kentucky Court of Appeals held the movant properly established that the husband dissipated marital assets without requiring an accounting.<sup>26</sup> "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."<sup>27</sup> 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

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Stock*, 693 So. 2d at 1084.

<sup>21</sup> *Id.*

<sup>22</sup> *Brosick v. Brosick*, 974 S.W.2d 498, 502 (Ky. Ct. App. 1998).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Brosick*, 974 S.W.2d at 502.

<sup>27</sup> *Id.*

wife presented sufficient evidence demonstrating dissipation of marital assets.<sup>28</sup> It was up to the husband to account for the funds as appropriate.<sup>29</sup>

Several courts allow leniency regarding intent. For example, in *Gadomski v. Gadomski*,<sup>30</sup> the New York Supreme Court, Appellate Division, held that a speculative investment after separation can be dissipation of marital assets.<sup>31</sup> The investment loss constituted dissipation because the defendant performed a “rash” investment shortly after the separation and refused to sell the stock despite evidence of a steady decrease in value.<sup>32</sup>

In addition, courts generally do not require fraudulent intent, but “foolish” or “frivolous expenditures” with the intent to act qualifies as dissipation of marital assets.<sup>33</sup> In *Reaney v. Reaney*,<sup>34</sup> the movant argued that her husband squandered or withheld \$53,000.00 in stock, securities and cash.<sup>35</sup> The Texas Court of Appeals held that the wife does not carry the burden of establishing fraudulent intent because the operative statute gives the court broad discretion in ordering a division of assets.<sup>36</sup> Instead, the court presumes fraudulent conduct once the movant demonstrates excessive or capricious gifts utilizing marital assets, and the burden of proof shifts to the alleged dissipating party, who is required to demonstrate the loss and dissipation of marital funds were not an abuse of managerial powers.<sup>37</sup>

B. *Timing: “at a time the marriage is undergoing an irreconcilable breakdown”*<sup>38</sup>

Courts generally do not require that the conduct constituting dissipation occur subsequent to the parties’ separation or after the parties’ commencement of a dissolution proceeding, since ei-

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Gadomski v. Gadomski*, 664 N.Y.S.2d 886, 888 (N.Y. App. Div. 1997).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *See In re Marriage of Getautas*, 544 N.E.2d 1284 (Ill. App. Ct. 1989); *Reaney v. Reaney*, 505 S.W.2d 338 (Tex. Civ. App. 1974).

<sup>34</sup> *Reaney*, 505 S.W.2d 338.

<sup>35</sup> *Id.* at 340.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *O’Neill*, 563 N.E.2d at 498-499.

ther of those timing constraints would be overly restrictive.<sup>39</sup> Several courts, however, refuse to recognize dissipation prior to a filing of separation or dissolution unless evidence exists demonstrating the marital breakdown occurred prior to the date of the alleged dissipation.<sup>40</sup> In addition, several courts recognize dissipation if the moving party establishes the alleged dissipating conduct occurred “in anticipation of divorce” or “at a time when the marriage was in serious jeopardy.”<sup>41</sup>

In *Booth v. Booth*,<sup>42</sup> however, the Virginia Court of Appeals refused to expand the definition of dissipation to cover expenditures regarding an extramarital affair spanning over a fifteen-year period.<sup>43</sup> The court held the wife provided insufficient evidence in which to find dissipation of marital assets because she failed to prove the irreconcilable breakdown of the marriage existed throughout the entire fifteen-year period.<sup>44</sup> In addition, there was insufficient evidence to hold that the husband’s conduct was done with the specific intent to deplete the marital estate.<sup>45</sup>

Several courts, though, disagree with *Booth*<sup>46</sup> and hold that expenditures relating to mistresses are in dissipation of marital assets even though no marital breakdown occurred during the time period in which the gifts or monies were given.<sup>47</sup>

Earlier Illinois cases permitted consideration of conduct occurring prior to the marital breakdown as dissipation by holding no limits exist regarding the time period for consideration of dissipation of marital assets,<sup>48</sup> until the Illinois Court of Appeals,

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<sup>39</sup> *In re Marriage of Smith*, 448 N.E.2d 545, 548 (Ill. App. Ct. 1983) (citing *Hellwig v. Hellwig*, 426 N.E.2d 1087, 1094 (Ill. App. Ct. 1981)).

