

“Romance Without Finance Ain’t Got No Chance”: Development of the Doctrine of Dissipation in Equitable Distribution States

by
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I. Introduction

“Romance without finance ain’t got no chance.”
—Saxophonist Charlie Parker

Most family lawyers presumably would agree with Mr. Parker’s insight that spouses need to reach some general agreement about financial matters or the marriage is headed for the rocks. Financial concerns become more pronounced as a marriage breaks down, because spouses are more likely to either hide resources or make irrational expenditure decisions. The basic way courts now deal with this issue is through a doctrine known as “dissipation.”

This doctrine is still developing in those states that have recently adopted equitable distribution. Before that time, in pure “title” states no division of property owned by one spouse was possible at divorce, so this problem did not exist. In contrast, community property states have dealt with this issue for a long time, since community property rules consider spouses joint owners of most acquisitions during marriage from the moment the property is acquired. One spouse frequently has the ability to unilaterally act for both spouses, so courts have had to develop rules regarding the standard of care that applied to such acts.

In this article I will outline the rules regarding a managing spouse’s duty of care that have evolved in community property

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states, and compare this precedent to the doctrine of “dissipation” being developed in non-community property states.

II. Rules That Have Evolved in Community Property States

A. Introduction

In all community property states, unilateral management of community property is the norm. Although all states require joint action in a limited number of transactions, most transactions involving community property may be carried out by one spouse. Because of this, all community property states have realized that some limits need to be placed on a spouse’s ability to deal unilaterally with community property.¹

B. Types of Transactions

1. Gifts

All community property states limit a spouse’s ability to make unilateral gifts of community property. Some bar all such gifts; some bar only “unreasonable” gifts.² In connection with the determination of whether a gift is “reasonable,” the relationship between the donor and donee is important. A gift to a family member is presumptively appropriate, while a gift to a paramour is not.³ If the gift is found to be unauthorized, the non-consenting spouse either can recover the gift from the donee (if the donee is known and the property is still in existence)⁴ or ask the donor spouse to reimburse the community for the value of the gift.⁵

¹ See generally J. Thomas Oldham, *Management of the Community Estate During an Intact Marriage*, 56 LAW & CONTEMP. PROBS. 99 (1993).

² *Id.* at 138-44.

³ *Id.* See, e.g., *Loaiza v. Loaiza*, 130 S.W.3d 894 (Tex. App. 2004); *Osuna v. Quintana*, 993 S.W.2d 201 (Tex. App. 1999); *Zieba v. Martin*, 928 S.W.2d 782 (Tex. App. 1996).

⁴ See WIS. STAT. ANN. § 766.70(6) (2001); *Mezey v. Fioramonti*, 65 P.3d 980 (Ariz. Ct. App. 2003); *Novo v. Hotel del Rio*, 295 P.2d 576 (Cal. Ct. App. 1956); *Osuna*, *supra* note 3.

⁵ See WIS. STAT. ANN. § 766.70(6) (2001); *Fields v. Michael*, 205 P.2d 402 (Cal. Ct. App. 1949); *Zieba*, *supra* note 3; *Mazique v. Mazique*, 742 S.W.2d 805 (Tex. App. 1987); Oldham, *supra* note 1, at 148.

2. *Payment of Family Law Obligations Resulting from Prior Relationships*

In Texas, if a spouse uses community property to pay a child support obligation relating to a child born before the parties married, this satisfaction of a pre-existing obligation is not perceived to be wrongful.⁶ Texas cases have extended this rule to cover legal fees incurred during marriage in connection with a modification action relating to a prior relationship.⁷ One court emphasized that the other spouse appeared to consent to the use of community funds to pay the legal fees.⁸ Another court has held it was not dissipation to use community funds to pay legal fees of a prior divorce as well as a money judgment due in connection with the divorce.⁹ In contrast, in California if a spouse uses community property to pay a child or spousal support obligation, the spouse must reimburse the community for such payments if separate property income was available but not used.¹⁰

