

Putting Together a Winning Dissipation Argument

As Published in the March 2010 Edition of the *American Bar Association Section of Family Law Newsletter – the AICPA Corner*

By Robert Vance, CPA/ABV/CFF, CVA, CFP
Lattimore Black Morgan & Cain, PC
Knoxville, TN
rvance@lbmc.com

Dissipation of marital property will most likely be defined by your state statutes and case law, but it generally can be defined as occurring after one spouse uses marital property, frivolously and without justification, for a purpose unrelated to the marriage and at a time when the marriage is breaking down¹. Expenditures that were typical or commonplace during the marriage will be difficult to prove as dissipation, especially when the other spouse acquiesced in them. The timing of the expenditure or transaction can be extremely relevant along with the transparency of the dissipating party's actions. Did he/she seemingly intend to hide, deplete, or divert a marital asset? The major problem in proving dissipation is the subjectivity and the interpretation as to what was typical or acceptable during the marriage and what was condoned by the other spouse.

According to the Tennessee Code Annotated (“T.C.A.”), the factors for a court to consider when equitably dividing the marital estate include “[t]he contribution of each party to the acquisition, preservation, appreciation, depreciation or *dissipation* of the marital or separate property.”² Black’s Law Dictionary defines dissipation as “[t]he use of an asset for an illegal or inequitable purpose, such as a spouse’s use of community property for personal benefit when a divorce is imminent.”³ In Tennessee, after the party alleging dissipation establishes a prima facie case that marital funds have been dissipated, the burden shifts to the party who spent the money to prove that the challenged expenditures were appropriate. The *Ward*⁴ case in Tennessee outlined a measured and logical approach for proving or disproving allegations of dissipation, which are now known as the “Ward Factors”. *Ward* directed that trial courts must distinguish between the marital expenditures that are wasteful and self-serving and those which are not so far removed from “normal” expenditures occurring previously during the marriage. *Ward* stated:

In determining whether dissipation occurred, we find trial courts should consider the following: (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. *Id.* at 420-421. The first prong is an objective test. To satisfy this test, the dissipating spouse can bring forward evidence, such as receipts,

vouchers, claims, or other similar evidence that independently support the purpose as alleged. The second prong requires the court to make an equitable determination based upon a number of factors. Those factors include: (1) the typicality of the expenditure to this marriage; (2) the benefactor of the 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; (4) the amount of the expenditure. Id. at 421.⁵

Exhibit 1 was derived from an actual case and contains a table of what the Wife (my client) alleged were highly questionable, frivolous and wasteful expenditures that were not typical during the marriage of the “Smiths”. Through the Request for Production of Documents, the Wife’s attorney had requested bank account statements, canceled checks, and credit card statements for the two years before the marital problems surfaced. The cash ATM withdrawals were atypical for the Husband during the marriage as were the travel and meals expenditures since he enjoyed a generous expense account from his employer and rarely incurred personal expenses of this nature. The Husband also initiated numerous new loans around separation time which encumbered debt-free vehicles and we provided evidence that he had no apparent need for the proceeds at the time. Although some of Exhibit 1 has been altered for confidentiality purposes, the Husband actually did incur fees for the cosmetic dentistry and the hair plugs in February 2006, which, we surmise, allowed or prompted him to purchase the \$20,000 diamond ring for his paramour in May. The loans, cosmetic expenses and jewelry typify the types of expenses contemplated in the Ward Factors.

An organized table, such as that presented as Exhibit 1, along with properly referenced copies of checks, receipts, deposition and interrogatory excerpts, etc., is a powerful tool to use in presenting the prima facie case and attempting to satisfy Prong 1 of the Ward Factors. Prong 2 will probably require additional proof through documentation of typical expenditures made during the marriage that were not dissipation, along with live testimony. The total balance of dissipated funds should be placed on the Marital Balance Sheet⁶ as an asset as if the expended funds still exist, and the non-dissipating spouse will receive an offset of another marital asset. If marital funds were spent on a frivolous or wasteful tangible asset that still exists, such as the diamond ring, or the funds are suspected of being diverted to a previously undisclosed bank account; consider placing the asset as a single line item on the Marital Balance Sheet rather than on the dissipation schedule since dissipation is often viewed as subjective by a judge.