<sup>40</sup> *Id.*

<sup>41</sup> *Booth v. Booth*, 371 S.E.2d 569, 576 (Va. Ct. App. 1988).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Booth*, 371 S.E.2d.

<sup>47</sup> *Mazique v. Mazique*, 742 S.W.2d 805 (Tex. App. 1987).

<sup>48</sup> *In re Marriage of O’Neill*, 541 N.E.2d 828 (Ill. App. Ct. 1989) (holding courts may consider conduct prior to irreconcilable breakdown) *rev’d*, 563 N.E.2d 494 (Ill. 1990). Prior to the Illinois Supreme Court’s review of *O’Neill*, *In re Getautas*, 544 N.E.2d 1284, 1288 (Ill. App. Ct. 1989), squarely rejected the *O’Neill* Illinois Court of Appeals holding that courts can consider conduct throughout the entire marriage.

Second District, squarely rejected the no time limitation theory in *In re Marriage of Getautas*.<sup>49</sup> The Illinois Court of Appeals in *Getautas*<sup>50</sup> explained its reasoning for rejecting the notion that dissipation can occur prior to the marital breakdown as follows: “This ruling calls into issue every expenditure and economic decision from the moment the wedding vows are pronounced. We do not believe that by enacting section 503(d) of the Act, the legislature intended to cause the courts to become auditing agencies for every marriage that falters.”<sup>51</sup> The court further criticized recognizing conduct prior to marital breakdown as contributing to asset dissipation because it created related issues of increasing litigation costs; malpractice threats to attorneys if they did not expend their energy inquiring into all expenses and economic decisions throughout the entire marriage; lack of judicial economy; and the effects on marriages by requiring parties to document each and every purchase completed throughout the marriage if divorce were to occur in the future.<sup>52</sup>

Subsequent to the *Getautas*<sup>53</sup> holding, the Illinois Supreme Court took review of *In re Marriage of O’Neill*,<sup>54</sup> reversed the decision, and restricted the dissipation definition to “when the marriage is undergoing an irreconcilable breakdown” by holding “undergoing” does not allow courts to consider the parties’ conduct from the time at which the marriage vows were taken until the dissolution of marriage petition filed.<sup>55</sup> The Illinois Supreme Court held that dissipation refers only to the improper use of marital property during the time in which the marriage is experiencing an irreconcilable breakdown.<sup>56</sup>

Other states expressly permit the court to consider activity prior to the marital breakdown as dissipation of marital assets. This is particularly true if the parties reside in a community property state.<sup>57</sup> For example, Florida permits courts to review par-

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<sup>49</sup> *In re Marriage of Getautas*, 544 N.E.2d 1284, 1288 (Ill. App. Ct. 1989).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *In re Marriage of Getautas*, 544 N.E.2d 1284, 1288 (Ill. App. Ct. 1989).

<sup>54</sup> *O’Neill v. O’Neill*, 563 N.E.2d 494 (Ill. 1990).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> OLDHAM, *supra* note 14, at § 13.02[1].

ties' conduct two years prior to filing the dissolution, regardless of when the marital breakdown occurred.<sup>58</sup>

### C. *Conduct: Behavior that Constitutes Dissipation of Marital Assets*

A bright line rule listing 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 reasonable expense.<sup>59</sup> Cases do, however, demonstrate some behaviors are more likely than others to be derivative of dissipation of marital assets. The following are a few examples of conduct that courts have a tendency to hold as conduct comprising dissipation of marital assets.

#### 1. *Gambling*

Generally courts hold that gambling can be a form of conduct in which dissipation of marital assets occurs. In *Reaney v. Reaney*,<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup>

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.<sup>63</sup> 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.<sup>64</sup> The Washington

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<sup>58</sup> FLA. STAT. ANN. § 61.075 (2005).

<sup>59</sup> OLDHAM, *supra* note 14, at § 13.02[1].

<sup>60</sup> *Reaney v. Reaney*, 505 S.W.2d 338, 339 (Tex. Civ. App. 1974).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* See also *Halupa v. Halupa*, 943 S.W.2d 272 (Mo. Ct. App. 1997); *Siegel v. Siegel*, 574 A.2d 54 (N.J. Super. Ct. Ch. Div. 1990); *Reaney v. Reaney*, 505 S.W.2d 338 (Tex. Civ. App. 1974).