3. *Investments*

Some have argued that a spouse should be liable for negligent unilateral investment choices. This argument has not been accepted in any state; in all community property states, if a spouse makes an investment choice in good faith before the marriage breaks down, he or she is not liable.¹¹ Risky investments made when the marriage is dissolving would be more closely scrutinized.¹²

4. *Gambling and Drug Use*

Married couples can lose money in a number of ways. Allegations of gambling, drinking, and drug use do appear with some frequency in divorce cases. One thing that seems useful to point

⁶ See *Hunt v. Hunt*, 952 S.W.2d 564 (Tex. App. 1997); *Pelzig v. Berkebile*, 931 S.W.2d 398 (Tex. App. 1996); *Zieba*, *supra* note 3.

⁷ See *Zieba*, *supra* note 3.

⁸ See *Garza v. Garza*, 217 S.W.3d 538 (Tex. App. 2006).

⁹ See *Bliss v. Bliss*, 898 P.2d 1081 (Idaho 1995).

¹⁰ CAL. FAM. CODE § 915 (2004).

¹¹ See *Oldham*, *supra* note 1, at 154-58; *cf. Alsenz v. Alsenz*, 101 S.W.3d 648 (Tex. App. 2003) (day trading losses).

¹² See *In re Marriage of Mokreva and Thomas*, No. G037390, 2007 WL 3138372 (Cal. Ct. App. Oct. 29, 2007).

out is that gambling and drinking are generally legal in the U.S., while drug use is not. This will be discussed in more detail below.

a. *Gambling*

Should all gambling losses result in liability? This would be a surprising rule. It was mentioned above that bad investments made in good faith normally do not result in liability. Are gambling losses like a bad investment, or something else? Or is gambling, within certain limits, like any other consumption choice, which also normally does not result in liability?¹³

Courts seem to focus on the magnitude of the loss, relative to the size of the marital estate.¹⁴ If one loses a substantial amount of community property gambling, at divorce that amount presumably would be allocated to that spouse's share of the community estate.¹⁵

b. *Loss of Community Property Due to Drug Use or Other Criminal Activity*

Community property courts have held that if a spouse intentionally commits a criminal act, that spouse should be liable for the losses that result. This rule has been applied to the cost of legal fees,¹⁶ the value of a pension lost when the spouse was discharged from the military as a result of the criminal conviction,¹⁷ and income taxes due as a result of the criminal activity.¹⁸

¹³ See *In re Marriage of Williams*, 927 P.2d 679 (Wash. Ct. App. 1996).

¹⁴ See *Reaney v. Reaney*, 505 S.W.2d 338 (Tex. App. 1974) (stating that a spouse should be liable for excessive gambling losses); *In re Marriage of Williams*, *supra* note 13 (gambling losses not substantial); *In re Marriage of Clark*, 538 P.2d 145 (Wash. Ct. App. 1975) (substantial amount of community funds spent on alcohol); *Anstutz v. Anstutz*, 331 N.W.2d 844, 846 (Wis. Ct. App. 1983) (stating that a spouse should be liable for excessive gambling losses).

¹⁵ See *Lindsay v. Lindsay*, 565 P.2d 199 (Ariz. Ct. App. 1977).

¹⁶ See *In re Marriage of Bell*, 56 Cal. Rptr. 2d 623 (Cal. Ct. App. 1996); *In re Marriage of Stitt*, 195 Cal. Rptr. 172 (Cal. Ct. App. 1983).

¹⁷ See *In re Marriage of Beltran*, 227 Cal. Rptr. 924 (Cal. Ct. App. 1986).

¹⁸ See *In re Marriage of Bell*, *supra* note 16.

5. *Intentional or Reckless Destruction of Property*

Intentional destruction of property is dissipation.¹⁹ The dissipated property is considered part of the marital estate awarded to the dissipating spouse when marital assets are divided.

