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**DISSIPATION OF MARITAL ASSETS AND  
INCOME**

*How to Find it, How to prove it and How to keep it.*

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Presented By  
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# **DISSIPATION OF MARITAL ASSETS AND INCOME**

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### **I. GENERAL CONCEPTS OF DISSIPATION**

#### **1. INTRODUCTION**

During the 1970's the *no-fault* movement swept the nation as state after state abandoned the notion of *fault* divorce. One of the many unintended consequences of this "civilization" of divorce was the erroneous belief that all spousal bad acts became inadmissible as irrelevant to the securing of a *just and equitable dissolution*. Although *no fault* may have barred evidence of bad acts as a basis for a divorce or punishment, it never was intended to limit the introduction of evidence where those bad acts have resulted in or are likely to result in financial harm or loss to an innocent spouse. In the era of *no fault*, fault has been resurrected as *the law of dissipation of income and assets*.

The specific justification for a dissipation claim and remedy varies however judges have not had difficulty in defining the applicable equitable principles. For example Virginia has held that "[t]o allow one spouse to squander marital property is to make an equitable award impossible." *Booth v. Booth*, 371 S.E.2d 569 (Va. App. 1988). In *In re the Marriage of Ansteitz*, 112 Wis.2d 10, 331 N.W.2d 844 (Ct. App. 1983), the Connecticut court stated that "...the court's authority to consider the contribution of each party to the marriage allows it to consider destruction or waste of the marital assets by either party."

As of 1996, states which have adopted *statutes* containing explicit language dealing with dissipation of assets, include Arizona, Delaware, District of Columbia, Florida, Illinois, Indiana, Kansas, Minnesota, Montana, New York, North Carolina, Ohio, Pennsylvania, Tennessee and West Virginia.

The materials in this article are split into eight (8) sections. The first section addresses a

general introduction to the concept of dissipation<sup>1</sup> including definitions. The second section addresses things to do at the outset, third party practice, and the law regarding timing of events, intent and burdens of proof. The third section addresses different theories of Dissipation. The fourth section addresses discovery and proving the dissipation case. The fifth section addresses remedies. The sixth section addresses post-trial matters. The seventh section concludes the text of the article. The final and eighth section provides a sample Divorce petition relating to dissipation<sup>2</sup>, a sample dissipation trial memorandum<sup>3</sup>, sample exhibits supporting a dissipation claim<sup>4</sup>, and a sample Judgment of Dissolution incorporating special findings relating to dissipation of assets and income<sup>5</sup>. It is hoped by providing such extensive materials that the reader will have a firm basis to plead, investigate and prove dissipation of assets and income such that an equitable result can be achieved.

The *fact pattern* used in the appendix involves a family business which had been transferred to the Husband's parents and a house titled in the parent's name. The transfers created both an issue of dissipation of assets and also dissipation of income by transferring an income producing asset.

## 2. **DEFINING DISSIPATION**

Illinois has been a leader in defining and developing the law of dissipation in terms of purpose and timing. In the case of, *In re O'Neill*, 138 Ill.2d 487, 563 N.E.2d 494, 16 FLR (BNA) 1595 (Ill. Sup. Ct. 1990), the first element of dissipation was defined as *the use by one spouse of "marital property, for his sole benefit and for a purpose unrelated to the marriage, at a time that the marriage was undergoing an irreconcilable breakdown."*

Other courts have focused on other elements. Virginia speaks in terms of use of property "*for a purpose unrelated to the marriage and in derogation of the marital*

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2 See Appendix 1. For Petition alleging dissipation, third-party fraud and constructive trust.

3 See Appendix 2. For a trial memorandum used in a successful dissipation case.

4 See appendix 3. For sample exhibits relating to dissipated income.

5 See appendix 4. For a sample Judgment which includes findings incorporated by the court in a Judgment of Dissolution of Marriage regarding dissipation of assets and income.

relationship."<sup>6</sup> Kentucky seeks a "...clear showing of intent to deprive one's spouse of his or her proportionate share of the marital property."<sup>7</sup> Minnesota defines dissipation as a "...frivolous, unjustified spending of marital assets."<sup>8</sup>

The second element, when the marriage is undergoing irreconcilable breakdown, has been defined as: "[a]t a time when the marriage relationship is in serious jeopardy,"<sup>9</sup> "in anticipation of divorce or separation"<sup>10</sup> and "during a period when there is a separation or dissolution impending."<sup>11</sup>

Courts have not generally recognized as dissipation improper financial acts, which occur during the marriage, that predate the breakdown of the marriage. Conversely, acts in derogation of a marriage (i.e. spending money on a paramour) are routinely viewed as acts which could not possibly have any marital purpose and therefore are subject to an equitable remedy.

## **II. METHODOLOGY IN ANALYZING AND STRUCTURING A DISSIPATION CLAIM**

### **1. THINGS TO DO WHEN YOU START**

#### **1.1 RECOGNIZE THE ISSUES**

The first step is to carefully interview the client to determine his or her knowledge of the family assets and income. The initial legal analysis in each case is to evaluate whether an equitable distribution of assets or award of support can occur *without* any special adjustment made to remedy dissipation by a spouse in that it is impossible to make an equitable award when a spouse is allowed to squander income or assets.

Evaluate the past few years financial discovery (i.e. financial statements, bank records, tax returns, business profit and loss statements, etc.) to ascertain whether there has been any unusual activities, transfers or changes. Dramatic business losses or income reductions are *red flag items*. Unusual transfers between accounts or to third parties are similar trouble areas. Use an ethics standard in evaluating the facts. If there is an impropriety or something with the appearance

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6 *Booth v. Booth*, 371 S.E.2d 569, 572 (Va.App. 1988).

7 *Robinette v. Robinette*, 736 S.W.2d 351 (Ky. Ct. of App. 1987).

8 *Volesky v. Volesky*, 412 N.W.2d 750, 752 (Minn. App. 1987). The court added: "Spending of marital assets to meet routine financial obligations and properly maintain the parties' marital property does not constitute dissipation."

9 *Smith v. Smith*, 114 Ill. App.3d 47, 448 N.E.2d 545 (1983).

10 *Booth v. Booth*, supra., note 2.

11 *Robinette v. Robinette*, supra., note 3.

of an impropriety you need to investigate further.

## 1.2 **ADDING NECESSARY PARTIES**

action to gain jurisdiction over the dissipated asset or the parties necessary to provide a remedy.

Frequently the dissipated asset is not squandered but rather is hidden with a third party. Transfers to parents, friends, trusts and children are not uncommon and the addition of a third party by a count of fraud, constructive trust or fraudulent transfer will bring not only the asset but the holder of the asset within the jurisdiction of the court. The filing of a *lis pendens* against the asset secures the asset while the divorce is pending.

Another benefit of adding the third party relates to the admissibility of evidence obtained from the third parties. Statements and documents which would otherwise be inadmissible hearsay may become admissible as an admission against interest by a party and if a conspiracy is shown the evidence is admissible against the spouse principle..

CAVEAT: Be wary of your state's time limitations on bringing third party actions. Many state joinder rules provide a 90 day window to add a claim against a third party. Thus it is often better to add parties at the outset and remove them later, if appropriate, rather than possibly waive the right to have all issues resolved at once.

Though codified by statute as an equitable action, divorce remains a civil proceeding subject to state rules of civil procedure. Applicable rules (citing the Oregon Rules of Civil Procedure) include ORCP 29 (joinder of persons needed for just adjudication) and ORCP 22 (third party claims).

NOTE: When applied to the fact pattern it can be seen that the parents were joined as parties because it would not be possible for the court to determine the parties interest in the family home without joinder of the parents who are "in title." Similarly, the issue of true ownership of the family business required joinder of the parent shareholders. Joinder of the family corporation gives the court jurisdiction to address corporate discovery matters and financial dealings between the corporation, the parents and the husband as it relates to income dissipation. It also allows the court to determine if the promissory notes the Husband has given to the corporation are true debts of the marriage.

Be sure to consider the legal theories by which the third parties can be relevant to the proceeding, consider why they are necessary to a complete resolution and remember to plead all possible theories. For example, for *fraud* you will generally have to prove (1) a false and material representation, (2) of which the victim had no knowledge of the falsity, with (3) the intent for the victim to rely and (4) actual reliance by the victim to their detriment.

In a *constructive trust* claim you must show that the third party is (1) holding property or money which (2) is subject to an equitable duty to convey to another if that holder would be *unjustly enriched* if the holder were permitted to retain it.

In a *fraudulent transfer* you must generally show a transfer without adequate consideration with the intent to hinder or defraud the claims of creditors. Oregon Revised Statute 95.230(1)(a) describes the basic elements of a fraudulent transfer as follows:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: IF it is made:

- (a) With actual intent to hinder, delay, or defraud any creditor of the debtor (i.e. whether the transfer or obligation was to an insider);
- (b) Whether the debtor had retained possession or control of the property transferred after the transfer;
- (c) Before the transfer was made or obligation was incurred, the debtor was sued or threatened with suit.

The foregoing factors are simply a legislature enactment of the common law "badges of fraud." **If such "badges of fraud" exist, "...the burden shifts to the defendants] to show that the conveyance was not made with an intent to defraud creditors, that the consideration was fair and that no benefit was secured or reserved to the grantor."** *Hughey v. Lind*, 92 Or App at 437, 758 P2d at 433, citing *Birens v. Hancock*, 71 Or App 273, 279, 692 P2d 153 (1984).

Although these actions can be brought separately, to avoid issues of merger or failure to plead it is best to consolidate issues and save expenses by raising all such issues in the divorce.

NOTE: The *fact pattern* raises issues of fraudulent transfers (treating the spouse as a creditor), fraud, constructive trust and dissipation all within the same pleading.

## 2. TIMING OF EXPENDITURE

In the overall analysis of a parties actions, the timing of events is critical to a dissipation claim. It was articulated in *Smith v. Smith*, 114 Ill.App. 3d 47, 448 N.E.2d 545 (1983), that "it is not necessary to show that dissipation occurred at the time the parties separated or after dissolution proceedings have been instituted, for such a requirement would be overly restrictive," although the dissipation must occur "at a time when the marriage relationship is in serious jeopardy."

This time frame was emphasized by the Illinois Supreme Court in *In re O'Neill*, 138 Ill.2d 487, 563 N.E.2d 494, 16 FLR (BNA) 1595 (Ill. Sup. Ct. 1990), when it reversed the appellate court which held that a court may consider dissipation that

occurred throughout the marriage.<sup>12</sup> The reversal was based upon the reasoning that there was no claim that the expenditure was during the time that the O'Neill's marriage was undergoing an irreconcilable breakdown.

Commenting at length why another rule would be inappropriate, the court in *In re Marriage of Getautas*, 189 Ill.App.3d 148, 544 N.E.2d 1284 (1989) observed that it would call into issue every expenditure and economic decision from the moment the wedding vows are pronounced. The rejection of this approach is based on the concept that courts should not become auditing agencies for every marriage that falters.

Citing *Getautas, supra.*, the Court of Appeals of South Carolina took a similar position in *Panhorst v. Panhorst*, 390 S.E.2d 376 (1990). In *Booth v. Booth*, 371 S.E.2d 569 (Va.App. 1988) the court noted that "at least until the parties contemplate divorce, each is free to spend marital funds."

### 3. **INTENT**

"...[A]lthough the most common definition of dissipation makes no reference to intent to dissipate, a requirement of such intent is often implied or mentioned explicitly in judicial opinions." This is consistent with maintaining that invisible line between proving fault *in an era of no-fault* and proving bad acts which cause financial harm (i.e. *quasi-fault*). It is the proof of financial harm to the marital estate which is the focus and thereby distinguishes itself from pure "fault."

In *Robinette v. Robinette*, 736 S.W.2d 351 (Ky. Ct. of App. 1987) the court described the concept of dissipation as "where there is a clear showing of intent to deprive one's spouse of his or her proportionate share of the marital property." See also, *In re Marriage of Drummond*, 156 Ill.App.3d 672, 509 N.E.2d 707 (1987) where the court rejected the husband's loss of \$14,500 in commodities trading as dissipation.

The court in *Semasek v. Semasek*, 479 A.2d 1047 (Pa. Super. 1984) referred to the wife's appropriation of over \$75,000 from joint bank accounts as "the intentional dissipation of marital assets by one party."

Other cases hold, however, that the dissipating party need not derive personal

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12 In *O'Neill*, a year and a half prior to the separation of the parties the Husband, who was accused of attempted rape, talked his wife into agreeing to spend \$15,000 for his defense, claiming his innocence. He later confessed during marriage counseling sessions.

benefit from the dissipation of the assets to be held accountable.<sup>13</sup> After reviewing the facts surrounding the creation of a trust for the parties' children two years prior to their divorce and finding it was the husband's intent to defraud the wife, an Illinois court had the trust set aside and apportioned between the parties. *In re Frederick*, 18 FLR (BNA) 1008, (Ill App Ct 2d Dist., 9/4/91). The husband was found to have had secretly met with a divorce lawyer at the time the trust was created and misrepresented to the wife the purpose of the letter she signed.

Although intent to dissipate is an element many courts require, such intent need not be fraudulent. The husband in *Reaney v. Reaney*, 505 S.W.2d 338 (Texas App. 1974) testified that he squandered his money, lost it and "very imprudently went through" it; that he lost some of it gambling and that he gave some of it away; that he "spent it very foolishly," and that at the time of trial he did not have any of it. He said he could not remember how much of the money he gave away or to whom he gave it, or how much of the money he lost in gambling. Holding that a finding of fraud was not necessary for the court to render a judgment against the husband for the wife's share of the money squandered, the appellate court ruled such actions as "presumptively fraudulent."

#### 4. **WHERE FAULT IS PRECLUDED AS A CONSIDERATION**

The prohibition against the consideration of fault in a state's distribution statute does not preclude a court from making appropriate adjustments to compensate for such dissipation. See, *In re the Marriage of Paulsen*, 677 P.2d 1389 (Colo. App. 1984) where the court held that:

"Just as a spouse's actions in contribution to and preservation of the marital estate are relevant factors, . . . so are a spouse's actions in depletion of the marital estate. The statutory language is broad enough to encompass consideration of acts of depletion. Moreover, a contrary interpretation would effectively reward the depleting spouse."