<sup>63</sup> In *Re Marriage of Williams*, 927 P.2d 679, 683 (Wash. Ct. App. 1996).

<sup>64</sup> *Id.*

Court of Appeals held insufficient evidence of dissipation existed because the wife worked three separate jobs which provided additional income.<sup>65</sup> This additional income helped balance out her excessive spending habits.<sup>66</sup>

### 2. *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.<sup>67</sup> Similarly, if a party has considerable assets at the time of separation, but at the time of trial these assets are no longer available, a court will consider this dissipation of marital assets unless the dissipating spouse can prove the specific funds were used for reasonable expenses.<sup>68</sup>

### 3. *Alcohol or drug related expenditures*

Excessive drinking and drug-related expenditures may constitute dissipation, but only if substantial amounts of money are spent on the drug related activity or alcohol purchases.<sup>69</sup> The Illinois Court of Appeals in *In re Marriage of Adams*<sup>70</sup> held that the husband did not dissipate marital assets, however, because although he drank alcohol, he was able to accurately account for a majority of his expenses in documentation.<sup>71</sup> This accounting effectively established the amount husband spent on alcohol was not substantial.<sup>72</sup>

### 4. *Expenditures relating 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.<sup>73</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *In re Marriage of Cook*, 453 N.E.2d 1357 (Ill. App. Ct. 1983).

<sup>68</sup> *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).

<sup>69</sup> *In re Marriage of Adams*, 538 N.E.2d 1286, 1291 (Ill. App. Ct. 1989).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *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).

### 5. *Investments*

A spouse who makes investments over an extended period of time, typically is not held to have dissipated marital assets.<sup>74</sup> This is particularly true if the party frequently traded stock or investments; earned money from such conduct; and it became part of the parties' business.<sup>75</sup> An investment may be considered dissipation, however, if the investment was made shortly after the separation or filing; the investment was speculative; and the spouse refused to sell the stocks even though the price continued to decline.<sup>76</sup>

### D. *Applying Factors to a Particular Set of Facts*

Other cases largely depend on how much the dissipator spent in correlation to the value of the marital estate and their standard of living.<sup>77</sup> Courts also consider whether the expenses were unreasonable in light of the parties' marital estate, standard of living and typical expenditures.<sup>78</sup> In addition, courts consider whether the accusing spouse objected at the time of the expenditure.<sup>79</sup> Finally, courts will consider the necessities of life and whether those necessities were appropriate and legitimate living expenses.<sup>80</sup>

## III. Preventing Parties from Dissipating: Preliminary Injunctions

### A. *Preliminary Injunctions: What Are They?*

Dissipation of marital assets prevents courts from having the ability to distribute all assets in the final decree.<sup>81</sup> Courts are in-

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<sup>74</sup> See *Horn v. Horn*, 445 So. 2d 717 (Fla. Dist. Ct. App. 1984); *In re Marriage of Drummond*, 509 N.E.2d 707 (Ill. App. Ct. 1987).

<sup>75</sup> *Jenike v. Jenike*, 857 A.2d 798 (Vt. 2004) (holding injunction overly restrictive because injunction did not permit husband to transact business).

<sup>76</sup> *Booth v. Booth*, 371 S.E.2d 569 (Va. Ct. App. 1988) (holding dissipation of marital assets when husband lost \$60,000 on a speculative investment and refused to sell).

<sup>77</sup> OLDHAM, *supra* note 14, at § 13.02[1].

<sup>78</sup> *Id.* at § 13.02[1].

<sup>79</sup> *In re Marriage of Stallworth*, 237 Cal. Rptr. 829 (Cal. Ct. App. 1987); *In re Marriage of Ryman*, 527 N.E.2d 18 (Ill. App. Ct. 1988).

<sup>80</sup> *In re Marriage of Hagshenas*, 600 N.E.2d 437, 452 (Ill. App. Ct. 1992).