In a Washington case, the parties owed substantial income taxes at divorce, at least in part due to the husband's carelessness in not filing tax returns. Based on a finding that the husband's actions constituted gross fiscal improvidence, the appellate court affirmed the trial court's order that the husband should be responsible for the tax liability.²⁰

6. *After the Marriage Has Broken Down*

The rules summarized above apply to actions taken in an intact marriage. Actions taken after the parties have decided to divorce are subject to more scrutiny.

a. *Liquid Assets that Disappear*

If one spouse has control of liquid assets when the relationship breaks down, and the value of the assets is substantially reduced during that period, the managing spouse must generally account for how these monies were spent, or these amounts will be charged to that spouse.²¹ Courts wish to thereby discourage reckless or fraudulent actions after the marriage has broken down.

b. *Management of the Community Estate During the Divorce*

Some courts have held a spouse liable for negligent management of community property after a divorce action is initiated. In one case, a spouse who was awarded exclusive possession of the family home was found liable for the damage done to the house when the roof began to leak and she did not repair the leak.²² In another, the wife was ordered to sell the house "as expeditiously as possible for the best price reasonably attaina-

¹⁹ See *Hebbring v. Hebbring*, 255 Cal. Rptr. 488 (Cal. Ct. App. 1989).

²⁰ See *In re Marriage of Steadman*, 821 P.2d 59 (Wash. Ct. App. 1991).

²¹ See *Gutierrez v. Gutierrez*, 972 P.2d 676 (Ariz. Ct. App. 1998); *Larson v. Larson*, 88 P.3d 1212 (Idaho Ct. App. 2003); *Zieba*, *supra* note 3; *Oldham*, *supra* note 1, at 164, n.382.

²² See *Grossnickle v. Grossnickle*, 935 S.W.2d 830 (Tex. App. 1996).

ble.” House prices had begun to fall in the jurisdiction; she told the broker to list the property for substantially more than the broker recommended. After a substantial period, she agreed to lower the price. By the time the house actually sold, about one year later, the parties received approximately \$70,000 less than they would have received one year earlier. The court determined that the wife was responsible for this loss.²³ A Wisconsin court held the wife liable for a loss of \$7500 due to her “deliberate neglect.”²⁴ A Louisiana court has held a spouse liable for terminating a profitable lease for no reason when the marriage was breaking down.²⁵

C. *The Remedy for Dissipation*

As a general rule, if a spouse in a community property state dissipates community property, that spouse solely bears the resulting loss. The amount lost is included in the portion of the estate awarded the spouse. So, if the community estate amounted to \$200,000 before the dissipation and one spouse causes a loss of \$50,000, that spouse should receive \$50,000 of the remaining assets and the other should receive \$100,000, if the marital estate is to be divided equally.²⁶ If the amount of marital property remaining is inadequate to charge the dissipating spouse for the full amount of the loss, a judgment against the dissipating spouse in favor of the other spouse is possible.²⁷

III. Dissipation Doctrine in Equitable Distribution States

A. *Introduction*

1. *The Period During Which Actions Will Be Considered*

A spouse’s management duty in an equitable distribution state varies from the duty that exists in community property

²³ See *In re Marriage of Hokanson*, 80 Cal. Rptr. 2d 699 (Cal. Ct. App. 1998).

²⁴ See *In re Marriage of Rapp*, 392 N.W.2d 129 (Wis. Ct. App. 1986).

²⁵ See *Kyson v. Kyson*, 596 So.2d 1308 (La. Ct. App. 1991).

²⁶ See *Arrington v. Arrington*, 613 S.W.2d 565 (Tex. App. 1981). See also *Gutierrez, supra* note 21; *Larson v. Larson*, 88 P.3d 1212 (Idaho Ct. App. 2003).

²⁷ See *Gutierrez v. Gutierrez, supra* note 21; *Loiaza v. Loiaza*, 130 S.W.3d 894 (Tex. App. 2004).