The same conclusion was reached by the court in *Anstutz v. Anstutz*, 112 Wis.2d 10, 331 N.W.2d 844 (Wis. App. 1983).

#### 5. **BURDEN OF PROOF**

In the majority of states, "once the aggrieved spouse shows that marital funds were withdrawn or used up during the marriage breakdown, the other spouse then bears the burden of proving that the money was spent for a marital or proper

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<sup>13</sup> In *In re Marriage of Siegel*, 123 Ill.App.3d 710, 463 N.E.2d 773 (Ill. 1984), the trial court allowed the marital home to go to foreclosure and subsequent sale, even though he had the ability to prevent it. In affirming, the appellate court noted that the Husband "obviously derived no personal benefit from the foreclosure."

purpose."<sup>14</sup>

### 5.1. **BURDEN ON ACCUSED SPOUSE**

See *In re Marriage of Smith*, 128 Ill.App.3d 1017, 471 N.E.2d 1008 (Ill. 1984), where the appellate court set out the oft-followed rule: “[T]he person charged with the dissipation is under an obligation to establish by clear and specific evidence how the funds were spent. General and vague statements that the funds were spent on marital expenses or to pay bills are inadequate to avoid a finding of dissipation.” 471 N.E. 2d at 1013.

The holding was the same in *In re Marriage of Petrovich*, 154 Ill.App.3d 881, 507 N.E.2d 207 (Ill. 1987) and in *In re Marriage of Partyka*, 158 Ill.App.3d 545, 511 N.E.2d 676 (Ill. 1987) where the court observed:

“[A]lthough respondent did testify to several specific expenditures for marital purposes, that he nonetheless failed to show by clear and specific evidence that he did not spend this money for his own benefit or purposes unrelated to the marriage is revealed by the fact that the expenditures to which he testified totaled far in excess of the entire \$14,000 amount of this check.” 511 N.E.2d at 682.

The courts of other states have followed the Illinois lead. See *Manaker v. Manaker*, 11 Conn. App. 653, 528 A.2d 1170 (1987) citing *Smith, supra*; *In re Marriage of Posinoff*, 683 P.2d 377 (Colo.App. 1984); *Sharp v. Sharp*, 58 Md.App. 386, 473 A.2d 499 (1984); *In re Marriage of Merry*, 689 P.2d 1250 (Mont. 1984); *Bland v. Bland*, 652 S.W.2d 690 (Mo.App. 1983); *Dove v. Dove*, 773 S.W.2d 871 (Mo. App. 1989); *Clements v. Clements*, 397 S.E.2d 257 (Va. Ct. App. 1990); and *Roehrdanz v. Roehrdanz*, 410 N.W.2d 359 (Minn. App. 1987).

### 5.2. **BURDEN UPON PARTY ASSERTING DISSIPATION**

Alternatively, in each of the following cases no dissipation was found because the party asserting dissipation that the funds expended were used for improper purposes did not sustain their burden. See *Beaser v. Beaser*, 225 Neb. 104, 402 N.W.2d 875 (1987); *Delano v. Delano*, 501 A.2d 1287 (Me. 1985); *Robinette v. Robinette*, 736 S.W.2d 351 (Ky. App. 1987). It is anticipated that Oregon would keep the primary burden on the party asserting dissipation but once an adequate threshold were crossed the court would likely shift the burden to the accused.

### **III. THEORIES TO ESTABLISH DISSIPATION**

#### **1. EXPENDITURES**

##### **1.1. LIVING EXPENSES**

##### **1.1.1. NOT CONSIDERED AS DISSIPATION**

A majority of courts do not consider expenditures by a party after the marriage break-up for living expenses as dissipation of assets. See *Snow v. Snow*, 277 Ill.App.3d 642, 650, 660 N.W.2d 1347, 1352 (1996) (no dissipation where husband sold \$17,000 in stock and used the proceeds to pay "family expenses and marital expenses, including debt payment(s). . . .") *In re Marriage of Schmidt*, 242 Ill.App.3d 961, 972, 610 N.E.2d 673, 681 (1993); *In re Marriage Hagshenas*, 234 Ill.App.3d 178, 197, 600 N.E.2d 437, 451 (1992).

The wife in *In re Marriage of Stallworth*, 192 Cal.App.3d 742, 237 Cal. Rptr. 829 (1987), who required support between separation and the issuance of a *pendente lite* order, was allowed to use a reasonable amount of community funds for that purpose without being charged for the funds used.<sup>15</sup>

The expenditures by the wife after separation for her support and to maintain the marital residence were held to be necessary and appropriate legitimate family expenditures, thus not dissipation, in *In re Marriage of Sevon*, 117 Ill.App.3d 313, 453 N.E.2d 866 (1983). e.g. *Green v. Green*, 64 Md. App. 122, 494 A.2d 721 (1985) (cash withdrawn from joint account, without wife's knowledge, was not marital property as it was used to pay alimony and child support -- it was found that the husband did not squander the funds); *Peterson v. Peterson*, 242 N.W.2d 103 (Minn. 1976) (funds withdrawn by wife from the parties' savings account used for past due Federal and state tax liability and attorneys' fees pursuant to a court order and for living expenses was not dissipation); *Layton v. Layton*, 687 S.W.2d 214 (Mo. App. 1985) (funds taken after separation by the wife from bank accounts and a jointly held CD, together with \$700 in coins, used by her for living expenses and accounted for by her, was held not to be dissipation); *Fornachon v. Fornachon*, 748 S.W.2d 705 (Mo.App. 1988) (husband's use of proceeds of insurance for security for an apartment and for living expenses was held not to be squandering, thus not subject to distribution).

##### **1.1.2. CONSIDERED AS DISSIPATION**

Cases finding that expenditures for living expenses do constitute dissipation turn mostly on the fact that those living expenses could not be adequately accounted for. See *In re Marriage of Toole*, 273 Ill.App.3d 607, 615, 653 N.E.2d 456, 462 (1995) (where court found insufficient documentation to support husband's contention that he spent marital funds on "'properly documented' family expenses and 'loan pay-back reasons'".) See also *In re Marriage of Partyka*, 158

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<sup>15</sup> The wife in *Stallworth* was, however, required to reimburse the community for funds she used for living expenses to the extent they exceeded a reasonable amount.

Ill.App.3d 545, 511 N.E.2d 676 (1987), *In re Marriage of Harding*, 189 Ill.App.3d 663, 545 N.E.2d 459 (1989) and *Hallman v. Hallman*, 575 So.2d 738 (Fla. 5th DCA 2/28/91).

## 1.2. **TEMPORARY SUPPORT**

### 1.2.1. **PERMISSIBLE EXPENDITURE**

Spending marital assets to meet expenses under a temporary order was held not to constitute dissipation in *In re Marriage of Volesky*, 412 N.W.2d 750 (Minn. App. 1987).

### 1.2.2. **CONSTITUTES DISSIPATION**

Other courts have found that expenditures of marital funds, notwithstanding that they were made pursuant to *pendente lite* support obligations, were such depletions as to include same in determining the distribution of assets. *Weiss v. Weiss*, 226 N.J. Super. 281, 543 A.2d 1062 (1988), *cert. denied* 554 A.2d 844 (1988). In *Holt v. Holt*, 97 Or. App. 192, 776 P.2d 7 (1989) the court ordered the husband to make up the amount he withdrew for spousal support.

## 1.3. **INCURRING OF DEBTS**

Where the trial court found the husband had been profligate in incurring personal and business debts, it was justified in making an appropriate adjustment in the distribution of assets. *Duckett v. Duckett*, 27 Mass. App. Ct. 1164, 539 N.E.2d 556 (1989). In *Beattie v. Beattie*, 650 A.2d 950 ( Me. 1994), the court charged husband with the debt the parties incurred in purchasing a boat when the purchase had a negative effect on the parties' credit rating, wife objected to the purchase and refused to sign the documents related to the purchase (although her signature did appear on them).

## 1.4. **RECREATION**

Expenditures after the breakup of the marriage do not constitute dissipation where both spouses had participated in an activity during the marriage or, while the marriage was intact, one spouse did not disapprove of the other's particular hobby or activity.

Thus, in *In re Marriage of Reeser*, 97 Ill.App.3d 838, 424 N.E.2d 45 (1981) the trial court was reversed for distributing more assets to the wife than to the husband based on a finding that the husband's expensive racing hobby had dissipated the marital estate. The appellate court stated that "We find no testimony at trial which indicated that the wife disapproved of the husband's racing hobby and there was no testimony to support the conclusion that the wife did not enjoy or otherwise participate in the husband's hobby."

The trial court was likewise reversed in *Willis v. Willis*, 107 A.D.2d 867, 868, 484 NYS 2d 309, 310 (1985) for finding wasteful dissipation by the husband engaging in flying and snowmobiling as same were pastimes in which the whole family, including the wife, participated. Indeed, it appears that the wife "enjoyed these activities immensely and became quite involved with them." The appellate court held:

"Expenditures which were agreed to and enjoyed by both parties but which, through hindsight, may seem improvident to parties who can no longer reach rational agreement should not be characterized as a waste of assets and held against one party. 107 A.D. 2nd 867, 868, 484 NYS 2nd 309, 310 (1985)."

An "Advice To Clients" was offered in 6 *Equitable Distribution Journal* 68 (June, 1985, no author). There it recited:

"To avoid a claim of dissipation of funds, a separated spouse should avoid changing his or her spending habits drastically and should keep careful financial records. Unusual expenditures close to the hearing should be avoided."

## 1.5. **TRAVEL**

### 1.5.1. **CONSTITUTES DISSIPATION**

The use of marital funds for travel is usually equated to dissipation when the travel is for other than a business purpose. See *In re Marriage of Dunseth*, 260 Ill.App.3d 816, 633 N.E.2d 82 (App Ct. IL 1994); *In re Marriage of Ryman*, 172 Ill.App.3d 599, 527 N.E.2d 18 (1988); *In re Marriage of Partyka*, 158 Ill.App.3d 545, 511 N.E.2d 676 (1987); *Barringer v. Barringer*, 514 S.W.2d 114 (Ky. App. 1974); and *Noll v. Noll*, 375 S.E.2d 338 (S.C.App. 1988).

### 1.5.2. **EXPENDITURE NOT DISSIPATION**

See *Dean v. Dean*, 87 Wis.2d 854, 275 N.W.2d 902 (1979) where the court held that:

"A trial court does not commit an abuse of discretion by permitting some expenditure for yearly vacations during the pendency of a divorce. However, the amount expended should always be reviewed, subject to the standards of reasonableness."

## 1.6. **DRINKING, DRUGS AND GAMBLING**

Excessive expenditure on alcoholic beverages have been considered as dissipation of marital assets. *In re Marriage of Clark*, 13 Wash. App.

805, 538 P.2d 145 (1975). In *Huntley v. Huntley*, 578 So.2d 890, (Fla. 1st DCA 1991), the court found that the wife was entitled to an equitable distribution of all the marital assets due to the special circumstances in the case including those dissipated by the drug addiction. In *Wolf v. Wolf*, 1996 WL 46039 (Ohio App. Dist. 6 1996), the court held that dissipation had occurred where husband withdrew \$5,900 from a joint bank account to buy drugs in violation of a restraining order.

Similarly, gambling losses or debts allegedly incurred for same, have been charged against the guilty spouse as dissipation. See *Kozlowski v. Kozlowski*, 633 N.Y.Sd 523 (Sup. Ct. 1995); *In re Marriage Hagshenas*, 600 N.E.2d 437, 234 Ill.App.3d 178 (App. Ct. Ill. 1992); *Reaney v. Reaney*, 505 S.W.2d 338 (Tex. App. 1974); *Lindsay v. Lindsay*, 115 Ariz. 322, 565 P.2d 199 (Ariz. App. 1977); *Siegel v. Siegel*, 241 N.J. Super. 12, 574 A.2d 54 (Ch. Div. 1990) and *Wilner v. Wilner*, NYLJ 12/23/91 p. 27 (Queens County, Sup.Ct.).

However, at least one case held that husband's dissipation of assets through gambling did not require an award more favorable to wife where evidence was presented from which it could be concluded that wife approved. *Dunseth v. Dunseth*, 633 N.E.2d 82, 260 Ill.App.3d 816 (App. Ct. Ill. 1994).

#### 1.7. **PARAMOUR**

Expenditures on a paramour will be adjusted against the wrongdoer. *Mika v. Mika*, 728 S.W.2d 280 (Mo. App. 1987) (the expenditure by the husband of \$3,500 on another woman during a post-separation affair was one of the justifications for an 84% property division in favor of the wife); *Simpson v. Simpson*, 679 S.W. 2d 39 (Tex. App. 1984) (in making the property distribution the trial judge was instructed to consider substantial gifts and other favors given another woman); *Neely v. Neely*, 115 Ariz. App. 47, 563 P.2d 302 (1977) (the wife's share in the community property was credited for \$1,200 spent by the husband on his girlfriend.); *In re Marriage of Sedlock*, 69 Wash.App. 484, 849 P.2d 1243 (Wash. App. Div. 1993)(court remanded case to trial court with instruction to charge husband's share of property distribution with \$28,000 which he spent on secretly renting an apartment for his girlfriend during the year prior to separation.); *Matti and Matti*, 647 So.2d 168, 170 (Fla. 2nd Dist. Ct. App. 1994)(court found that wife and wife's boyfriend dissipated assets "either by trickery or simply by duress" and therefore the trial court erred in not charging the amount of dissipation against her share of property distribution.).

However, where the amount of dissipation is relatively small a court may not make any adjustment against the wrongdoer. See *Murphy v. Murphy*, 631 N.E.2d 893, 259 Ill.App.3d 336 (App. Ct. Ill. 1994)(court declined to make a significant charge against husband where he spent approximately \$7,800 on trips and gifts involving his girlfriend).

### 1.8. **SUPPORT FOR RELATIVES**

Long-standing expenditures for relatives that have a historical precedence are not generally considered dissipation when made after the marriage break-up.

In *In re Marriage of Aud*, 142 Ill.App.3d 320, 491 N.E.2d 894, the court found that the husband did not improperly dissipate marital assets by spending almost \$70,000 in marital funds for care of his widowed mother. In *Aud* the husband was his mother's only living descendant. The husband spent approximately the same amount of money for his mother's care as he had for years prior to the marital breakdown, and the wife did not object to such expenditures while they were being made.

