

Dissipation: Should timing be a factor?

A recurring issue in Illinois domestic relations law is when "dissipation" occurs. Dissipation is defined as the use of marital money for a non-marital purpose during or after the time a marriage is irretrievably broken down. Ordinarily, a spouse who is guilty of dissipation is ordered to repay the marital estate the money that was dissipated.

Dissipation is mentioned directly in Section 503(d) of the Illinois Marriage and Dissolution of Marriage Act. That statute provides, in relevant part, that marital property shall be divided without regard to marital misconduct, and that one of the factors that a court should consider when determining that division is the dissipation by each party of marital or non-marital property. Although many states recognize dissipation, or a similar concept, Illinois is one of the few that places a time limit of when dissipation can occur. Thus, although the statute does not designate a specified time period, the Illinois Supreme Court found that dissipation may only occur while the marriage is undergoing an irretrievable breakdown. *In re Marriage of O'Neill*, 138 Ill.2d 487, 563 N.E.2d 494 (1990). The fact that dissipation may only occur within this window of time raises several questions.

First, what constitutes an irretrievable breakdown of a marriage? Do both parties need to accept that their marriage is over? Can one party's behavior be indicative that a marriage has broken down? What if that behavior is something that the other spouse has accepted and condoned over the years?

As with many issues in family law, Illinois trial courts have substantial discretion in determining answers to these questions. Although picking an actual point in time that the dissipation meter starts running can be difficult, courts have established some loose guidelines to determine when a marriage is irretrievably broken. Thus, where there is evidence that one party no longer desires to be married to the other, a court will find that irreconcilable differences have arisen which has caused an irretrievable breakdown of their marriage. *In re Marriage of Smoller*, 578 N.E.2d 256 (1st Dist. 1991).

Although this guideline is helpful, it does not offer assistance to an innocent party in a case where their spouse has spent marital money inappropriately for an extended period of time, unbeknownst to that innocent spouse. Common expenditures include gambling, drinking, and having an extended affair. These actions are

Matrimonial Law

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hidden from one spouse who, presumably, if made aware of the conduct, would want a divorce.

The law in Illinois puts this innocent spouse at a disadvantage, while rewarding the guilty spouse for successfully manipulating the innocent spouse while hiding the dissipation. Although courts in Illinois have stated that since adultery is grounds for dissolution of marriage itself, the legitimate objects of matrimony have been destroyed if one spouse is guilty of committing adultery, *In re Marriage of Bates*, 490 N.E.2d 1014, 1016(2nd Dist. 1986), there has not been an opinion in Illinois that specifically provides that all money spent on a boyfriend/girlfriend during a secret affair would be considered dissipation.

Other states provide greater protection to an innocent party, by affording a spouse the opportunity to fully recover money spent by their spouse for a non-marital purpose throughout a marriage, not just after the marriage is "broken."

In California and Texas, courts treat dissipation differently than Illinois, and their cases are instructive. As opposed to a timing requirement, California and Texas courts permit a monetary award from a party's share of community property if there has been a deliberate misappropriation or constructive fraud, regardless of timing. In the California case of *In re Marriage of Czapar*, the court found substantial evidence supported a finding that the husband abused his management right by using a community corporation for personal expenditures, and ordered a reimbursement to the community for the inappropriate use of money, including the payment of a salary to his girlfriend for a job that she was clearly not qualified to perform. *In re Marriage of Czapar*, 285 Cal.Rptr. 479, 232 Cal.App.3d 1308 (App. 4 Dist. 1991).

In Texas, a presumption of constructive fraud arises where one spouse disposes of the other spouse's one-half interest in community property without the other's knowledge or consent. In the Texas case *Zieba v. Martin*, the court found the community

estate was entitled to reimbursement for money the husband spent on girlfriends, and money withdrawn from bank accounts without his wife's consent. *Zieba v. Martin*, 928 S.W.2d 782 (Tex.App.-Houston [14 Dist.], 1996). Texas courts have gone further, and held that a spouse must be innocent and unknowing for the constructive fraud to have occurred. In *Spruill v. Spruill*, the court affirmed a lower court ruling that husband had committed constructive fraud by spending a substantial portion of community property money on his girlfriend without showing that it was done with his wife's consent. *Spruill v. Spruill*, 624 S.W.2d 694 (Tex. App.1981).

As practitioners in Illinois, we understand that we have to operate under the dissipation-timing requirement established by the Supreme Court in *O'Neill*. But courts should do more to protect an innocent spouse who truly does not know of their spouse's illicit expenditures, especially if those expenditures were ongoing for years.

As opposed to arbitrarily choosing a point in time that a marriage is irretrievably broken, courts should establish a rebuttable presumption test which would operate as follows: If a spouse shows that a behavior was unknown from a specific point in time, and that behavior resulted in the use of marital money for a non-marital purpose, there should be a presumption that the marriage was irretrievably broken at that point in time. The meter quantifying dissipation should start running at the time the behavior commenced.

However, in several cases, spouses know of their partner's actions and resulting spending, but choose to ignore or condone it. In many cases, it is obvious that one spouse has knowledge that their husband/wife has a gambling problem, drinking problem, or is having an affair. Then, the question becomes: "What has that spouse done with that knowledge?" If the answer is that they accepted that behavior, and chose to stay married irrespective of their spouse's misappropriation of money, the "breakdown" presumption is rebutted. A guilty spouse should not be punished for behavior that was historically accepted and condoned by a "not so innocent" spouse.

In the practice area of family law, we learn a great deal about people. After spending years with the same person, sometimes a spouse will simply accept their partner's various flaws, including spending money for something

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unrelated to the marriage. *Some spouses accept gambling, drinking, and extra-marital affairs casually, similar to accepting snoring, sloppiness, or other character traits that may be annoying, but are simply part of a marriage. It becomes part of that specific relationship. In other relationships, one spouse may be completely unaware of their spouse's illicit behavior, and not only do they become heartbroken, but they also suffer financial consequences when they realize the amount of money used by their spouse for a non-marital*

purpose:

The law in Illinois should financially protect those innocent parties. The law, in its present state, simply does not offer this protection, as our timing requirement is simply too arbitrary. As long as Illinois defines dissipation as the "expenditure of marital money for a non-marital purpose after the irretrievable breakdown of the marriage," it should be made clear that, often times, a marriage is over long before one spouse may actually know it. The law should protect that spouse.