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states. In a community property state, both spouses are equal owners of community property from the date of acquisition. In contrast, in an equitable distribution state if one spouse receives salary during marriage, unless that spouse deposits the money in a joint account, the other has no claim to the money until the marriage breaks down and a divorce action is filed. Dissipation rules in a number of equitable distribution states therefore generally focus on management actions done after the marriage has broken down.²⁸ Transfers or transactions in contemplation of divorce are also scrutinized.²⁹

Because of this particular temporal focus, it is not surprising that the rules evolving in these states are somewhat stricter than

²⁸ See 2 BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* § 6:108, at 605 (2005). See also *Monas v. Monas*, 665 So.2d 346 (Fla. Dist. Ct. App. 1995); *In re Marriage of O'Neill*, 563 N.E.2d 494 (Ill. App. Ct. 1990); *In re Marriage of Smith*, 448 N.E.2d 545 (Ill. App. Ct. 1983); *Brown v. Brown*, No. 2005-CA-002069-MR, 2007 WL 1893589 (Ky. Ct. App. June 29, 2007); *Malin v. Laznoch*, 736 N.W.2d 390 (Neb. Ct. App. 2007); *Orwick v. Orwick*, 2005 WL 2338629 (Ohio Ct. App.); *Ghulam v. Sidiqi*, No. 2870-06-4, 2007 WL 4380112 (Va. Ct. App. Dec. 18, 2007). For example, in *Baker v. Baker*, 733 N.W.2d 815 (Minn. Ct. App. 2007), when the wife challenged a purchase made by the husband, the court stated that it could be dissipation only if it was made in contemplation of divorce. In *Kittredge v. Kittredge*, 803 N.E.2d 306 (Mass. 2004), although the husband gambled throughout the marriage, the court held that only the gambling after the marriage broke down was dissipation. Similarly, in *Smith v. Smith*, 444 S.E.2d 269 (Va. Ct. App. 1994), the court held that amounts spent by the husband on his mistress before the marriage broke down were not dissipation. *cf.* *Kondamuri v. Kondamuri*, 852 N.E.2d 939 (Ind. Ct. App. 2006) (considering gambling losses significantly before divorce filing); *In re Marriage of Rodriguez*, 969 P.2d 880 (Kan. 1998) (considering losses due to criminal activity before the marriage broke down); *Brady v. Brady*, 39 S.W.3d 557 (Mo. Ct. App. 2001) (considering actions before separation); *Leadingham v. Leadingham*, 698 N.E.2d 465 (Ohio Ct. App. 1997) (court considers actions four years before the divorce filing); *Wayda v. Wayda*, 576 A.2d 1060 (Pa. Super. Ct. 1990) (considering actions before separation); *De Angelis v. De Angelis*, 923 A.2d 1274 (R.I. 2007) (considering the husband's actions throughout the marriage); *Nelson v. Nelson*, No. A05-1507, 2006 WL 539394 (Minn. Ct. App. Mar. 7, 2006) (considering losses to the marital estate before marriage breakdown as negative contributions that should affect the equitable distribution of the marital estate); *Derr v. Derr*, 696 N.W.2d 170 (Wis. Ct. App. 2005) (losses from day trading incurred more than one year before the divorce action was filed could be considered).

²⁹ See TURNER, *supra* note 28, § 6:106, at 606-608. See, e.g., MINN. STAT. § 518.58 (1a); *Jacobowitz v. Jacobowitz*, 925 A.2d 424 (Conn. App. Ct. 2007).

the rules summarized above that govern unilateral actions in community property states while the marriage is still intact. The Supreme Judicial Court of Massachusetts has stated that a test of dissipation incorporates both a factor of timing (actions after the marriage has broken down) and intent (the action is done for the purpose of thwarting the other's rights to a fair share of the marital estate).³⁰

The drafters of the ALI's Principles of Family Dissolution were critical of using a concept such as "marriage breakdown" as a rule for determining what actions a court should review.³¹ For example, some cases have found that marriage breakdown can occur long before the parties separate or file for divorce.³² This can lead to uncertainty regarding what acts are to be reviewed. The Reporters suggest that a clear time frame based on a certain specified period before the divorce petition was filed would provide more guidance. For example, Florida now specifies that actions within two years of filing the petition can constitute dissipation.³³

2. *What Constitutes Dissipation*

Many cases have adhered to the principle developed in community property states that dissipation includes only acts that are reckless or intentional and reduce the value of the marital estate. Some other states have expanded the definition to include the use of marital property "for his or her own benefit and for a purpose unrelated to the marriage at a time when the relationship is in serious jeopardy."³⁴ Such a standard would include almost all expenditures after separation, including living expenses. Such a thorough review of the spouses' expenditures seems needless and a waste of energy and money.³⁵ This topic is more complicated regarding using marital funds for living expenses incurred after

³⁰ See *Kittredge*, *supra* note 28. See also American Law Institute Principles of the Law of Family Dissolution: Analysis and Recommendations [hereinafter "ALI Principles"] § 4.10(2) & comment c, at 754 (2002).