<sup>81</sup> *In re Marriage of Centioli*, 781 N.E.2d 611, 617 (Ill App. Ct. 2002).

creasingly utilizing preliminary injunctive relief to address the issues of dissipation in a dissolution proceeding. These court-ordered injunctions serve to maintain a status quo by preventing the parties from dissipating marital assets and are typically statutory in nature.<sup>82</sup> Preliminary injunctions operate as a preventive mechanism serving to prohibit the parties from falsifying records, refusing to disclose asset information and “intentionally, knowingly, or recklessly destroying, removing, concealing encumbering, transferring or otherwise harming or reducing value of property.”<sup>83</sup> Injunctions are arguably a better option than post-dissipation relief because they prevent dissipation before the damage has been created.<sup>84</sup>

1. *Are injunctions a good idea?*

Although preliminary injunctions serve an important goal of preventing dissipation in a dissolution proceeding, limitations exist that may diminish their use or the likelihood of obtaining one.<sup>85</sup> Not only do injunctions interfere with the parties’ abilities to manage their own property and assets, they also can severely limit the parties’ abilities to continue in their businesses, employment, and as a result, interfere with their everyday lives.<sup>86</sup> Courts, therefore, generally require the parties to show a likelihood of dissipation.<sup>87</sup> Additionally, injunctions must not be overly broad and must enable parties to carry out the necessities in their life, which include standard utilities, mortgages, businesses, etc.<sup>88</sup>

An example of a well-written injunction is located in *In re Marriage of Truitt*,<sup>89</sup> where the court addressed an injunction restraining both parties from making property unavailable to a

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<sup>82</sup> *Id.*

<sup>83</sup> TEX. FAM. CODE ANN. § 6.501 (Vernon 2005).

<sup>84</sup> Brett R. Turner, *Here Today, Gone Tomorrow: Identification and Division of Dissipated Marital Assets* (2005) (on file with author).

<sup>85</sup> TURNER, *supra* note 2, at § 3.05.

<sup>86</sup> *Messenger v. Edgar*, 623 N.E.2d 310, 316 (Ill. 1993) (holding although exceptions to the automatic injunction existed statutorily, a party was still denied due process because they were unable to use their own property to perform expenditures or transactions).

<sup>87</sup> Turner, *supra* note 83.

<sup>88</sup> *In re Marriage of Truitt*, 863 P.2d 1287, 1289-1290 (Or. Ct. App. 1993).

<sup>89</sup> *Id.*

court during the dissolution proceeding, but expressly permitting the parties to make all necessary expenditures from their respective joint checking accounts.<sup>90</sup> The husband argued that the wife's withdrawals from a Vanguard account violated the injunction when she used the money for family living expenses and improvements to a house to get the house ready to put on the market.<sup>91</sup> The Oregon Court of Appeals held that a violation of the injunction did not occur because both parties were utilizing the account for their living expenditures, which included the property improvements because they served to increase the value of the marital asset.<sup>92</sup>

## 2. *Who are injunctions enforced against?*

Courts have issued preliminary injunctions against a spouse or a non-spouse joined as a party to the case.<sup>93</sup> These injunctions may prohibit the parties from dissipating property owned by the corporation when the marital estate owns an interest in the corporation.<sup>94</sup>

In *In re Marriage of Schmidt*,<sup>95</sup> the Illinois trial court entered an injunction prohibiting the officers, management, and employees from "withdrawing, spending, disposing of, encumbering, transferring, pledging" any of the parties' assets except for usual business transactions after giving seventy-two hour written notice to the wife and her attorney.<sup>96</sup> The husband argued the court was without authority to enjoin management and disposition of business interests.<sup>97</sup> The Illinois Court of Appeals held that the Illinois Marriage and Dissolution of Marriage Act<sup>98</sup> does not preclude a court from enjoining business assets.<sup>99</sup> Additionally, the court noted that enjoined parties may move for a modifica-

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Arnold v. Spears*, 36 S.W.3d 346 (Ark. 2001) (holding injunction against landlord to account for and prohibiting the sale of marital property as valid injunction).

<sup>94</sup> *In re Marriage of Schmitt*, 747 N.E.2d 524 (Ill. App. Ct. 2001).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 529.

<sup>97</sup> *Id.* at 534.

<sup>98</sup> ILL. COMP. STAT. 5/501(a)(2)(i) (2005).