Expenditures made shortly before separation have been held to constitute dissipation. See *Lee v. Lee*, 615 N.E.2d 1314, 246 Ill.App.3d 628 (App. Ct. Ill. 1994) where the court held that husband's transfer of over \$250,000 to the parties' children only three months prior to separation constituted dissipation.

### 1.9. **LOANS**

Frequently loans made, or allegedly made, to persons "close" to the lender are regarded as dissipation.

A "loan"<sup>16</sup> of \$16,000 by a husband to his brother, who was an investment broker handling the husband's account, was determined to be a dissipation of marital assets in *Head v. Head*, 168 Ill. App. 3d 697, 523 N.E.2d 17 (1988), *modified on other grounds*, 652 N.E.2d 1246, 273 Ill.App.3d 404 (1995).

In *Rosenberg v. Rosenberg*, 64 Md. App. 487, 497 A.2d 485, 493 (1985), *cert. denied*, 305 Md. 106, 501 A.2d 845 (1985)<sup>17</sup> the court declared not only the loan by the husband to his girlfriend, surreptitiously made after informing the wife he intended to divorce, but also the interest that was foregone thereon, a dissipation of marital assets. As to the interest lost, the court said:

“Because the dissipation of marital property constitutes a fraud on marital rights, and the court noted that interest would have been accrued on an ordinary loan, appellee was wrongfully deprived of this gain on marital property. We, therefore, hold the court did not err in including interest on the loan as marital property.”

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16 The court itself utilized the quotation marks to the word "loan."

17 In *Rosenberg, supra.*, the court commenced its lengthy opinion by stating: "Large fortunes beget large problems, which engender predictable issues when the holders of those fortunes enter the domestic relations arena."

The court did allow a consideration of the tax liability on the interest that was imputed to the husband.

Recently, in *McComish v. McComish*, 642 N.Y.S.2d 921 (Sup. Ct. 1996), the court declined to declare dissipation and award husband a credit for the full amount of \$10,000 which wife loaned the parties' eldest daughter, where there was some testimony that husband had previously agreed to loan daughter the money for a business investment. However, husband was given a \$3,500 credit for his share of \$7,000 which wife loaned daughter, then "took back" and spent on personal use.

#### 1.10. **EMPLOYEE SALARIES AND OTHER BUSINESS EXPENSES**

Where one spouse's business expenses are within the parameters of comparable salaries and customary business expenses, a claim that such expenditures are dissipation for same by an aggrieved spouse usually fails. See *In re Marriage of Calisoff*, 176 Ill.App.3d 721, 531 N.E.2d 810 (1988) and *In re Marriage of Aud*, 142 Ill.App.3d 320, 491 N.E.2d 894 (1986).

#### 1.11. **LEGAL FEES AND OTHER LITIGATION EXPENSES**

##### 1.11.1. **LEGAL FEES AS DISSIPATION**

Legal fees and other litigation expenses of one spouse against the other have been considered as dissipation.

In *Ray v. Ray*, 336 S.W.2d 731 (Mo. 1960) the court acknowledged that the withdrawal of \$1,500 from a joint account was permissible even though it was not taken with the express consent or acquiescence of the wife. In approving same, the court observed that the funds did in fact go for the accomplishment of a common purpose and therefore were considered as being taken with implied acquiescence. However, as to other funds used to pay the husband's lawyer, the court stated:

"If the attorney was employed in connection with suing the defendant, or in reference to taking over the joint property -- in other words, for a purpose antagonistic to the defendant -- we think it can hardly be said to have been an expenditure for mutual benefit which would carry the implied consent or acquiescence. The same thing would be true of money spent for detectives to shadow the wife."

See also *Viles v. Viles*, 610 A.2d 988 (Sup. Ct. PA 1992), where the court held there was dissipation to the extent that husband prolonged the proceedings.); *Hortis v. Hortis*, 367 N.W.2d 633, *aff'd on other grounds*, 378 N.W.2d 837 (Minn. App. 1985); *Head v. Head*, 168 Ill. App. 3d 697, 523 N.E.2d 17 (1988), *modified on other grounds*, 652 N.E.2d 1246, 273 Ill.App.3d 404 (1995) and *Bell v. Bell*, 587 So.2d 642 (Fla. 1st

Dist. Ct. App. 1991). See also *Wrona v. Wrona*, 592 So.2d 694 (Fla. 2d Dist. Ct. App. 1991), where the parties litigated needlessly to where the attorneys fees reduced the marital estate and the husband's future child support ability. On remand the court suggested that if the trial court determines that avoidable litigation expense was caused by one party more than the other, it is authorized to adjust the equitable distribution so that any resulting decrease in marital assets is borne by the party who caused the needless expense.

### 1.12. **TAXES**

In *Grandovic v. Grandovic*, 387 Pa. Super. 619, 564 A.2d 960 (1989), the court held that it was an abuse of discretion by the trial court to exclude from the marital estate assets which were used to pay income taxes after separation which benefited one spouse over the other, notwithstanding that a joint return was filed.

### 1.13. **UNEXPLAINED EXPENDITURES**

Where expenditures are unexplained, some courts attribute such expenditures to dissipation, as did the court in *Bland v. Bland*, 652 S.W.2d 690 (Mo. App. 1983).

## 2. **INVESTMENTS**

### 2.1 **SPECULATIVE INVESTMENTS CONSIDERED AS DISSIPATION**

A minority of courts have ruled that improvident or speculative investments constitute waste and therefore dissipation. See *Booth v. Booth*, 371 S.E.2d 569 (Va. App. 1988); *Tuller v. Tuller*, 469 So.2d 212 (Fla. 5th DCA 1985)<sup>18</sup>; and *In re Marriage of Petrovich*, 154 Ill. App.3d 881, 507 N.E.2d 207 (1987).<sup>19</sup>

In *Fielder v. Fielder*, 646 N.Y.S.2d 839, (N.Y. App. Div. 1996), the court held that "husband's questionable investments without input from the wife amounted to the dissipation of marital assets.

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18 The dissent in *Tuller, supra.*, opined that: "[I]f the husband uses marital funds to make a good investment, upon dissolution the wife is entitled to equitably share the increased marital assets resulting from the husband's good investment of marital funds; but if he makes a bad investment of marital funds, upon dissolution the trial judge should consider that fact and dock his share for the resulting loss of marital assets. This makes the marriage a very good economic partnership for the wife but not for the husband."

19 In the dissent in *Petrovich, supra.*, the writer observed it was ludicrous for the majority to say the wife was unaware of what was occurring when the value of the stock rose. "She was content at that time to ride out the gamble. Both of the parties rolled the dice; both deserve to suffer the loss, and it is not fair to allocate all of the loss to the husband by the device of calling it a dissipation of assets."

## 2.2. **INVESTMENT LOSSES NOT DISSIPATION**

The majority of jurisdictions have held that investment losses are an unfortunate marital enterprise and should therefore neither benefit nor penalize either party. In *Guyette v. Guyette*, 195 Wis.2d 88, 537 N.W.2d 149 (Wis. App. 1995), the court held that no dissipation occurred because, although wife made an unsuccessful business venture, it was in good faith and there was no evidence of an intent to deplete the marital assets.

In *Drummond v. Drummond*, 156 Ill. App. 3d 672, 509 N.E.2d 707 (1987), where the husband admitted losing \$14,500 in the commodities market, the court held that not only was there no evidence of intent to willfully dissipate marital assets, but that the investments were made during the early part of the almost three year marriage when there was no marital discord.

In *Hagshenas v. Hagshenas*, 234 Ill.App.3d 178, 600 N.E.2d 437 (Ill. App. Dist. Ct. 1992), the court found no intent on the part of husband to dissipate assets when he invested \$125,000 in 300 shares of stock. See also *Goldman v. Goldman*, 248 N.J. Super. 10, 589 A.2d 1358, 1362 (Ch. Div. 1991), *affirmed*, 646 A.2d 504 (1994); *Hellwig v. Hellwig*, 100 Ill. App. 3d 452, 426 N.E.2d 1087 (1981); *Wassif v. Wassif*, 77 Md. App. 750, 551 A.2d 935 (1989); and *Lippert v. Lippert*, 627 P.2d 1206 (Mont. 1981).

In *Gentile v. Gentile*, 565 So.2d 820, 823 (Fla. 4th DCA 1990) the appellate court observed:

"[T]hose entering into a marriage partnership must share not only the benefits and successes of the relationship, but also the risk of failure and the economic consequences to the parties of such failure. To allow the parties to litigate whether one spouse invested the parties' money contrary to a "prudent man" standard entitling the other spouse to a greater share of the marital pie and economic devastation for the other spouse raises the consideration of "marital misconduct" to new and uncharted levels of fault finding. The next step of course would be to insist on a financial accounting of all of the marital years to determine which spouse was the more prudent investor and spender. We do not choose to start down such a path with this case."

## 3. **FAILURE TO FILE A JOINT RETURN**

Usually, but not always, the filing of a joint tax return will cost the parties less in taxes than if each filed, "married, filing separately." Thus, in *Gruver v. Gruver*, 372 Pa. Super. 194, 539 A.2d 395 (1988), the trial court was upheld in finding that the

husband dissipated marital assets to the extent of increased tax liability by failing to file a joint income tax return with his wife. However, see *Hedelius v. Hedelius*, 361 N.W.2d 421 (Minn. App. 1985) for a contrary ruling.

#### 4. **TRANSFERS OF PROPERTY**

##### 4.1. **TRANSFERS TO PARENTS**

Where there is no showing of a bona fide purpose, business or otherwise, for a transfer of assets to one's parents, courts have no hesitancy in disregarding such transfer.

A holding that a husband cannot, after separation of the parties, voluntarily reduce his assets by their transfer to his parents was upheld in *Clayton v. Clayton*, 569 A.2d 1077 (Vt. 1989). There, seven months before the marriage, the husband entered into an agreement with his parents to obtain stock in a family business, payment for which was made during the marriage. The wife was unaware of the terms of the agreement which provided that the stock was sold with the understanding that it was always to be considered the personal property of the husband and not as joint property in the event of his marriage.

Although the husband received a bill of sale for his interest in the stock, the stock itself was never issued. After the parties separated, the husband's parents marked the agreement "void." The husband argued that the trial court should give weight to his contract with his parents under which his parents sought to recapture his interest in the business. That argument was rejected, the trial court stating that the husband "cannot benefit legally by his acquiescence in his father's manipulation of the parties' assets, especially where, as here, there appears to be no rational business purpose." 569 A.2d 1077, 1078 (Vt. 1989).

In affirming in *Clayton*, the Vermont Supreme Court noted that the wife did not seek a declaration that the purported conveyance was fraudulent nor did she name the parents as third party defendants. Nevertheless, the court reasoned:

"It was the court's duty to consider the bona fide ease of the transfers from plaintiff to his parents in assessing . . . the value of all property interests of each party. [The husband] was free to present evidence that the conveyances to his parents were bona fide and not undertaken for the purpose of diminishing the value of the marital estate, but he did not do so. Instead, he presented evidence of a contract expressly designed to insulate certain assets of [the husband] from any claim that [husband's] spouse might make. 569 A.2d 1077, 1080 (Vt. 1989)

See also *Bak v. Bak*, 24 Mass. App. Ct. 608, 511 N.E.2d 625 (1987) where the

court stated: "When a divorce is eminent, a spouse may be a 'creditor' . . . entitled to complain of conveyances designed to frustrate the right to assignment of property."

## 4.2. **TRANSFERS TO CHILDREN**

### 4.2.1. **HELD IMPROPER**

In *Halvorson v. Halvorson*, 482 N.W.2d 869 (N.D. 1992), husband transferred cattle, machinery, and 40 acres of land to one of the parties' children. The court found this transfer to constitute wrongdoing when it stated, "these assets were transferred without consideration, without . . . [wife's] consent, and against . . . [wife's] desire to treat all of the children equally." *Halvorson*, 482 N.W.2d at 870. See also *Ahlo v. Ahlo*, 619 P.2d 112 (Hawaii App. 1980)

Also note *Hollander v. Hollander*, 18 FLR (BNA) 1027 (Md. Ct. Spec. App., Nov. 1, 1991), where the courts stated:

"[W]here a chancellor finds that property was intentionally dissipated in order to avoid inclusion of that property towards consideration of a monetary award, . . . the chancellor should consider the dissipated property as extant marital property . . . to be valued with the other existing marital property."

See *McGoldrick v. McGoldrick*, 85 Or. App. 412, 736 P.2d 622 (1987); *Van Wyk v. Van Wyk*, 86 Wis.2d 100, 271 N.W.2d 860 (1978) and *Brooks v. Brooks*, 733 P.2d 1044 (Alaska-1987).

## 4.3. **TRANSFERS TO A TRUST**

It was the holding of the court in *Lynch v. Lynch*, 147 Vt. 574, 522 A.2d 234 (1987), that since property owned by either spouse is subject to distribution, notwithstanding a transfer of property to a trust, where one party reserves the power of revocation, that power of revocation is tantamount to ownership. Accordingly, the trial court had the power to order the trust revoked and consider the trust property as marital property. See also *Kaladic v. Kaladic*, 589 P.2d 502 (Colo. App. 1978), and *In re Marriage of Stallworth*, 192 Cal. App. 3d 742, 237 Cal. Rptr. 829 (1987) where it was held that "absent written consent, written ratification, waiver or estoppel, the non-donor spouse is not precluded from voiding the gift from community funds into a trust for the minor child."

## 5. **ENCUMBERING MARITAL ASSETS**

Where marital property is encumbered and there is no showing that same was made to acquire marital property or to satisfy debts, the courts have been justified in including the full value without the encumbrance as marital property, and thus subject to distribution.

In *Sharp v. Sharp*, 58 Md. App. 386, 473 A.2d 499 (1984) the trial court was affirmed in giving no credit for the mortgage on the farm because it could have found either that the husband failed to establish that any unpaid debt was directly traceable to acquisition of marital property or that the property had been encumbered to avoid equitable distribution. See also *Maio v. Maio*, 151 A.D.2d 463, 542 N.Y.S.2d 253 (NY 1989) and *In re Marriage of Donovan*, 122 Ill.App. 3d 803, 462 N.E.2d 9 (1984).