³¹ See ALI Principles, *supra* note 30, § 4.10, Reporters Notes, at 764-65.

³² See *In re Marriage of Rai*, 545 N.E.2d 446 (Ill. App. Ct. 1989) (marriage breakdown occurred six years before divorce filing); *Harris v. Harris*, 621 N.W.2d 491 (Neb. 2001).

³³ See FLA. STAT. § 61.075(1)(i) (2002).

³⁴ *In re Marriage of Westcott*, 516 N.E.2d 566, 570 (Ill. App. 1987).

³⁵ See ALI Principles, *supra* note 30, § 4.10, Reporter's Notes, at 763.

the point under a state's law (for example, the time the divorce action is filed) when the parties stop accumulating marital property (because income earned after that date is nonmarital property.)³⁶

3. *Dissipation of Nonmarital Property*

A spouse cannot be liable for dissipating his own nonmarital property.³⁷ Of course, he can be responsible for dissipating his spouse's nonmarital property. Some courts have held that the spouse could also be liable in such an instance under general principles of bailment.³⁸

B. *Types of Transactions*

1. *Intentional Destruction of Marital Property*

Intentional destruction of marital property while the marriage is breaking down obviously constitutes dissipation.³⁹ This should be true even if the market value of the property destroyed is nominal.⁴⁰

Courts have also held a spouse liable for intentionally and unreasonably withholding consent to transactions to maintain the marital estate. In one case, after the marriage broke down, the parties defaulted on their mortgage and foreclosure proceedings were begun. The husband qualified for a refinancing loan; as a condition to funding the loan, the bank required a quitclaim deed from the wife. She refused to provide this. As a result, the husband did not obtain the loan, and the house was sold at a foreclosure sale for approximately \$40,000 below market value. The court held that the wife should bear this loss.⁴¹

³⁶ See *infra* text at note 55.

³⁷ See *In re Marriage of Harris*, 132 P.3d 502 (Mont. 2006); *Brzuszkiewicz v. Brzuszkiewicz*, 813 N.Y.S.2d 793 (N.Y. App. Div. 2006); *Bawa v. Bawa*, 2006 WL 1390961 (Ohio Ct. App. 2006).

³⁸ See *In re Marriage of Amich*, No. 06CA2493, 2007 WL 3378336 (Colo. Ct. App. Nov. 15, 2007).

³⁹ See *Bleuer v. Bleuer*, 755 A.2d 946 (Conn. App. Ct. 2000); *Turner v. Taylor*, 471 A.2d 1010 (D.C. 1984); *Newby v. Newby*, 734 N.E.2d 663 (Ind. Ct. App. 2000).

⁴⁰ See *In re Marriage of Ferkel*, 632 N.E.2d 1133 (Ill. App. Ct. 1994).

⁴¹ See *Porath v. Porath*, 855 N.E.2d 511 (Ohio Ct. App. 2006).

If a spouse intentionally destroys the value of a marital business while the marriage is breaking down, this is dissipation.⁴² One court has held that filing bankruptcy can constitute dissipation.⁴³

2. *Reckless Management of Marital Property*

In a number of cases, courts have held that reckless management of marital property can constitute dissipation. Examples include not making proper repairs of a house the spouse is living in⁴⁴ or other property the spouse was managing,⁴⁵ otherwise negligently managing property by, for example, not collecting rent due,⁴⁶ or not making mortgage payments or tax payments.⁴⁷

A Tennessee court held that, when the husband withdrew \$48,000 in cash before the year 2000 scare, placed it in a drawer at the home, and then the cash was lost, this was dissipation.⁴⁸

3. *Selling Marital Property for Much Less Than Fair Market Value*

If a spouse sells marital property for substantially less than fair market value, this can constitute dissipation.⁴⁹ The loss to

⁴² See *Dixon v. Dixon*, 512 S.E.2d 539 (S.C. Ct. App. 1999); *Kerzner v. Kerzner*, 694 N.Y.S.2d 49 (N.Y. App. Div. 1999); *Fishman v. Fishman*, 805 A.2d 576 (Pa. 2002).