<sup>99</sup> *Schmitt*, 747 N.E.2d at 529.

tion if extraordinary expenditures arise.<sup>100</sup> The court upheld the injunction enjoining the corporation's assets because the injunction followed the specific language of the statute and prohibited the parties from alienating assets except in the usual course of business.<sup>101</sup>

Similarly, courts have held that a party may be able to seek an injunction to enjoin non-spouses who are not joined as parties if a corporation is found to be the alter ego of the spouse dissipating property.<sup>102</sup>

### 3. *How does one obtain a preliminary injunction?*

Two types of preliminary injunctions exist which states are beginning to utilize to prevent dissipation in a dissolution proceeding. The first, an automatic injunction, requires no action by the parties and is utilized in a small number of states. The second, a preliminary injunction pendente lite, requires a party seeking the injunction to file a motion, hearing and a formal order entered by the court.<sup>103</sup>

#### a. *Automatic injunctions*

A few states, such as Colorado, Maine, and Arizona, have enacted automatic injunctions.<sup>104</sup> These injunctions are statutorily based and automatically impose mandatory injunctions against both parties upon the filing of a dissolution proceeding.<sup>105</sup> They prohibit the parties from "transferring, encumbering, concealing, selling or otherwise disposing of any of property of the parties" unless the conduct is related to the "usual course of business, necessities, or court and reasonable attorney fees related to the action."<sup>106</sup> The court clerk typically enters the injunction upon filing and delivers the injunction with the summons

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<sup>100</sup> *Id.* See also ILL. COMP. STAT. 5/501 (2005).

<sup>101</sup> *Id.*

<sup>102</sup> See *Lytal v. Lytal*, 818 So. 2d 111, 113 (La. Ct. App. 2001) (holding the corporation was the husband's alter ego when he was removing funds from a corporation under his control and upheld an injunction directed specifically against the corporation).

<sup>103</sup> See TEX. FAM. CODE ANN. § 6.501 (Vernon 2005).

<sup>104</sup> See COLO. REV. STAT. § 14-10-107(4)(b) (2005); ME. REV. STAT. ANN. tit. 19-A, § 903 (2005); ARIZ. REV. STAT. ANN. § 25-314 (2004).

<sup>105</sup> See COLO. REV. STAT. § 14-10-107(4)(b) (2005).

<sup>106</sup> See ARIZ. REV. STAT. ANN. § 25-315 (2004).

and complaint to the respondent.<sup>107</sup> Statutes permit such transferring or encumbering only when both parties execute their written consent to the action or with permission of the court.<sup>108</sup>

A modification of the automatic injunction is possible upon filing a motion to show good cause as to why the injunction should be modified or terminated.<sup>109</sup> This effectively places the burden of remedying a court oversight on the spouse desiring such modification or termination regardless of whether that party demonstrated a likelihood of dissipation. If a party is refused the right to a modification or termination hearing, courts hold that due process rights were denied.<sup>110</sup>

Furthermore, automatic injunctions terminate when either the court revokes or modifies the injunction, in which case the new order governs; a final divorce or separation decree is entered; or the action is dismissed.<sup>111</sup>

Automatic injunctions have invoked considerable litigation, including constitutional claims that they violate due process. The Illinois Supreme Court even implied that across the board imposition of injunctions in divorce cases are unconstitutional.<sup>112</sup> In *Messenger v. Edgar*,<sup>113</sup> a wife challenged the Illinois automatic injunction statute on the basis of a violation of due process.<sup>114</sup> At the time, section 501.1<sup>115</sup> imposed an automatic injunction against both parties upon filing, but also excluded from the injunction any conduct performed in the usual course of business, necessities, reasonable costs, expenses, and attorney's fees.<sup>116</sup> The Illinois Supreme Court held the automatic injunction upon filing and service of divorce violated the due process rights of the parties as a deprivation of property, even with the inclusion of exceptions to the automatic injunction, because it effectively re-

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<sup>107</sup> *Id.*

<sup>108</sup> COLO. REV. STAT 14-10-107(4)(b) (2005 ).

<sup>109</sup> ME. REV. STAT. ANN. tit. 19-A, § 903(1)(A)-(B) (2004).