#### 6. **FAILURE TO PREVENT FORECLOSURE**

Where one party has the means to keep a mortgage current and does not, that party is properly charged with dissipation of that asset. Such activity (or non-action) is usually charged against the wrong doing party in the distribution. See *Heins v. Heins*, 783 S.W.2d 481 (Mo. App. 1990); *In re Marriage of Aslaksen*, 148 Ill. App. 3d 784, 500 N.E.2d 91 (1986); *In re Marriage of Siegel*, 123 Ill. App. 3d 710, 463 N.E.2d 773 (1984); and *In re Marriage of Cook*, 117 Ill. App. 3d 844, 453 N.E.2d 1357 (1984).

#### 7. **DISSIPATION OF NON-MARITAL ASSETS**

Although a party should be able to dispose of his or her own non-marital assets without restraint, should a parties' disposition of non-marital assets during marital strife be a consideration in the distribution of the marital assets? The answer was "yes" according to the holding in *In re Marriage of Cecil*, 202 Ill. App. 3d 783, 560 N.E.2d 374 (1990).

In *Cecil, supra.*, the evidence showed that the wife sold a home owned by her prior to the marriage without her husband's knowledge and distributed the proceeds to her children. The court stated that "[t]his conduct... [by the wife] should be considered in the distribution. It is inequitable to allow her to dissipate her non-marital estate in view of marital difficulties, and then to receive a larger distribution than that to which she would normally be entitled simply because she had little non-marital property at the time of the dissolution."

### **IV. PROVING DISSIPATION**

#### 1. **PURSUING DISCOVERY**

After the facts presented by your client are fully analyzed the next step is to aggressively pursue discovery to determine where and how assets or income have been dissipated. Frequently the dissipated assets are not squandered but rather are hidden with a third party. Third party discovery needs to be focused and related to your theory.

Remember that third party claims, though colored by their incorporation into a divorce proceeding, are *traditionally non-matrimonial* in nature and as such may have different standards of proof and different triers of fact (i.e. fraud, can be tried separately as a jury trial). Also, the third party claim is not necessarily resolved by a decision to "do equity" particularly when the issue is fraudulent transfer, constructive trust or dissipation. For those reasons

discovery against the third parties must be fully explored so that their involvement in the divorce issues can be proven and related to the divorce issues at hand.

CAVEAT: In the use of evidence remember that third parties are not mere witnesses but are "parties" and as such, all evidentiary exceptions applied to parties will apply. Admissions of third parties can be used, without calling the third parties, to establish the constructive trust, fraudulent transfer and the dissipation of income.

## 2. **PROVING YOUR CASE**

Once the theories have been established, the parties have been added and the discovery is complete the next step is to prepare to prove your case. A trial memorandum citing relevant authorities is critical because each dissipation case is fact specific. Make sure the memorandum states the questions to be posed to the court in a manner which effectively supports your claim for specific remedies.

For example, the following questions would apply to the fact pattern:

- 1) *In view of the fraudulent transfer of the business, and its income potential, what is Petitioner's earning capacity for purposes of calculating support?*
- 2) *How do the fraudulent acts of dissipating and/or transferring of assets by Petitioner and Third-party Respondents affect how the remaining assets and liabilities should be divided?*
- 3) *Should the Court consider the Husband's participation in the fraud in making a "long half" distribution to the Wife?*
- 4) *What is the proper duration and amount of spousal and child support to be awarded Wife in view of all the facts of this case?*
- 5) *Should Wife be awarded all her attorney fees, expert fees, and costs in this matter, particularly in view of the actions taken by Husband in concert with his family?*

Further, it is not enough to merely believe your client. To prove dissipation or hiding of assets in third parties it is critical to be able to trace the dissipation and clearly establish that your theory and your clients right to the remedy. *Inferences will not satisfy the burden of proof against a third party.*

In dissipation cases, the trial memorandum must outline the relevant law, the facts which support application of the law, and the remedy you want the court to impose. It is also important to anticipate an appeal by requesting and then providing the court with proposed written findings. The proposed findings can serve as further argument as to why the relief should be awarded. Without a good record and findings it is difficult to sustain a dissipation case on appeal. Weave the facts in a clear and cogent manner yet do not over complicate the issues by becoming unfocused.

NOTE: In the *fact pattern* the Wife took the position that the house equity was similar to the business equity so it was just and equitable to award the Husband the dissipated assets and award the wife all the rest. This was proven by first establishing the value of the dissipated asset and then establishing through the facts and law why it should be treated as a marital asset for division purposes. The support awards were based on "potential income" (i.e. what Husband reasonably should have earned had there not been dissipation.) By showing what the Husband made while owning the dissipated asset and what the corporation provided him after the fraudulent transfer back to the parents (i.e fake loans). Also note that a post-decree modification is likely to be unsuccessful due to the strong findings in the Judgment.

## **V. SHOW THE COURT THE PATH TO EQUITY**

### **1. REMEDIES**

The last trial step is to remember that it is not enough to show the need for equity if you can't show the court how to provide a remedy. For dissipation of assets where there are enough remaining assets to compensate the aggrieved spouse, the court may charge the guilty party's distributive share with the dissipated amount thereby creating an equal award by awarding the guilty party a phantom asset. A similar remedy is to make an unequal distribution. Courts have fashioned different remedies for dissipation of assets. Some approaches depend upon what the state's particular statute allows them to do, while others depend upon the nature of the assets remaining for division. For example:

#### **1.1. THE COURT CAN CHARGE THE DISSIPATED AMOUNT TO GUILTY PARTY'S DISTRIBUTIVE SHARE**

A charge of the dissipated amount to the guilty party as his or her distributive share of the assets, where there are sufficient assets to compensate for same, is by far the most prevalent remedy. E.g. *In re Marriage of Partyka*, 158 Ill. App. 3d 545, 511 N.E.2d 676 (1987) ("Where a party has dissipated marital assets the court may charge the amount dissipated against his or her share of the marital property so as to compensate the other party"); *Sharp v. Sharp*, 58 Md. App. 386, 473 A.2d 499 (1984) ("Where a chancellor finds that property was intentionally dissipated in order to avoid inclusion of that property toward consideration of a monetary award . . . the chancellor should consider the dissipated property as extant marital property . . . to be valued with the other existing marital property.

This principle would apply even where the dissipated property cannot be recovered because it is in the hands of a purchaser who took in good faith, without notice and for value."); *In re Marriage of Faulkner*, 582 S.W.2d 292 (Mo. App. 1979) ("The inclusion of the depleted assets in the division of marital property apparently stem from the court's reluctance to deny respondent the benefit of the assets dissipated by appellant."); *Hartland v. Hartland*, 777 P.2d 636 (Alaska 1989) (Giving a

large percentage of assets because of dissipation caused reversal and remand to allow the trial court the opportunity "to recapture any dissipated assets and then determine the appropriate division of property. In doing so, the court should take care that it does not double count, that is, recapture dissipated assets and make a preferential award to [the wife] because assets have been dissipated."); *Ahlo v. Ahlo*, 619 P.2d 112 (Hawaii App. 1980) (Crediting the wife in the overall division of the marital assets with the amount she dissipated was the appropriate remedy.).

In *Martin v. Martin*, 156 Ariz. 452, 752 P.2d 1038, 1044 (1988), the Arizona Supreme Court discussed various remedies when dissipation of assets occurs. The remedy favored by the court was "the value of the dissipated property should be added to the value of the other existing community, joint tenancy, and other property held in common. The total value of existing and dissipated property should be equitably divided between the spouses."

## 1.2. **THE COURT CAN AWARD A MONEY JUDGMENT TO INNOCENT SPOUSE**

The court in *Martin, supra.*, went on to add that "where physical assets are not readily divisible or available, we believe that the statute contemplates that the court could compensate a spouse for his or her interest in the asset, and, of necessity, that would be an award of money." 156 Ariz. 452, 752 P.2d 1038, 1044 (1988)

In *Reinberg v. Reinberg*, 16 FLR (BNA) 1428 (Fla. Cir. Ct. 1990), there were no assets remaining at the time of the final hearing. The court held:

"In this case the dissipated property no longer exists as it has been long spent by the husband. But the fact that the assets previously dissipated no longer exist in the same or equivalent form has not prevented some courts from making a lump sum award representing the "non-dissipated" spouse's share of the value of such assets. The court thus awards the wife a lump sum representing her share of the value of the dissipated assets, or one-half of the \$143,960, for a lump sum award of \$71,980."

Recognizing that a lump sum award could not be paid because there were no assets, the court ordered the husband to pay the lump sum to the wife at the rate of \$3,600 per year in monthly installments of \$300.<sup>20</sup>

In *A.I.D. v. P.M.D.*, 408 A.2d 940 (Del. Super. 1979), the court held that it was within the equitable powers of the court to make an award out of future trust income where the husband had "squandered" or "wasted" all of the presently available marital property.

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<sup>20</sup> This was in addition to permanent periodic alimony.

1.3. **THE COURT CAN USE DISSIPATION TO JUSTIFY AN UNEQUAL DISTRIBUTION**

The distribution in *In re Marriage of Petrovich*, 154 Ill. App. 3d 881, 507 N.E.2d 207 (1987), of 92% of the property to the wife was justified by the husband's dissipation of considerable marital assets.

1.4. **THE COURT CAN CONSIDER IT AS A FACTOR IN THE AMOUNT AND DURATION OF A SPOUSAL SUPPORT AWARD**

Another possible remedy expressed by the Arizona Supreme Court in *Martin v. Martin*, 156 Ariz. 452, 752 P.2d 1038, 1042 (1988), is consideration of dissipation as a factor "in making a suitable award of spousal maintenance." The *Martin* court cautioned that only after the trial court has determined that a spouse is entitled to maintenance "that excesses in dealing with the common property can be considered to establish the appropriate amount to be paid for maintenance."

1.5. **THE COURT CAN USE DIFFERENT DATES FOR ASSET AND LIABILITY VALUATIONS**

In the case of *Berish v. Berish*, 69 Ohio St.2d 318, 432 N.E.2d 183 (1982) the dissipation of the marital assets dictated the timing of the valuation of the assets. The court ruled that the valuation of the dissipated assets should be at the time of the separation, when the assets existed prior to the dissipation, rather than at the time of the trial.

## **VI. AFTER THE TRIAL**

1. **JUDGMENTS**

After the trial is complete the proposed findings you have provided the court early in the case will ultimately provide the basis for the Judgment. Without a good record, judgment and findings a satisfactory judgment may be lost on appeal.

CAVEAT: It should also be noted that inclusion of third parties can also give the the court control over the third parties. For example, in the *fact pattern*, the judgment requires the third parties to ensure that the Wife receives title to the real property which is in the parents name. It also provides for contempt remedies if any party failed to comply with the courts ruling.

2. **APPEAL**

It is particularly true in a dissipation case that the trial attorney must be thinking of appeal throughout the preparation and trial of the matter. No attorney can guarantee their client that a judgment will not be appealed however an attorney can act to minimize the risk of appeal or the risk of reversal. Since proof of dissipation takes the form of proving *quasi-fault* it is important to make sure that there are judgment findings and that those findings incorporate the elements described in this article showing acts in derogation of the marriage, acts time sensitive to the marital breakdown or acts which result in financial harm to the marital estate.

## **VII. CONCLUSION**

It is no longer sufficient for the attorney to merely establish the parties' existing assets, liabilities and income and then set support and divide the assets. The attorney must thoroughly examine the asset, liability and income activities of the parties to determine whether or not there has been dissipation of income or assets. If found, the attorney must aggressively evaluate the financial history, establish the fault of the guilty party and then provide the court with the remedy to achieve a just and equitable distribution of the assets and income of the parties.

Counsel must be zealous in making a thorough examination of the financial picture of the parties from the time of the breakdown of the marriage relationship between the parties. Only after all such issues are explored can there be a consideration of a fair and equitable distribution of the assets in divorce.

**APPENDIX "1"**  
**SAMPLE PLEADING**

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF GREED

IN THE MATTER OF THE MARRIAGE	)	
Husband D. JONES,	)	
	)	No. 99999
Petitioner,	)	
	)	<b>FIRST AMENDED</b>
and	)	<b>RESPONSE,</b>
	)	<b>COUNTERCLAIM AND</b>
WIFE C. JONES,	)	<b>THIRD-PARTY CLAIMS</b>
Respondent,	)	
	)	
and	)	
DOUGLAS W. IN-LAW and SUSAN H. IN-	)	
LAW, husband and wife, and IN-LAW	)	
ROOFING, CO., an Oregon corporation,	)	
Third-Party Respondents.	)	
_____	)	

1.

The parties either own, have an equitable interest in, or have a constructive trust interest in real property, retirement, business and personal property which should be equitably divided by the Court including, but not limited to, Petitioner being awarded the marital interest in In-Law Roofing Co. subject to any indebtedness owed said corporation and Respondent being awarded the family home subject to the conditions set forth in paragraph 16.

2.

Petitioner should assume and hold Respondent harmless from any debts incurred on or before March 1, 1994. All debts incurred after that date should be the responsibility of each party, except for family debts incurred by Respondent.

3.

The parties own or claim an interest in certain real property which should be equitably divided between Petitioner and Respondent, as follows:

Parcel 1 - The marital residence should be awarded to the Respondent based on the following allegations:

- a) Petitioner, Respondent and Third-Party Respondent In-Laws entered into an oral agreement whereby said property was purchased for Petitioner and Respondent by said Third-Party Respondents.
- b) Title was to be held in the name of said Third-Parties until such time as a tax lien was removed from Petitioner and Respondents assets. When they were able, Petitioner and Respondent were to repay the Third-Parties the down payment. The Petitioner and Respondent were to make the payments on said residence.

- c) Petitioner and Respondent have fully performed to date on said agreement by making all the required payments, making repairs, making substantial improvements and providing upkeep on said residence.
- d) Petitioner and Respondent have detrimentally relied upon the agreement with said Third-Party Respondents by taking the above actions as well as making extra principal payments and substantial improvements to the property under the promise of a transfer of title.
- e) The tax lien was removed in 1992.
- f) Title to said residence currently is being held in constructive trust by Petitioner's parents, DOUGLAS W. In-Law and SUSAN H. In-Law (known hereafter as Third-Party Respondents In-Laws).
- g) Said property should be awarded to the Respondent subject to Respondent assuming the bank loan and the Respondent granting Third-Party Respondent a non-interest bearing mortgage in favor of said Third-Parties which would be payable within 10 years or upon sale of the property, whichever occurred first. Said real property is located at 123 Primrose Lane, Albany, Linn County, Oregon, and is more particularly described as follows:  
Lots 1 and 6, LOST LAKE, Linn County, Oregon.