⁴³ See *In re Marriage of Campbell*, 140 P.3d 320 (Colo. Ct. App. 2006).

⁴⁴ See *Mir v. Mir*, 571 S.E.2d 299 (Va. Ct. App. 2002).

⁴⁵ See *Hansen v. Hansen*, 616 N.Y.S.2d 637 (N.Y. App. Div. 1994).

⁴⁶ See *Busby v. Busby*, 671 So.2d 162 (Fla. Dist. Ct. App. 1996); *Held v. Held*, 896 S.W.2d 709 (Mo. Ct. App. 1995).

⁴⁷ See *In re Marriage of Simeone*, 214 B.R. 537 (Bkrcty. E.D. Pa. 1997); *In re Marriage of Siegel*, 463 N.E.2d 773 (Ill. App. Ct. 1984); *In re Marriage of Cook*, 453 N.E.2d 1357 (Ill. App. Ct. 1983); *Heins v. Heins*, 783 S.W.2d 481 (Mo. Ct. App. 1990); *Cimperman v. Cimperman*, No. 80807, 2003 WL 547814 (Ohio Ct. App. Feb. 27, 2003); *In re Marriage of McKenzie*, 833 P.2d 1338 (Or. Ct. App. 1992).

⁴⁸ See *Flannary v. Flannary*, 121 S.W.3d 647 (Tenn. 2003).

⁴⁹ See *Abood v. Abood*, 119 P.3d 980 (Alaska 2005) (spouse traded in car for substantially less than market value); *A. & L. Inc. v. Grantham*, 747 So.2d 832 (Miss. 1999) (selling stock for much less than fair value); *Reynolds v. Reynolds*, 109 S.W.3d 258 (Mo. Ct. App. 2003) (selling property at garage sales for unreasonably low prices); *Syslo v. Syslo*, No. L-01-1273, 2002 WL 31166937 (Ohio Ct. App. Sept. 30, 2002) (marital property sold at garage sale for much less than fair value).

the marital estate should be included in the portion of the marital estate to be awarded the spouse who dissipated the asset.⁵⁰

4. *Consumption Decisions*

As a general rule, most states do not consider it dissipation to use marital funds for reasonable living expenses.⁵¹ Excessive living expenses, of course, could constitute dissipation.⁵² To determine what is “reasonable,” many courts look to whether expenditure levels changed after the marriage broke down.⁵³ If the expenditures violate court orders, this could be significant.⁵⁴

Turner explains why this issue could become more complicated in states where parties stop accumulating marital property before the date of divorce. He notes that it is more obvious that spending marital funds on reasonable living expenses should not be dissipation when the spouse’s income earned during that pe-

⁵⁰ See *Forshee v. Forshee*, 145 P.3d 492 (Alaska 2006).

⁵¹ See *TURNER*, *supra* note 28, § 6:107, at 577. See, e.g., *Roth v. Roth*, No. 2D06-3360, 2008 WL 80224 (Fla. Dist. Ct. App. Jan. 9, 2008); *Stuckey v. Stuckey*, 169 P.3d 344 (Kan. Ct. App. 2007); *Kester v. Kester*, 108 S.W.3d 213 (Mo. Ct. App. 2003).

