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The how, when and whether of dissipation

Divorce is often filled with suspicion, skepticism and distrust.

The root of these feelings is often financial. There are many ways finances can cause a strain between a divorcing couple. Examples include mortgages, household bills, child-related expenses and much more. One financial topic worth noting, especially around the end of the year, is dissipation.

Dissipation typically occurs when large amounts of money go unaccounted for and marital funds are disappearing after the marriage is considered irretrievably broken.

What is dissipation?

Illinois law defines dissipation in ILCS 5/503, which states in summary, spending of marital assets for a nonmarital purpose during the irretrievable breakdown of the marriage.

Classic examples of dissipation include buying gifts for a new partner, going on vacation, gambling losses, excessive amounts of money on drugs or alcohol. These are some of the common ways marital funds are dissipated. But there are other less discreet ways.

For example, when one spouse blatantly transfers money out of a marital bank account into their separate, personal account without consent or court order and uses that money on a nonmarital purpose.

Dissipation claims are not strictly monetary. In some cases, destroying or failing to maintain property can be considered dissipation. If one spouse deliberately stops paying the mortgage on the marital residence and it falls into foreclosure, the loss might be considered dissipation. Another example, if a spouse would destroy a marital asset.

How to identify dissipation:

Jeffrey W. Brend and Jennifer M. Fletchall are family law attorneys at Levin & Brend P.C. One of their areas of focus is business valuation and forensic accounting.

Here, they offer several tips to help identify dissipation through the discovery process:

1. Request the front and back of checks. Get copies of checks written out of both business and personal bank accounts. This may lead you to undisclosed accounts.

2. Request business payroll checks. This may lead you to marital income being funneled through to another employee.

3. Obtain a court order for a credit report. This may also lead you to undisclosed assets or liabilities.

4. Request business tax returns and business financial statements. These documents may alert you to nonrecurring, unusual or extraordinary expenses — like expensive jewelry purchases for a spouse's girlfriend or boyfriend during the holidays or an extravagant trip to a warm destination for New Year's Eve.

5. Request business ledgers. You may unpleasantly learn a spouse's girlfriend or boyfriend is being paid a salary from the company and not working there. Pay particular attention to the cost of goods sold, repairs and outside service accounts of the general ledger.

6. Look in the ceiling tiles ... seriously. Numerous cash withdrawals, even insignificant amounts (which add up), may alert you to a spouse stockpiling cash to use for nonmarital purposes.

It is also important to understand a family's business. For example, if a spouse owns a coin-operated laundry, request the water bills. Copies of these bills will help determine if the income reported by the business matches the amount of water actually utilized by the business.

COLLABORATIVE CONCEPTS

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Matching supply purchases to revenue is another simple way to determine if a business is accurately reporting income and expenses.

Some spouses withdraw large sums of cash in order to minimize their paper trail. This is especially true after a dissipation claim has been filed. Be vigilant. Watch for large cash withdrawals made by a spouse, or through their business, without explanation.

It is crucial to start the discovery process as early as possible to obtain spending records from a spouse. If and when a spouse in uncooperative in providing the information needed, it can be gathered by serving the appropriate subpoenas upon banks, businesses and credit card companies to gather as much information as possible.

What to do after identifying dissipation?

After filing for divorce, the spouse claiming dissipation must serve written notice upon the spouse committing dissipation no later than 60 days before trial or 30 days after discovery closes, whichever is later. The written notice must state the date or period of time during which the marriage began its irretrievable breakdown, an identification of the property dissipated and a date, or period of time, when the dissipation occurred.

Fletchall and Brend also recommend filing an ex parte motion to mirror the hard drive of business and individual computers. Filing this type of motion allows information collection before evidence of dissipation is wiped clean (i.e. so that the dissipating spouse cannot clear their computer's files before an attorney has access to them).

It may also be appropriate to file a petition for a temporary restraining order to prevent either spouse from further dissipating the marital estate, if there is evidence one spouse is engaged in exhausting marital funds for a nonmarital purpose. A temporary restraining order can freeze accounts and limit spending until the issue is resolved.

If a spouse is found to have dissipated marital assets, they must reimburse the marital estate for all the money spent and/or assets hidden.

For example, if the court finds that a spouse dissipated $100,000, the dissipating spouse would reimburse those funds to the marital estate. Those funds would then be subject to equitable distribution.

It is important to be aware of the costs of claiming dissipation. Tracking bank accounts, business records and credit reports can be expensive.

It is important to weigh the costs of filing a dissipation claim and how much a client would actually gain if they succeeded on the claim.

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