Parcel 2. The real property Petitioner and Respondent own located 1010 State Street, Albany, Linn County, Oregon, should be awarded to Petitioner.

4.

A full and complete determination regarding the ownership and distribution of the family home, the stock, land, corporate loan and trailer cannot be made without the Third-Party Respondents being included as parties. Respondent should be awarded a judgment against Petitioner and Third-Party Respondents for her reasonable attorney's fees and costs incurred herein pursuant to ORS 107.105.

AS AND FOR RESPONDENT'S FIRST THIRD-PARTY CLAIM AGAINST THIRD-PARTY RESPONDENTS, Respondent alleges as follows:

5.

Respondent realleges Paragraphs 1 through 4 herein.

6.

- a) Petitioner, Respondent and Third-Party Respondent In-Laws entered into an oral agreement whereby said Primrose property was purchased for the Petitioner and Respondent by the Third-Party Respondent In-Laws.
- b) Title was to be held in the name of said Third-Parties until such time as a tax lien was removed from Petitioner and Respondents assets. When they were able, Petitioner and Respondent were to repay the Third-Parties the down payment. The Petitioner and Respondent were to make the payments on said residence.
- c) Petitioner and Respondent have substantially performed on said agreement by making the required payments, making repairs, making substantial improvements and providing upkeep on said residence.
- d) Petitioner and Respondent have detrimentally relied upon the agreement of said Third-Party Respondent In-Laws by taking the above actions as well as making years worth of payments, extra principal payments to pay down the mortgage and

substantial improvements to the property all under the promise of a transfer of formal ownership and title.

- e) The tax lien was removed in 1992.
- f) Said residence title is being currently held in constructive trust by Third-Party Respondents In-Laws.
- g) Said property should be awarded to the Respondent subject to Respondent assuming the bank loan and Respondent granting Third-Party Respondent a non-interest bearing mortgage in favor of the Third-Party Respondent In-Laws which would be payable within 10 years or upon sale of the property, whichever occurred first. Said real property is located at 123 Primrose Lane, Albany, Linn County, Oregon, and is more particularly described as:

Lots 1 and 6, LOST LAKE HOMES, Linn County, Oregon.

AS AND FOR RESPONDENT'S SECOND THIRD-PARTY CLAIM, RESPONDENT ALLEGES:

7.

Respondent realleges paragraphs 1-6.

8.

..... DOUGLAS W. In-Law and SUSAN H. In-Law entered into a written agreement to sell to Petitioner their stock in In-Law Roofing Co., the land upon which it is located and the trailer from which it operates all of which are a subject of this proceeding. Said agreement was a culmination of oral statements made to Petitioner and Respondent. The terms of said sale are detailed in written documents.

9.

..... The following facts are relevant to Respondent's Third-party claim:

- a) Petitioner made all the required payments and was current on all his obligations at all relevant times. The sellers had authorized Petitioner to receive salary and dividends in amounts in excess of that necessary to support his family and to make the necessary payments. Said business generated enough income to support said dividends and salary. In addition to salary, Petitioner received \$5,000 per month in dividends which was enough to make the purchase payments and set enough aside for taxes on the payments.
- b) Petitioner was the Contract owner of said business, land and trailer subject to his contractual obligation to the Third-Party Respondents.
- c) At or about the time of the filing for Dissolution, and without consideration for Respondent's investment, the Petitioner and Third-Party Respondents entered into an agreement to cancel the sale by retroactively terminating the purchase.
- d) As part of said retroactive purchase, Petitioner apparently waived his claim of interest in the purchase.
- e) Subsequent to the retroactive termination of the agreement, the Petitioner and said corporation agreed that his prior dividend payments would now be called loans from the corporation although they were not loans when distributed to Petitioner.
- f) Said alleged loans would allow the Third-Party In-Laws to be unjustly enriched by allowing them to receive the benefits of the purchase payments and at the same time be reimbursed the cost of those payments through their third party corporation.

- g) Said claimed \$15,000 and \$20,000 loans are "sham" transactions in that they were duly authorized dividend payments when paid and the attempt of the parties to characterize them as loans, after the fact, is an attempt to create false debt to lower any equitable award Petitioner may owe Respondent in this dissolution.
- h) The Court should declare that said loans are void and unenforceable or in the alternative, that they do not constitute a debt of the marriage.
- l) The Court should further determine that said retroactive termination was a fraudulent transfer in anticipation of Respondent's dissolution claim and with the intent to hinder or defraud Respondent from having the Court consider Petitioner's interest in these assets as assets of the marriage.
- j) The Court should set aside that transfer.
- k) The Court should determine the value husband acquired in said corporation and his income potential from said corporation in its final determination in this dissolution.

AS AND FOR A THIRD THIRD-PARTY CLAIM AGAINST THIRD-PARTY RESPONDENT SUSAN IN-LAW, Respondent alleges in the alternative as follows:

10.

Realleges paragraphs 1-9.

11.

That in the event the court does not find that there is a "constructive trust" over the family home as described in paragraph 19 above, then said representations by SUSAN In-Law that she would help them purchase a home by loaning the down payment and obtaining a purchase loan were false. That the falseness of that representation was material and Respondent had no knowledge of the falsity of said representation.

12.

That based on information and belief, SUSAN In-Law intended for Respondent to act upon said representation by Petitioner and Respondent by their making repairs, principal and interest payments and well as making substantial improvements to the home.

13.

That Respondent was ignorant of the falsity of said representations.

14.

That Respondent had a right to rely and did rely upon their purported truth.

15.

That in the event the Court does not find a constructive trust as pled above, then Respondent will have been damaged to her consequent and proximate damage in an undetermined amount in the approximately range of \$75,000.

16.

That said fraudulent actions were aggravated or wanton and as such Respondent should be awarded punitive damages in the sum of \$100,000 against Third-Party Respondent SUSAN In-Law.

WHEREFORE, Respondent prays for a Judgment:

## APPENDIX "2" SAMPLE TRIAL MEMORANDUM

This case involves the dissolution of a 16 year marriage complicated by serious acts of misconduct, "dissipation of marital assets" and fraud perpetrated by the Husband with the aid of his family, the Third-Party Respondents.

Wife is 33 years old and works as a waitress. Husband is 41 and until the filing of the divorce was owner of the family roofing business, known as In-Law Roofing Co. There are three children of the marriage aged 15, 12, and 10. Custody in the Wife is not contested.

Third-party Respondents are Husband's parents and currently are the absentee owners of In-Law Roofing Co. Prior to the parties' separation, Husband was made an officer of In-Law Roofing. He also ran the business. In the summer of 1993, the parents retired to eastern Oregon. Thereafter they sold In-Law Roofing, some land and a trailer to Husband and approximately six months before the divorce was filed the final sale paperwork was completed. Thereafter, Husband was the owner of In-Law Roofing subject to the terms of the contract sale agreement.

The parties also owned a home which was titled in the parents' names due to a tax lien against the parties. The parents loaned the parties the down payment, and the parties made the payments, made substantial improvements and even made extra principal payments. The parents loan was similar to the help they had provided to another child.

Shortly before Husband filed for divorce he consulted his parents. They jointly agreed to mark the sale agreement "void" or "cancelled" effectively transferring ownership of the business back to his parents. *In essence, they attempted to "unsell" the business.* In addition, Husband had his mother send Wife a "rental" agreement for the parties' home which was never signed.

On or about October 28, 1995, Wife filed her first amended response which alleged claims of fraud, constructive trust, fraudulent transfer and dissolution claims of dissipation of income and assets.

On March 17, 1995, subsequent to depositions being completed and new counsel being obtained by the Third Party Respondents, a settlement between Wife and Third-Party Respondents was reached wherein the parents would drop any claim of interest in the family residence (*i.e. it would now be considered a marital asset without claim of interest by them*). Wife would not pursue her fraud claim against Mrs. In-Law nor would she attempt to set aside the transfer of title to the business.

However, as a specific condition to the settlement, Wife retained the right to pursue all claims against Husband (including pursuing a property and support award which recognized the sale of the business to Husband and the acts taken subsequent thereto). In addition, the court would retain jurisdiction over all parties and the home to determine the title and the validity, amount and terms of any debt owing to the Third Party Respondents (*i.e. such as the terms for paying the home down payment, loans from the corporation to the parties and alleged loans made by the corporation to Husband*).

This agreement is contained in a letter dated March 17, 1995, and executed by counsel for Wife and Third Party Respondents, a copy of which is attached hereto as Exhibit "162".

Husband opposed this settlement which placed the family home clearly in the marital asset category.

To equitably resolve these issues, the Court will need to make specific findings on a number of key matters. The key issues are as follows:

- 1) *In view of the fraudulent transfer of the business, and its income potential, what is Petitioner's earning capacity for purposes of calculating support?*
- 2) *How do the fraudulent acts of dissipating and/or transferring of assets by Petitioner and Third-party Respondents affect how the remaining assets and liabilities should be divided?*
- 3) *Should the Court consider the Husband's participation in the fraud in making a "long half" distribution to the Wife?*
- 4) *What is the proper duration and amount of spousal and child support to be awarded Wife in view of all the facts of this case?*
- 5) *Should Wife be awarded all her attorney fees, expert fees, and costs in this matter, particularly in view of the actions taken by Husband in concert with his family?*

Wife sets forth in the attached Exhibit "2" the proposed findings and judgment orders sought.

I.

**THE VALUE OF IN LAW ROOFING CO. (DISSIPATED BY HUSBAND) SHOULD BE ATTRIBUTED TO HUSBAND, FOR PURPOSES OF THE ASSET DIVISION ANALYSIS**

In Clayton v. Clayton 569 A.2d 1077, 1078 (Vt. 1989), after the parties' separation, the Husband and his parents "voided" a written agreement for the sale of stock in the family business. The Court rejected the Husband's claim that the asset was not marital by stating that the Husband "...cannot benefit legally by his acquiescence in his father's manipulation of the parties assets, especially where, as here, there appears to be no rational business purpose [for the voiding..]"

The facts in this case are virtually identical. In-Law Roofing was purchased six months prior to the divorce filing. After separation, the Husband and his parents "cancelled" the sale for no consideration, with no rational business purpose (e.g. Husband was current in all payments and had fulfilled all contract terms), and in contemplation of the divorce. Notwithstanding that, Husband continued to run the business, served as corporate President, and the parents remained out of the area. Nothing has changed other than legal ownership and the way Husband is paid.

*In Clayton, the Wife did not add the parents as parties nor did she plead fraudulent conveyance yet the court still rejected a claim of a bona-fide transfer and for purposes of asset valuation and division treated the stock as a marital asset still controlled by Husband.*

In this case, Wife did add the parents and the corporation as parties and they remain so (despite a partial settlement) so the court has full jurisdiction to resolve the claims between the parties and the Third-Party Respondents. In this case, Wife did allege the fraudulent behavior and the fraudulent transfer. Clayton demonstrates that such steps, though recommended, are not necessary in a court of equity.

The above-described retroactive termination was a fraudulent conveyance between Husband and his parents which unjustly enriched the In-Laws at the expense of Wife by allowing the In-Laws to receive:

- (a) The business back without a payment of fair market value.
- (b) The benefit of the purchase payments (approx. \$20,000).
- (c) Allowing the corporation to claim that Husband is obligated to repay the

dividends and other moneys given to Husband while keeping the purchase payments.

It should be clear to the Court that except for the loan to both parties to pay their tax lien, all the other claimed "loans" are not expected to be repaid.

*In fact, Third-Party Respondent, DOUGLAS In-Law, admitted in deposition that Husband did not owe the money and it was not expected that he repay the "loans."* This entire post separation transaction is an attempt to hide Husband's true assets and income. The cancellation agreement was a blatant fraudulent transfer under ORS 95.230(1)(a).

ORS 95.230(1)(a) defines a fraudulent transfer as follow:

"A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor."

In determining "actual intent," ORS 95.230 instructs the Court to consider the following factors:

\* Whether the transfer or obligation was to an insider. The term "insider" is generally considered to mean a close associate or family member such that the transaction is not at arm's length. In such situations, the transaction should be scrutinized closely. Smith and Smith, 74 Or App 656, 705 P2d 197 (1985); Hughey v. Lind, 92 Or App 433, 758 P2d 431 (1988). Here, the transaction was between the family shareholders of a closely held corporation. This is precisely the type of "inside" relationship this statute envisions.

\* Whether the debtor had retained possession or control of the property transferred after the transfer. Although technical ownership of In-Law Roofing returned to the In-Laws after the take-back, practical control remained in the hands of Husband. Husband retained day to day control over the business. The In-Laws never returned to Albany from eastern Oregon, and at the time of deposition no shareholders meetings were ever held about the operation of the business.

\* Before the transfer was made or obligation was incurred, the debtor was sued or threatened with suit. The most salient point of this transfer is that it occurred contemporaneously with the divorce suit. The potential claim to the business of Wife was a motivating factor in Husband and his parents' actions.

It should also be noted that there was no consideration for the transfer, not even the return of the payments made for the purchase. In fact In-Law Roofing elected to keep the payments and then "recast" the dividends paid to Husband (which were made to assist him in making the payments) as loans.

The foregoing factors are simply a legislature enactment of the common law "badges of fraud." **If such "badges of fraud" exist, "...the burden shifts to the defendant[s] to show that the conveyance was not made with an intent to defraud creditors, that the consideration was fair and that no benefit was secured or reserved to the grantor."** Hughey v. Lind, 92 Or App at 437, 758 P2d at 433, citing Birens v. Hancock, 71 Or App 273, 279, 692 P2d 153 (1984). The burden is therefore on Husband and his parents and one which they cannot sustain.

This increasingly common issue of family dissipation of marital assets was addressed in the Journal of Family Law, Winter 1990, in an article written by Melvyn B. Frumkes. Attached

as Exhibit "3" is the first page of the article along with pages 318-320 which address the remedies for such dissipation.