Smith v. Smith

Exhibit 1-Dissipation of Marital Assets by Husband

3/31/08

Date	Check Num	Description	Memo	Totals	Girlfriend Expenses				Other	
					Clothing & Dept. Stores	Travel, Meals & Ent.	Loans to G'friend	Cash	Bank Loans	Cosmetic Medical
10/1/05		Refinance of H's Paid-for Car	Per H's Depo	15,000.00					15,000.00	
10/1/05		Disney World Trip	Per Answers to Interrog.	5,000.00		5,000.00				
10/13/05	1032	Sports Tickets Etc.	Per Answers to Interrog.	3,000.00		3,000.00				
11/1/05	1016	Check to Girlfriend		2,500.00			2,500.00			
11/1/05		Credit Union Loan #12345	Unknown purpose	20,000.00					20,000.00	
11/1/05	1045	Sports Tickets Etc.	Per Answers to Interrog.	3,000.00		3,000.00				
12/20/05	1053	Check to Girlfriend		415.00			415.00			
12/27/05		Miguelas Clothing	Women's clothing shop	692.48	692.48					
12/29/05		Miguelas Clothing	Women's clothing shop	567.00	567.00					
1/3/06		Airline		915.14		915.14				
1/3/06		Airline	Chicago trip	915.14		915.14				
1/3/06		Apple Store		398.00	398.00					
1/18/06		Ruth's Chris Steak House	H seen out w/ Girlfriend	341.00		341.00				
1/31/06		Cash Advance on cc	Vegas trip	402.00		402.00				
2/2/06		Over-the-counter W/D	Vegas trip	400.00		400.00				
2/2/06		SunTrust Cash	Vegas trip	402.00		402.00				
2/5/06		Cash Advance on cc		402.00		402.00				
2/15/06		Cosmetic Dentist Inc.	Per H's Admission	7,890.00					7,890.00	
2/15/06		Hair Plugs R Us	Per H's Admission	12,107.00					12,107.00	
2/23/06		Banana Republic		1,095.76	1,095.76					
3/4/06		Delta Air	Trip w/ Girlfriend	678.00		678.00				
4/5/06		Delta Air	Trip w/ Girlfriend	678.00		678.00				
5/10/06		Victoria's Secret	Women's clothing shop	789.00	789.00					
5/19/06		Girlfriend's Diamond Ring	Per H's Depo	20,000.00	20,000.00					
6/8/06		Atm Cash Withdrawal		2,000.00				2,000.00		
7/10/06		Victoria's Secret	Women's clothing shop	150.00	150.00					
8/17/06		Over-the-counter Withdrawal		7,300.00				7,300.00		
9/8/06	1283	Cash		2,500.00				2,500.00		
Totals				109,537.52	23,692.24	16,133.28	2,915.00	11,800.00	35,000.00	19,997.00

¹ *Altman v. Altman*, No. M2003-02707-COA-R3-CV, 2005 Tenn. App. LEXIS 207, at *5-6(Tenn.Ct.App. Apr. 7, 2005) (perm. app. denied).

² T.C.A. § 36-4-121(c)(5) (2005).

³ Black's Law Dictionary 486 (7th ed. 1999).

⁴ *Ward v. Ward*, No. W2001-01078-COA-R3-CV, 2002, WL 31845229 (Tenn.Ct.App. Dec. 19, 2002).

⁵ 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).

⁶ A Marital Balance Sheet is a listing of separate and marital assets and debts in a single table representing the entire estate with a proposed division of each item. The table "balances" the net estate into one version of a proposed equitable division.