<sup>110</sup> *In re Marriage of Finer*, 893 P.2d 1381 (Colo. Ct. App. 1995).

<sup>111</sup> ME. REV. STAT. ANN. tit. 19-A, § 903(2)(D) (2004).

<sup>112</sup> *Turner*, *supra* note 83, at 2.

<sup>113</sup> 623 N.E.2d 310 (Ill. 1993).

<sup>114</sup> *Id.*

<sup>115</sup> ILL. COMP. STAT. 5/501.1 (1992).

<sup>116</sup> *Id.*

strained both parties from disposing of “any and all property,” including non-marital property.<sup>117</sup>

State Legislatures’ tendencies to statutorily impose overly broad injunctions, which effectively restrict the parties ability to continue in their everyday life, have led several professionals and courts to prefer a complete avoidance of automatic injunctions and instead only permit injunctions upon a minimal showing by the moving party that dissipation is more than a mere speculative possibility.<sup>118</sup>

b. *Preliminary injunctions pendente lite*

While only a few states impose automatic injunctions upon filing of the dissolution, many others issue preliminary injunctions upon a motion by a party to the action.<sup>119</sup> The moving party is required to prove that there is a reasonable threat of future harm or reason to fear imminent dissipation.<sup>120</sup> Courts typically require the moving party to establish the following when determining whether to issue a preliminary injunction:

- 1) the moving party has a right that is in need of protection;
- 2) the moving party will suffer irreparable harm without that protection;
- 3) no adequate remedy at law exists; and
- 4) the moving party is likely to succeed on the merits.<sup>121</sup>

Preliminary injunctions are severely scrutinized by courts and courts will not order them unless the moving party demonstrates dissipation is more than a mere chance.<sup>122</sup> “A preliminary injunction is an extraordinary remedy that is applicable only to situations where an extreme emergency exists and serious harm would result if not issued.”<sup>123</sup>

<sup>117</sup> *Messenger v. Edgar*, 623 N.E.2d 310, 316 (Ill. 1993).

<sup>118</sup> *Id.* at 316. *See also* TURNER, *supra* note 2, at § 3.05.

<sup>119</sup> *See* TEX. FAM. CODE ANN. § 6.501 (Vernon 2005).

<sup>120</sup> *Franzese v. Franzese*, 436 N.Y.S.2d 979 (N.Y. App. Div. 1981); *Kennedy v. Kennedy*, 616 N.E.2d 39 (Ind. Ct. App. 1993).

<sup>121</sup> *In re Marriage of Schmidt*, 455 N.E.2d 123, 125 (Ill. App. Ct. 1983).

<sup>122</sup> TURNER, *supra* note 2, at § 6.30. *See also* *Reich v. Reich*, 717 N.Y.S.2d 277 (N.Y. App. Div. 2000) (reversing injunction because moving party failed to demonstrate defendant was threatening or attempting to dispose of marital assets).

<sup>123</sup> *In re Marriage of Centioli*, 781 N.E.2d 611, 614 (Ill. App. Ct. 2002).

For example, the Illinois Court of Appeals held that “merely having control” over assets without more evidence is an insufficient basis to support an order for a preliminary injunction.<sup>124</sup> A threat of future harm, however, is typically proven by the moving party establishing evidence detailing past acts of dissipation or reliable statements of intent to dissipate in the future.<sup>125</sup>

### B. *Past Acts of Dissipation*

If a moving party can demonstrate previous acts by the defendant rising to the level of dissipation, a preliminary injunction is likely to be ordered. For example, when a wife demonstrated that her husband had previously forged her signature in an attempt to transfer eight million dollars out of the country, the Florida Court of Appeals held this evidence of past conduct established a sufficient threat of future dissipation and upheld the preliminary injunction ordered by the Illinois Circuit Court.<sup>126</sup> Additional examples of past acts of dissipation sufficient to order a preliminary injunction include avoiding service of process while removing property and threatening to declare bankruptcy;<sup>127</sup> withdrawing substantial amounts of money close to filing date; and disposing of marital property associated with a business.<sup>128</sup>

Furthermore, some courts have held that past misconduct relating to property is sufficient evidence to order a preliminary injunction.<sup>129</sup> An Indiana Appellate Court held that a preliminary injunctive order was proper where the husband refused to provide the wife with any information on his pension account, which was a divisible marital asset.<sup>130</sup> In addition, husband maintained that he had the right to dispose of the pension account without consultation with wife.<sup>131</sup> Wife believed husband either

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<sup>124</sup> *Id.* at 617.