In Soutiere v. Soutiere, 657 A.2d 206, 209 (Vt. 1995), the court affirmed the Clayton holding. In discussing the division of the marital property, the court held that judges have the power to include within marital assets property which has been placed in another name to avoid distribution to a spouse.

In Alaska, in the case of Pattee v. Pattee, 744 P.2d 658 (Alaska 1987), within days of the wife filing for divorce, the husband sold his interest in a bar which some family members owned jointly. The appellate court found that the husband intended to defraud the wife of her share of the marital asset since "three days after [the husband] was served with divorce papers, he 'sold' a valuable income-producing property to his brother at a very favorable price after which his family provided him with rent-free accommodation, money and a car." Pattee, 744 P.2d at 661. The Pattee Court identified eight criteria which may help in determining whether the transfer was a fraudulent conveyance: "inadequate consideration; transfer in anticipation of an impending suit; insolvency of the transferor; failure to record; a transfer encompassing substantially all of the transferor's property; a transfer completely depleting the transferor's property; and the relationship between the parties to the sale." Pattee, 744 P.2d at 660; citing Gabaig v. Gabaig, 717 P.2d 835, 837-838 (Alaska 1986).

Similarly in Illinois, the court in In re Marriage of Pahlke, 507 N.E.2d 71 (Ill. App. 1 Dist. 1987), held that the sale of the marriage residence by the husband to a third party was a sham transaction "where the third party and the husband may have acted in collusion to deprive the wife and children of the marital home." (Id. at 73) Significant factors leading to the court's decision that this was a sham sale were: neither a real estate broker nor an attorney was involved in the sale; the third party knew that the wife was in possession of the premises on the day of sale; the husband told the third party that "he had no prior conversations with his wife concerning the sale of the marital residence and suggested that the secret conveyance was justified as a divorce tactic"; and the value of the house was more than the amount it was sold at.

Similarly, an Oregon court recently held that a payment from a husband to his brother was a sham payment designed to reduce the assets available for dissolution, the wife was entitled to an amount equal to half of the amount conveyed to the brother. Shelley and Shelley, 127 Or. App. 616, 873 P.2d 464 (1994).

The remedy proposed by Wife is that Husband be charged with the dissipated amount (as an asset) and that the dissipation of the asset and its income capability be considered in setting spousal support.

## II.

### **WIFE SHOULD BE AWARDED INDEFINITE SPOUSAL SUPPORT AND CHILD SUPPORT BASED ON HUSBAND'S DEMONSTRATED EARNING CAPACITY AND THEIR DISPARITY IN INCOMES WITH THE COURT RECOGNIZING THAT HUSBAND ENGAGED IN FRAUDULENT ACTS IN ORDER TO ARTIFICIALLY LOWER HUSBAND'S INCOME FOR PURPOSES OF THIS LITIGATION**

The award of spousal support is not at issue. Husband's petition, in paragraph nine, asks the court to award reasonable spousal support for a reasonable time. The dispute is over the

amount and duration. To set spousal and child support at a reasonable level, the Court must first determine the earning capacity of Husband. In this case, the court must focus on more than the actual wages of Husband because the fraudulent acts taken by Husband and his family have allowed Husband to manipulate his income and income capacity for support purposes.

1. Equitable analysis.

The same analysis which applies to a transfer of assets to the parents *in avoidance of property division* also applies to the transfer of income capacity. Just as the court in Clayton v. Clayton 569 A.2d 1077, 1078 (Vt. 1989), rejected the Husband's claim that the voided stock sale was not marital, this court should not permit Husband to benefit legally by his acquiescence and participation in his and his parents' manipulation of the parties income especially where, as here, there appears to be no rational business purpose for the action.

2. Factors in calculating income.

**If Husband cannot be permitted to insulate the asset from a claim of Wife, then he should also not be permitted to insulate the potential income.**

OAR 137-50-340 is an appropriate starting place to review the factors to be considered in determining income. Under this rule, gross income includes: salaries, wages, bonuses, dividends, and other factors. OAR 137-50-340 goes further, addressing self-employed individuals or individuals who own closely held businesses. OAR 137-50-330(2)(a) also addresses rebuttal criteria which allow for departure from the guideline level of child support. From the administrative rules, the Court must then look at ORS 107.105(1)(d)(D) which addresses the "earning capacity" of each party. When these factors are construed together, the Court can understand the significance of the unique facts of this case.

Husband worked for the family business since 1988 with one goal: to purchase the business. Wife supported his long hours and commitment to this goal. Around 1991, Husband began managing the business and in the fall of 1993, the sale of the business to Husband was consummated. Prior to the sale, Husband's salary and bonuses were approximately \$46,500 per year. Husband also had outside employment from his own business.

**After the sale, Husband was authorized by the corporation, in writing, to receive up to \$120,000 per year; \$35,000 in salary and another \$85,000 in dividends. He was also authorized to take out \$800 per month (\$9,600 per year) as lease payments to himself.** In fact, upon Husband's purchase of the business, he began drawing approximately \$90,000 per year by taking \$5,000 per month in dividend income in addition to his salary for a monthly income of \$7,483 per month. This income level was continued each and every month until he filed for divorce. Then, and only then, actions were taken to hide his true income.

First, Husband and Third-Party Respondents jointly and retroactively canceled the sale of the business and pretended it had never occurred. *They even jointly and retroactively altered the corporate records so that the dividend payments were now labeled as loans.* Second, the corporation continued to pay him more than his new "reduced" salary by making continual "loans." Third, they told the Wife that he no longer owned the business.

The flaw in the scheme was that Husband was current in his business purchase payments. He had honored every term of the purchase and sale agreement and there was no legitimate business reason to terminate the sale. In deposition, the Third-Party Respondents conceded that the reason was the pending divorce and that is why Husband continues to run the business.

By retroactively terminating the sale, that marital asset would purportedly be removed

from the asset division equation as would the income it produced. The corporation even "recast" the \$5,000 per month of income (i.e., dividend payments) as "loans" creating debt from what had clearly been marital income. As a result, Husband hoped to dramatically lower his spousal and child support exposure. *The Court should not encourage or ratify such fraudulent actions.*

It is undisputed that the Third-party Respondent sold the business to Petitioner. It is undisputed that Petitioner was current on his purchase obligations at the time of the retroactive termination. It is undisputed that the sale agreement had no provision that would authorize the retroactive termination of the agreement under those facts. It is also undisputed that the retroactive termination was done in contemplation of and timed to coincide with this divorce. It is clear how much gross income was anticipated by the sale agreement.

In the interest of equity, the Court should set Husband's earning capacity at \$6,000 per month (\$72,000 per year) which is only 60% of the \$120,000+ income he was authorized to receive under the sale agreement and is 80% of the exact amount he was paying himself at the time he fraudulently transferred the business back to his parents.

This \$72,000 per year figure is more than supported by the corporation's own tax returns. In 1992, In-Law Roofing paid officers \$106,843. In 1993, it paid officers \$116,685 or over \$140,000 if you add Husband's wage to the 1993 figure. In 1994, when the business was sold, Husband and the Third parties contemplated an income package of over \$120,000/year of which an annualized \$90,000 per year was actually paid.

An income range of \$90,000 to \$129,600 was the minimum income level all the parties anticipated for Husband when the business was purchased and that is supported by the evidence, the depositions, and the sale agreement. Wife concedes that a portion of that income was to be expended to the parents for the purchase of the business but that purchase would have also increased the equity stake in the business. It would still have been gross income to Husband. Certainly, \$72,000 per year is a reasonable wage for the president, manager and chief operating officer of the business.

*The only reason Husband's income is not at that level at this time is because of the fraudulent and retroactive termination of the business sale.*

3. Statutory Authority related to the duration of spousal support.

This case presents the classic facts contemplated by the legislature and the courts in establishing a basis for permanent support.

- \* The parties have been married 16 years.
- \* The Wife will have custody of three minor children.
- \* Wife has assisted Husband advance in his career including the purchase of the family business.
- \* Wife has been a mother and the homemaker since the birth of the parties' first child.
- \* Wife has no job skills other than being a waitress.
- \* Wife requires education and retraining to compete in the current marketplace.
- \* Wife will never be able to recover her lost earning capacity and receive wages comparable to Husband earning capacity.

A. WIFE SHOULD BE AWARDED SPOUSAL SUPPORT IN A REASONABLE AMOUNT AND DURATION

Wife should be awarded spousal support due to the length of the marriage, disparity in

the parties' earning capacity, Wife's career sacrifices for Husband, Wife's absence from the job market to perform the role of homemaker and other equitable considerations.

The Supreme Court in Grove and Grove, 280 Or 341, 571 P2d 577 (1977) noted that the legislature chose to express the standards for support not in terms solely of need but in terms of what is just and equitable. The purpose is to do justice between the parties. It is the policy of the state of Oregon that spousal support operates to lessen substantial financial inequities between the spouses, taking into account their needs and those of their dependents as well as their probable incomes.

Spousal support addresses the twin problems of income and disparity of income potential between former spouses. Here it is the overwhelming disparity of income and income potential income due to Wife's extended absence from the job market, which results in the need to provide Wife with a standard of living not overly disproportionate to that enjoyed during the marriage.

In the lead case of Kitson and Kitson, 17 Or App 648, 523 P2d 575 (1974), the court noted these important factors stating:

"While each case must be decided on its own facts and no formula can be stated, certain principles emerge from an examination of the above cases. The most significant factor usually is whether the wife is employable at an income not overly disproportionate from the standard of living she enjoyed during the marriage. The wife's employability includes consideration of her education, training, experience, age, health, capacity, whether she has custody of small children, etc. Length of the marriage is germane because the longer the marriage, the more likely it is that the wife has foregone employment experiences, the absence of which will make it more difficult for her to achieve self-sufficiency." Kitson and Kitson, supra at 578. [Emphasis added.]

ORS 107.105(1)(d) provides for spousal support in amounts that may be "just and equitable" and specifies categories, consideration of which is mandatory. The critical categories and facts relevant in this case are:

1. THE LENGTH OF THE MARRIAGE

Length of marriage has been and continues to be a major factor in determining the eligibility for support and its duration. In this case, the parties have been married 16 years. Permanent spousal support has been awarded in a multitude of marriages of similar duration. For example, Stuart and Stuart, 107 Or App 549, 813 P2d 49 (1991) (17 year marriage); Bailey and Bailey, 108 Or App 678, 816 P2d 1195 (1991) (16 year marriage); Pokorny and Pokorny, 109 Or App 503, 820 P2d 827 (1991) (17 year marriage); Griggs and Griggs, 113 Or App 178, 831 P2d 79 (1992) (18 year marriage).

2. THE AGE AND HEALTH OF THE PARTIES

Wife is 35 years old and in generally good health. Although presently only 35, it is going to be extremely challenging for a 35 year old woman with three young children and limited employment history to find work that will support her and her family at a level comparable to Husband.

3. THE CONTRIBUTION BY ONE SPOUSE TO THE EARNING CAPACITY OF THE OTHER SPOUSE

The Court has consistently held that contributions over the duration of the marriage to the other spouse's earning capacity justify significant amounts of spousal support. See, e.g., Goff

and Goff, 109 Or App 447, 820 P2d 33 (1991) (Court awarded permanent support, noting that, "husband has achieved an advantageous economic position through the parties' joint efforts."); Hearn and Hearn, 128 Or App 259, 875 P2d 508 (1994) (Indefinite support awarded in light of Wife's, "14 year absence from the work force, taken in order to raise children and enable Husband to pursue his education and gain an advantageous economic position."). Here, Wife has not worked a full-time job in order to care for the children and look after the home so Husband could be free to pursue his career with In-Law Roofing.

#### 4. DISPARITY IN EARNING CAPACITY

Disparity in earning capacity of the parties has routinely been held to be the most significant factor in determining the amount and duration of support.

Since 1988, Husband has earned an ever increasing salary as an employee and owner of In-Law Roofing. Husband's annualized income was \$90,000 per year when he gave away the business. He earned between \$40,000 and \$50,000 per year plus trades of services when he was not the owner (after expenses). It is unlikely that Wife will be able to find employment which will bring her up to the standard of living she enjoyed during the marriage. Wife simply cannot make up the fifteen years she has given over to Husband in support of his career.

#### 5. THE NEED FOR EDUCATION AND RETRAINING

Wife will need support to develop skills.

#### 6. THE EXTENT TO WHICH THE PRESENT AND FUTURE EARNING CAPACITY OF A PARTY IS IMPAIRED DUE TO THE PARTY'S EXTENDED ABSENCE FROM THE JOB MARKET TO PERFORM THE ROLE OF HOMEMAKER

Wife has lost critical years from her professional career to contribute to Husband's career and care for the parties' children. She may be able to begin a career after training, *but will never be able to make up the lost years*. If she is lucky enough to earn an adequate income comparable to the lifestyle Husband fraudulently disposed of then Husband can seek modification.

#### 7. NUMBER, AGES, HEALTH AND CONDITION OF DEPENDENTS

In addition to supporting herself, Wife will be caring for and supporting the parties' three children. Spousal support cannot be considered in a vacuum. Doubtless the needs of the children shall put some strain on Wife's resources even with the addition of child support.

#### 8. TAX ASPECTS OF THE SPOUSAL SUPPORT AWARD

Spousal support is tax deductible to Husband and taxable to Wife. In reality, Husband will receive a tax deduction for spousal support adding back to his disposable income approximately 30% of the face amount of the support award. Conversely, Wife will be paying that amount in additional taxes.

#### 9. THE STANDARD OF LIVING ESTABLISHED DURING MARRIAGE

Unfortunately, Wife will never be able to enjoy the standard of living that she had during the marriage. However, the courts have mandated that the supported spouse should be able to enjoy a post-dissolution standard, "not overly disproportionate to that enjoyed during the marriage." Grove and Grove, *supra*, Olson and Olson, 52 Or App 695, 699, 629 P2d 834 (1981); ORS 107.105(1)(d)(E). Here, support should be awarded at least in an amount which will allow Wife to build towards self-sufficiency.

Wife should be awarded indefinite spousal support based on Husband's earning capacity, the factors present in this case and disparity in incomes. The court is permitted to award non-modifiable support as "compensation" due to the unrecoverable loss incurred. A portion of the

support should be designated as such "compensation." As described above, the Court should also recognize that Husband and his parents have engaged in a fraudulent reconveyance to artificially lower Husband's income for the purposes of this litigation.