<sup>125</sup> TURNER, *supra* note 2, at § 6.30.

<sup>126</sup> Bansal v. Bansal, 748 So. 2d 335, 337 (Fla. Dist. Ct. App. 1999).

<sup>127</sup> *In re Marriage of Schmitt*, 747 N.E.2d 514 (Ill. App. Ct. 2001).

<sup>128</sup> Nordgren v. Nordgren, 655 N.Y.S.2d 585 (N.Y. App. Div. 1997).

<sup>129</sup> Kennedy v. Kennedy, 616 N.E.2d 39 (Ind. Ct. App. 1993). *See also* Leonard v. Leonard, 678 So. 2d 497 (Fla. Dist. Ct. App. 1996) (holding temporary injunction proper where a wife revoked a trust controlling lottery proceeds that parties previously shared, emptied joint safe deposit box of documents related to winnings and trust, and denied her husband access to documents).

<sup>130</sup> Kennedy, 616 N.E.2d at 42.

<sup>131</sup> *Id.*

misrepresented or failed to disclose the true value of his pension account.<sup>132</sup> The court held that although no oral testimony was present to establish a threat, a court is entitled to consider the pleadings, depositions, responses to discovery and compliance when determining whether to order an injunction.<sup>133</sup>

### C. *Reliable Statements of Intent to Dissipate in the Future*

Statements or threats by the defendant to dissipate in the future are sufficient evidence to uphold a preliminary injunction order.<sup>134</sup> A reliable statement of intent includes conduct by a party who threatens to dissipate assets in the future. For example, a husband threatened to transfer property to his child, born of his present girlfriend.<sup>135</sup> The husband also owned a company in which he employed the girlfriend and he told his wife that he had the ability to successfully transfer those assets to his child.<sup>136</sup> The wife filed a motion for a preliminary injunction enjoining the husband from disposing or removing assets.<sup>137</sup> At the hearing, she brought in evidence of his business to demonstrate his ability to dissipate assets and the lower court ordered the injunction.<sup>138</sup> The husband argued it was error to order the injunction, but the court held the injunction was proper because the threats coupled with his ability to dissipate provided a sufficient basis for imposing a preliminary injunction.<sup>139</sup>

The moving party must substantiate a statement of intent by either providing documentary evidence or by the defendant admitting to making such statements.<sup>140</sup> Some cases, however, hold that a court does not need to find evidence of irreparable harm or likelihood of success on the merits to grant a preliminary in-

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<sup>132</sup> *Id.* at 41.

<sup>133</sup> *Id.* at 42.

<sup>134</sup> *See In re Marriage of Peterson*, 744 N.E.2d 877 (Ill. App. Ct. 2001).

<sup>135</sup> *Taft v. Taft*, 548 N.Y.S.2d 726 (N.Y. App. Div. 1989).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Kroteya v. Kroteya*, 566 N.Y.S.2d 265 (N.Y. App. Div. 1991) (holding the injunction was proper because defendant admitted his intention to purchase airline tickets to Africa; distribute a substantial portion of the remaining balance; and offered no evidence to the contrary).

junction because courts have broad discretion when issuing orders in the interest of justice.<sup>141</sup>

As is the case with automatic injunctions, preliminary injunctions are effective until the divorce decree is rendered disposing of all marital assets or until a court orders a modification or termination of the injunction.<sup>142</sup>

In addition, preliminary injunctions pendente lite also include a risk of overly broad drafting by the courts. Courts are reluctant to arbitrarily issue injunctions at every whim and a few courts refuse to order broad injunctive relief even if evidence exists that the injunction is warranted.<sup>143</sup>