III.

**THE MARITAL RESIDENCE SHOULD BE HELD TO BE AN ASSET OF THE MARRIAGE AND SHOULD BE AWARDED TO WIFE FREE OF ANY CLAIM BY HUSBAND**

1. HISTORY OF THE MARITAL RESIDENCE AS AN ASSET OF THE MARRIAGE

Wife and Third-Party Respondents have stipulated and agreed that the family home is a marital asset. Though Husband opposed the settlement, he has acknowledged the asset in his proposed distribution. The following summarizes the facts that led up to the settlement between Wife and Third-Party Respondents.

In 1988, Husband and Wife returned to Oregon from Montana, in order for Husband to work for his father and with the promise to one day take over the family roofing business. At that time, they had endured a bankruptcy and a substantial tax lien against their assets. At first, the family rented a home on Sixth Street in Albany.

In Third-Party Respondent Mrs. In-Law's opinion, that house and its location were not suitable for the family and she and her husband wanted to help them purchase better housing. Mrs. In-Law called a meeting at her home to present to Petitioner and Respondent a proposal. The meeting was attended by Petitioner, Respondent, and the Third-Party Respondent In-Laws. SUSAN In-Law proposed to purchase a house of Wife's choosing. She and her husband would loan the down payment and secure the loan.

The parties orally agreed on the following terms: Title was to be held in the In-Law's name until such time as the above-described tax lien was removed from Husband and Wife's assets to prevent seizure by the government. *When they were able, Husband and Wife were to repay the In-Laws the down payment.* Husband and Wife were to make the payments on the house through the In-Laws, in addition to making the repairs, and improvements they wanted. This arrangement of buying a home for their children was not unusual for the In-Laws. *They had purchased a home for a daughter under similar terms wherein the down payment has still not been repaid even though the home has been sold. The only difference in the other child's situation was that without a tax lien there was no need for the In-Laws to hold title.*

Husband and Wife fully performed their part of the agreement. They have made all house payments, even writing extra payments "for principle." Husband and Wife also made between \$10,000 and \$20,000 worth of improvements to the property which have substantially improved its market value. These improvements included a new bathroom, counters, rugs and landscaping. Husband and/or Wife have also made all upkeep on the home. The tax lien was removed in 1992 and the next year Husband purchased the family business.

When Petitioner filed for dissolution of the marriage, in concert with Husband, Third-party Respondent Pat In-Law reneged on the house purchase agreement, which had been substantially performed, and for the first time asserted that the house was a rental and not being held by her for Petitioner and Respondent. That position was maintained until the settlement.

Inasmuch as the legal status of the home is no longer an issue, the legal analysis regarding the fraud and constructive trust are only relevant to attorney fees. As a result, that part of this memorandum is attached as a supplement marked Exhibit "4". The supporting evidence will not be offered at trial.

IV.

**ATTORNEY FEES MUST BE AWARDED WIFE IN THIS MATTER**

**In 21 years of practice, this counsel has never seen a case more deserving of an award of attorney fees and Wife asks the court to make special findings in awarding such fees and costs against Husband.**

Wife's lack of ability to pay and Husband's fraudulent acts in concert with his parents are appropriate considerations in awarding attorney fees. Clapperton & Clapperton, 58 Or App 577, 649 P2d 620 (1982). The fact that the family home is now conceded by the parents as a marital asset (when that position was rejected for a year) is proof of the extraordinary acts Wife had to take to prove her claim. The fact that Husband attempted to undermine that settlement is further proof.

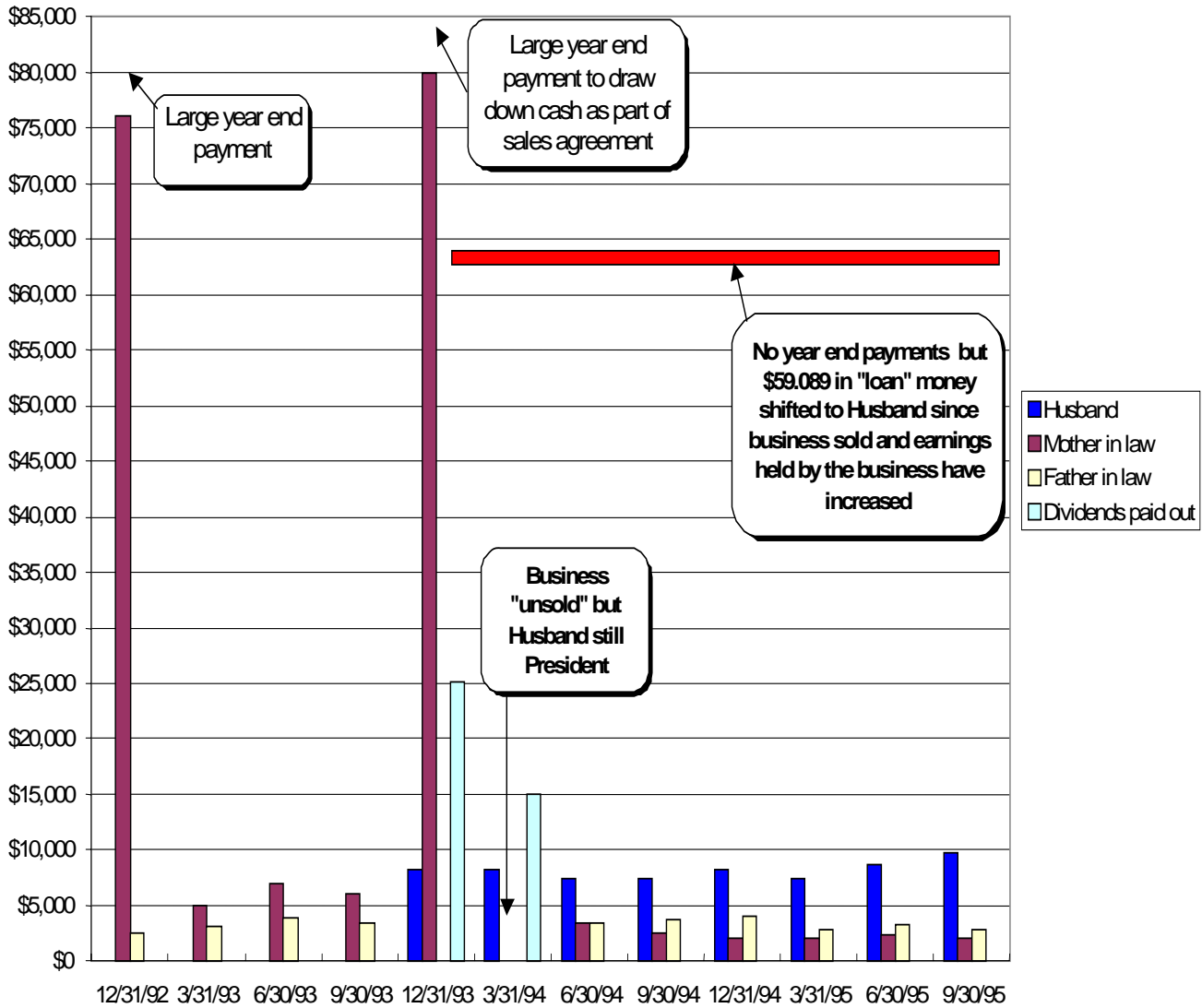
Husband has made it extremely difficult to ascertain the true nature of the marital assets. Husband has failed to provide timely discovery, has attempted to hide marital assets through the use of cancelled sales and rewritten documents all of which have hindered Wife's attorney in locating and evaluating the marital assets of the parties. Wife should not be so penalized.

In Hinsdale and Hinsdale, 20 Or App 638, 532 P2d 1137, 1140 (1973), the Court of Appeals awarded attorney fees even though the trial court awarded Wife \$180,000 in cash and assets stating:

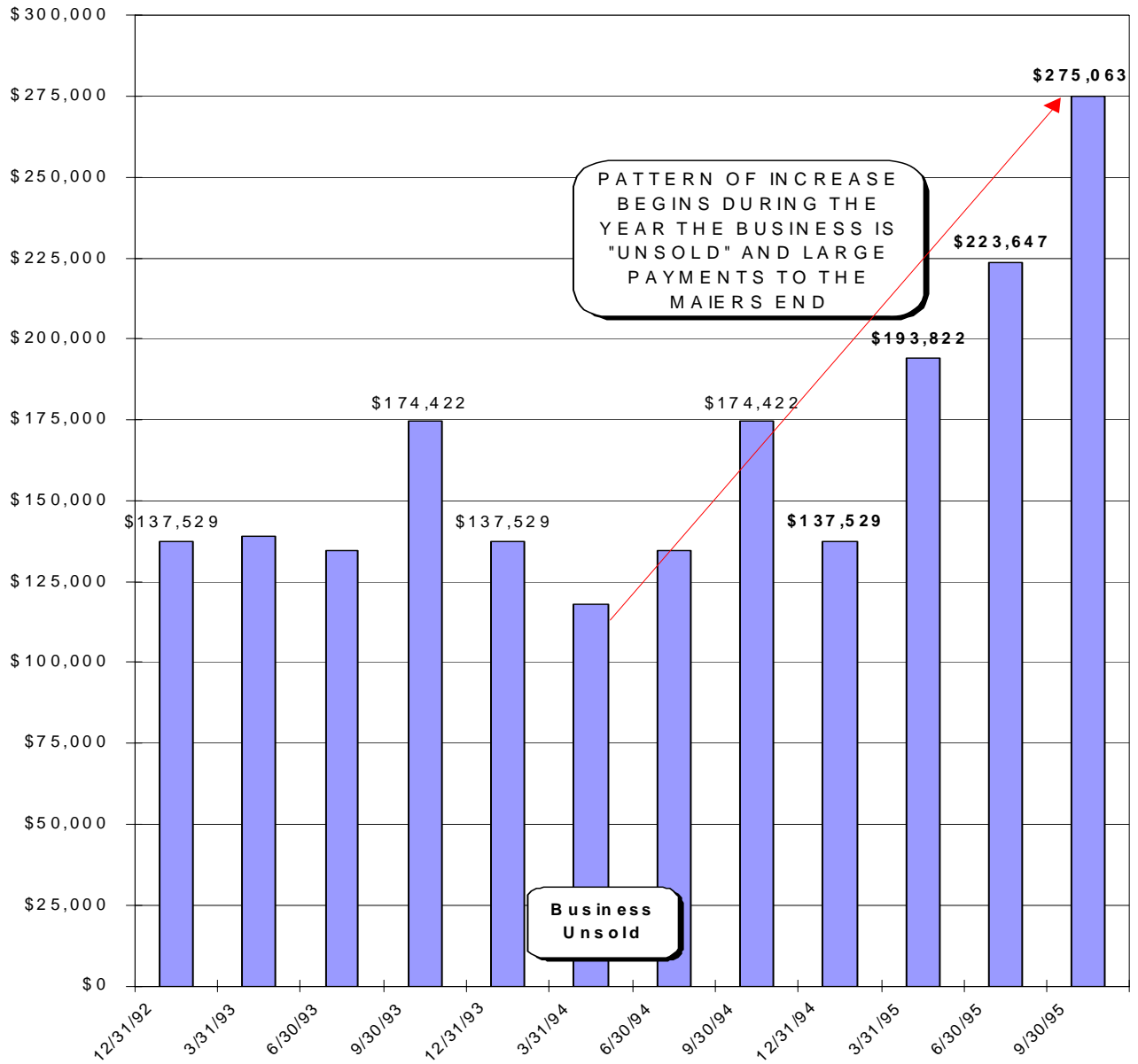
" . . .the wife, as respondent to the suit, was forced to go to unusual lengths in order to present her case in the matter of the property division. To expect the wife to pay her attorney's fees, which are much greater than would have otherwise been necessary if there had been co-operation and candidness on the part of the husband, from her portion of the property award is an inequitable result."

Additional factors will be submitted in the Rule 68 affidavit but the above factors alone justify a full and complete award of attorney fees and costs. Attorney fees are also an appropriate remedy for the acts of dissipation.