For example, in the case of *Woodrum v. Woodrum*,<sup>144</sup> the trial court ordered a preliminary injunction because the husband was selling assets to meet expenses.<sup>145</sup> The Florida Court of Appeals held the injunction preventing the husband from “selling, transferring, assigning, mortgaging, hypothecating, encumbering, or disposing of any assets in his possession or control without the prior consent of the wife” was overly broad because he earned his living in investments.<sup>146</sup> The injunction restricted his ability to continue investing because the injunction enjoined the husband from transferring or selling all property.<sup>147</sup> The court remanded the issue to the lower court for reconsideration regarding the extent of the injunction although the trial court properly exercised its discretion in preventing dissipation of marital assets.<sup>148</sup>

A less subtle error in failing to properly construe an injunction occurred in the case of *Fasano-Amon v. Amon*.<sup>149</sup> In this case, the New York court released Merrill Lynch dividends and interest to a husband when it was discovered the injunction permitted him access to only \$600.00 per month, resulting in an inability to make ends meet, while the wife was given access to \$1,200.00 per month.<sup>150</sup>

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<sup>141</sup> Taft v. Taft, 548 N.Y.S.2d 726 (N.Y. App. Div. 1989).

<sup>142</sup> Catalano v. Catalano, 551 N.Y.S.2d 539 (N.Y. App. Div. 1990).

<sup>143</sup> Woodrum v. Woodrum, 590 So. 2d 1093 (Fla. Dist. Ct. App. 1991).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Woodrum*, 590 So. 2d at 1093.

<sup>148</sup> *Id.*

<sup>149</sup> Fasano-Amon v. Amon, 613 N.Y.S.2d 186 (N.Y. App. Div. 1994).

<sup>150</sup> *Id.*

#### IV. Conclusion

A party who dissipates premarital assets creates an unequal playing field which prevents courts from rendering a fair and equitable distribution of marital assets. All courts have the ability to consider the dissipating parties' conduct when dividing property either through unequal division of assets, rescission of fraudulent conveyances, or classification of marital property,<sup>151</sup> but little or nothing at all can be done to remedy the financial situation of a non-dissipating spouse who has no idea the property even exists. Injunctions serve to prevent this scenario from ever occurring and operate to prevent the dissipating spouse from engaging in misconduct.

Several opponents to injunctions, however, question the effectiveness and restrictive nature of injunctions due to their limitations and intrusiveness.<sup>152</sup>

First, the protection provided by injunctions comes with a substantial cost to the parties due to the loss of control over their finances and resources.<sup>153</sup> This cost is increased significantly when dealing with automatic injunctions imposed on an innocent spouse, which is what has led some courts to require a *pendente lite* motion and filing evidence demonstrating a likelihood of dissipation prior to enjoining parties from dissipating marital property.<sup>154</sup>

Second, injunctions are easy to violate because they are only effective if parties abide by them.<sup>155</sup> If a spouse violates the injunction, the court must turn to other available remedies, which are currently the same remedies as if the party had dissipated the assets without an injunction.<sup>156</sup> Additionally, a spouse who dissipates assets is presumably motivated by deceitfulness, in which case merely ordering a preliminary injunction is arguably unlikely to effectively stop dissipation if this was the spouse's intent from the beginning.<sup>157</sup> This is especially true in the case of con-

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<sup>151</sup> Turner, *supra* note 83.

<sup>152</sup> See TURNER, *supra* note 2, at § 3.05.

<sup>153</sup> See *id.* at § 3.05.

<sup>154</sup> See *In re Marriage of Centioli*, 781 N.E.2d 611, 614 (Ill. App. Ct. 2002).

<sup>155</sup> Turner, *supra* note 83.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

cealed or hidden assets in which one spouse is not even aware of the existence of such property.

Injunctions, however, should not be dismissed in their entirety because a formal order by the court restricting parties from transferring, selling, or concealing marital assets may serve as a notice to the parties that this type of conduct is not tolerated by courts and does carry consequences. Injunctions also serve as the only preventive mechanism currently in existence addressing the prevalent issues of dissipation of marital assets. Although post-dissipation remedies do exist to cure the damage, their effectiveness is questionable. Consequently, injunctive orders are increasing in use in dissolution proceedings, whether they are automatic (less extensively used) or ordered upon motion by a party (more extensively used).

Furthermore, not only do injunctive orders facilitate preventive measures, they also take a more proactive stance in disallowing dissipation. After all, the only way parties truly receive a fair and equitable division of assets is if dissipation never occurs.

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