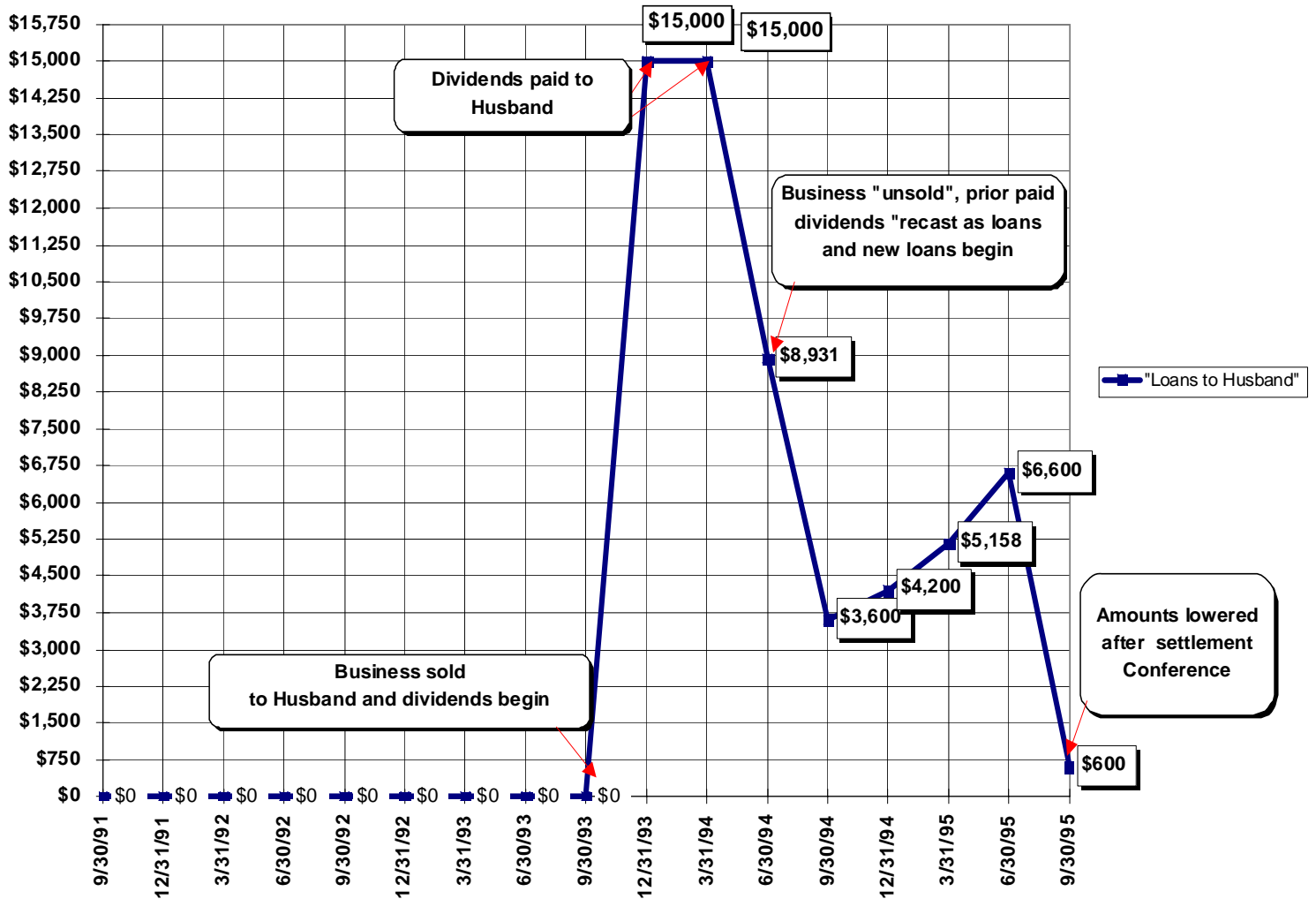
## APPENDIX "3" SAMPLE EXHIBIT OF HISTORY OF OFFICERS SALARIES



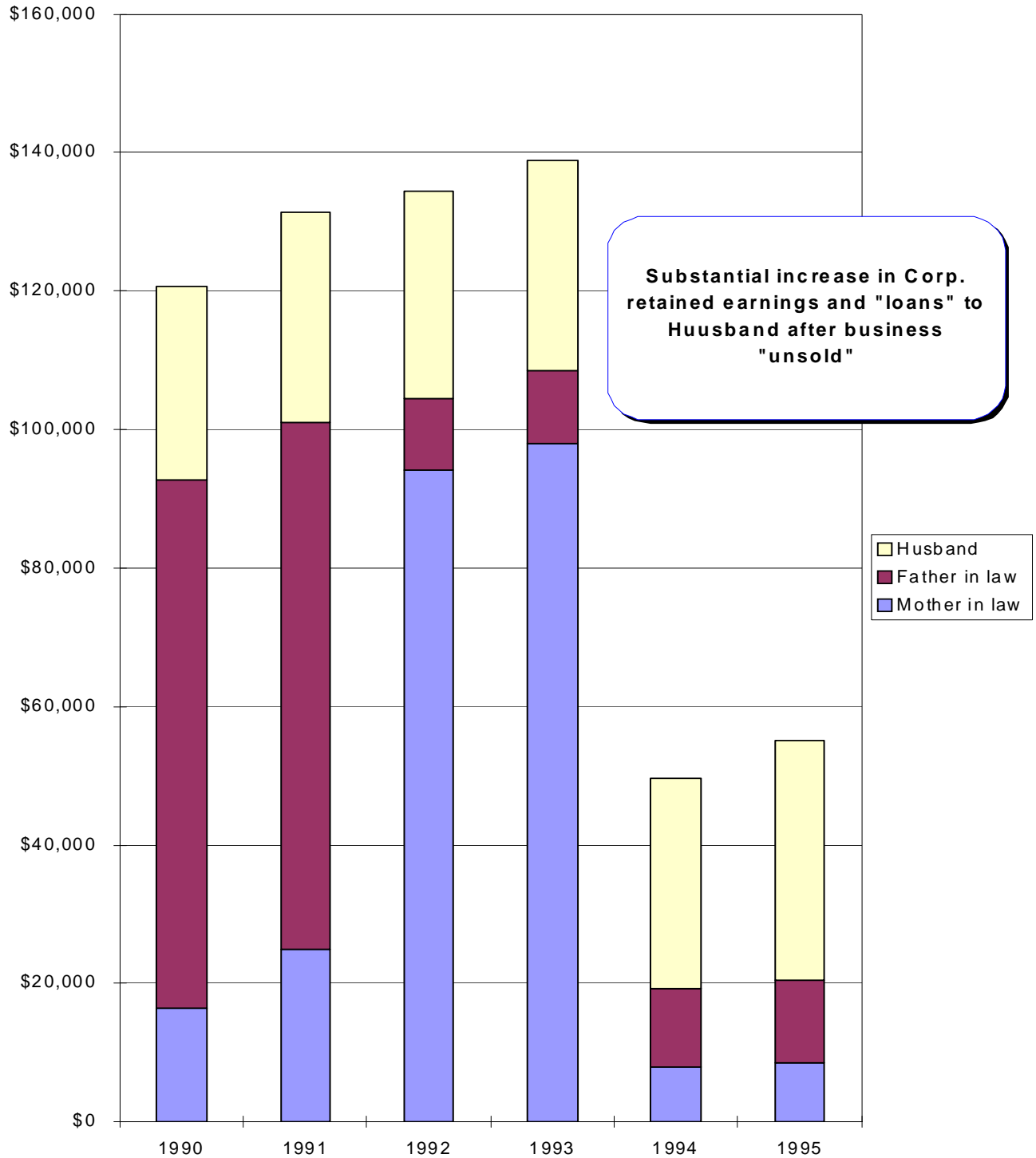
## SAMPLE EXHIBIT OF INCREASE IN SHAREHOLDERS EQUITY WHILE DIVORCE PENDING



## SAMPLE EXHIBIT OF CHANGES IN CORPORATE LOAN/DIVIDEND ACTIONS WHILE DIVORCE PENDING



## SAMPLE EXHIBIT OF OFFICER PAYROLL HISTORY



## APPENDIX "4"

### SAMPLE JUDGMENT OF DISSOLUTION LANGUAGE

THIS MATTER coming before the Honorable Smart Judge for trial on October 31 and November 1, 1995, and the Court having taken testimony and received exhibits, and Respondent having appeared in person and by counsel, Gilbert B. Feibleman, Petitioner having appeared in person and by counsel, Gary Lawyer, and Third Party Respondents having appeared in person, by their corporate representative and by their attorney, Donald Lawyer, and the Court took the matter under advisement and issued a letter opinion dated November 10, 1995 and, makes the following specific findings:

1.12 The Third Party Respondents are necessary parties because they are in title to the family residence and they were the owners and contract vendors of In-Law Roofing at the time of its sale to Petitioner and the subsequent cancellation.

**[Paragraphs deleted because they are irrelevant to example]**

3.2. At the time of the purchase of the family home located at 123 Primrose Lane, Albany, Oregon 97321 there was an agreement that the home was being purchased for Petitioner and Respondent (hereafter referred to as "the parties"), that the down payment was being loaned at no interest, and that the down payment could be paid back when the parties were able.

3.3. Third Party Respondent In-Laws and Respondent have entered into a settlement whereby the In-Laws waive any claim of title in the property and will transfer their interest to the parties pursuant to the direction of this court.

3.4. As part of their settlement, the In-Laws and Respondent have not agreed on the terms of repayment of the down payment, and the Court retains jurisdiction to resolve that issue and the method of assigning the loan.

3.5. The Petitioner conspired with Third Party Respondent In-Laws to wrongfully dissipate marital assets by removing the marital home from consideration in the marital estate. (See findings 6 and 9 infra. As part of that conspiracy, Petitioner denied the parties' claim of interest and called the property a rental when he: (a) had always considered it the parties'; (b) had made substantial improvements under a claim of ownership; (c) contracted for water under a claim of ownership; (d) made extra principal payments under a claim of ownership; and (e) always held the property out to others as belonging to the parties. The Petitioner further told Respondent that the only way she would share in the equity in the home was if she agreed to his terms in which case his parents would tender title. Otherwise, they would jointly put her "out on the street." The court makes this finding as it bears on the award of attorney fees only.

3.6. That on or about September 30, 1993, Third Parties Jim In-Law and SUSAN In-Law entered into a legitimate sale to Petitioner of the business known as In-Law Roofing.

3.7. The Petitioner and Third Party Respondents entered into an oral agreement while the parties still cohabitated, which was later codified in writing, that sold Third Party Respondent In-Law Roofing, land and a mobile home (office) to Petitioner. It was the intent of the Third Parties that said sale was equitably made to the parties and was for the benefit of both parties.

3.8. Prior to said sale, Petitioner ran In-Law Roofing, and at the time of the actual sale the Third Party In-Laws had already moved to Eastern Oregon from the Albany area.

3.9. In anticipation of Petitioner filing for dissolution and Respondent filing a claim against these assets, the Petitioner and the Third Parties conspired to retroactively cancel the written agreement regarding the In-Law Roofing sale. At that time, the Petitioner had fully complied with each and every term of the sale agreement. At that time, the Third Party Respondents In-Law had not sent any letter specifying any item of default. At that time, there was no legal reason by which the sale agreement could have been terminated. At that time there was no rational or logical business reason for Petitioner to return the business and terminate the sale.

3.10. The cancellation of the sale and transfer back to the Third Parties of the corporate and other sale assets was an attempt by the Third Parties and Petitioner to dissipate and manipulate marital assets which would have the effect of removing them from the jurisdiction of this Court.

3.11. The acts of the Petitioner and the Third Party Respondents resulted in the wrongful dissipation of marital assets in that the re-transfer by Petitioner of the business was without consideration, the transfer was made to hinder the potential claim of the Respondent in the dissolution suit, the transfer was to an insider and the threat of divorce was pending at the time of the reconveyance of the business to the Third Party Respondents.

3.11.1 The Court notes in particular the testimony of the corporation's attorney in making finding 3.11 in that he testified that:

- a. termination of the sale of the business was, in part, a way of limiting husband's exposure on spousal and child support in the divorce; and
- b. the possibility that wife would share in obtaining part of the business was a factor in advising the In-Laws about unselling the business; and
- c. the value of the business and what wife would get in the divorce was another consideration that he and the In-Laws discussed in making the sale; and
- d. he was concerned about how much husband would have to pay as spousal and child support in light of the dividends.

3.12. Petitioner served in the role as President and manager of In-Law Roofing in the past and continues to do so.

3.13. The net value of In-Law Roofing (and the other contract sale items) at the time of the fraudulent conveyance to the Third Party In-Laws was \$87,938. It is just and equitable to charge Petitioner with the value of those transferred assets.

3.14. In-Law Roofing had the ability to produce substantial income to its officers and manager. In 1992 it paid its officers \$106,843. In 1993 it paid its officers and Petitioner over \$140,000. The contract sale terms written in 1994 allowed for combined annual payments to Petitioner of \$35,000 in salary, \$800 per month in lease payments, and \$85,000 in dividends for a combined income in excess of \$120,000 per year. During Petitioner's period of ownership, he paid himself wages of \$2,483 per month and \$5,000 per month in dividends for a combined gross monthly income of \$7,483 per month or approximately \$90,000 per year.

3.15. The Court specifically rejects the Petitioner's claim that the combined gross income he earned while owner of In-Law Roofing cannot be considered in determining his income capacity for purposes of setting support.

3.16. Petitioner will not be permitted to legally benefit by his actions and his acquiescence in concert with the Third Parties to manipulate the Petitioner's income by

retroactively terminating his contractual right to receive in excess of \$120,000 per year in income.

4. The Court finds that for purposes of calculating child and spousal support the Petitioner possesses the capacity to earn \$6,000 per month and the Respondent possesses the capacity to earn \$1,100 per month. Counsel should calculate child support based upon these findings, including the spousal support award, pursuant to the Oregon Child Support Guidelines.

5. Respondent's current earning capacity is impaired due to her extended absence from full time work outside the home and the parties desire for her to fulfill the role of homemaker. The court finds that based upon her good health, age and possession of a real estate license, Respondent's earning capacity will increase over time and that within seven years wife's earning capacity should be high enough to insure that she can afford a standard of living not disproportionate to what she enjoyed while married. Accordingly spousal support should be \$1000 per month for two years; reducing to \$800 per month of two years; reducing to \$650 per month for two years; and reducing to \$500 per month the final year.

6. The actions of Petitioner, in concert with the Third Parties, have caused Respondent to go to extraordinary lengths to establish the true marital assets, debts and income. As a result of those actions, Respondent has incurred substantial attorney's fees and costs which should not have been necessary. Those actions resulted in the need for thorough and complicated analysis, research, discovery, preparation, and evidence presentation which in and of themselves resulted in the Third Parties' decision, only after the case was approximately 1 year old, to relinquish a claim of interest in the family home. Based on the actions of the Petitioner, in concert with the Third Parties, the Court awards a judgment against Petitioner for all of Respondents' attorney's fees, costs, expert fees and discovery fees. Respondent's counsel shall submit an affidavit pursuant to ORCP 68 regarding his Rule 68 attorney fees and costs and a supplemental accounting of all other non ORCP 68 charges attributable to this case. The non-ORCP 68 charges will be assessed as part of the property division.

7. This marriage should be dissolved.

8. The family home is awarded to Respondent subject to the mortgage and the debt owed to Third Party Respondents for the down payment. The Petitioner's interest in the business is awarded to the Petitioner.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. **REAL PROPERTY.**

A. Respondent is hereby awarded the real property located at 123 Primrose Lane, Albany, Lane County, Oregon, free and clear of any claim of Petitioner or the Third Parties subject to the mortgage herein and the marital down payment obligation, if any, owed to DOUGLAS In-Law and SUSAN In-Law. The Third parties shall use their best efforts and shall fully cooperate in assigning to Respondent the current mortgage on the property.

Said real property is further described as follows: \_\_\_\_\_

The court retains jurisdiction of this case to supervise the transfer of title, assignment of loan and execution of the Third Parties' security, and resolve any conflict which may arise so as to insure that the court's goals of transfer to Respondent are met.

Petitioner shall assume and pay all obligations owing thereon and hold Respondent harmless therefrom.

11. **ATTORNEY FEES AND COSTS.** Respondent is hereby awarded judgment against Petitioner in the amount of \$35,000 for her reasonable attorney fees and costs incurred herein.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

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CIRCUIT COURT JUDGE