⁵² See *Morgan v. Morgan*, No. 2006-CA-000426-MR, 2007 WL 2812600 (Ky. Ct. App. Sept. 28, 2007) (husband paid for his own cosmetic surgery and lavish trips); *Robinson v. Robinson*, 751 A.2d 457 (Me. 2000) (extensive spending for clothes); *Longo v. Longo*, No. 2004-G-2556, 2005 WL 1007248 (Ohio Ct. App. Apr. 29, 2005) (\$100,000 spent). See also *Miller v. Miller*, 105 P.3d 1136 (Alaska 2005); *In re Marriage of Dunseth*, 633 N.E.2d 82 (Ill. App. Ct. 1994); *In re Marriage of Bartley*, 712 N.E.2d 537 (Ind. Ct. App. 1999); *In re Marriage of Hagshenas*, 600 N.E.2d 437 (Ill. App. Ct. 1992); *Goodman v. Goodman*, 754 N.E.2d 595 (Ind. Ct. App. 2001); *Maharam v. Maharam*, 666 N.Y.S.2d 129 (N.Y. App. Div. 1997); *Cardinale v. Cardinale*, 889 A.2d 210, 221 (R.I. 2006); *Deidun v. Deidun*, 606 S.E.2d 489 (S.C. Ct. App. 2004).

⁵³ See *Baker*, *supra* note 28; *Barriger v. Barriger*, 514 S.W.2d 114 (Ky. 1974); *Johnston v. Johnston*, 649 N.E.2d 799 (Mass. App. Ct. 1995); *Duckett v. Duckett*, 539 N.E.2d 556 (Mass. App. Ct. 1989). A New Jersey court has stated: “[Factors to consider in determining whether there has been dissipation of marital assets include] (1) the proximity of the expenditures to the parties’ separation, (2) whether the expenditure was typical of expenditures made by the parties prior to the breakdown of the marriage, (3) whether the expenditure benefited the ‘joint’ marital enterprise or was for the benefit of one spouse . . . and (4) the need for, and amount of, expenditure.” *Kothari v. Kothari*, 605 A.2d 750, 753 (N.J. Super. Ct. App. Div. 1992).

⁵⁴ See *Lattanzi v. Lattanzi*, No. 2006CA00184, 2007 WL 1518639 (Ohio Ct. App. May 23, 2007).

riod is marital property. Once the parties stop accumulating marital property (for example, if this occurs as of the date of separation or the date of divorce filing), the argument could be made that after that date living expenses should not be paid with marital funds.⁵⁵

5. *Investments*

Many courts have held that a spouse should not be liable for investment losses made in good faith.⁵⁶ Decisions made before the marriage breaks down are particularly hard to challenge.⁵⁷ Of course, if the investment was made in violation of an order of the divorce court, that could make it dissipation.⁵⁸

A number of courts have held that it was not dissipation when, after a marriage broke down, a spouse invested in stock options,⁵⁹ commodities,⁶⁰ a Broadway play,⁶¹ or Arabian horses.⁶² But the standard that courts apply is not always clear. In *Grunfeld v. Grunfeld*,⁶³ the court noted that the investment was made in “good faith” and that the complaining spouse had not adequately shown the unreasonableness of the investment. Is the standard good faith or one of reasonableness? In *Hauge v. Hauge*,⁶⁴ the court notes that the manager consulted an investment advisor; is this required? *Wilner v. Wilner*⁶⁵ states:

⁵⁵ See TURNER, *supra* note 28, § 6:107, at 582.

⁵⁶ See *Rosenbloom v. Rosenbloom*, 851 So.2d 190 (Fla. Dist. Ct. App. 2003); *Nelson v. Nelson*, 795 So.2d 977 (Fla. Dist. Ct. App. 2001); *Grathwohl v. Grathwohl*, 871 N.E.2d 297 (Ind. Ct. App. 2007); *Solomon v. Solomon*, 857 A.2d 1109 (Md. 2004); *Goldman v. Goldman*, 589 A.2d 1358 (N.J. Super. Ct. Ch. Div. 1991); *Wilner v. Wilner*, 595 N.Y.S.2d 978 (N.Y. App. Div. 1993); *Mikhail v. Mikhail*, 2005 WL 195492 (Ohio Ct. App.); *McDavid v. McDavid*, 511 S.E.2d 365 (S.C. 1999); *Hauge v. Hauge*, 427 N.W.2d 154 (Wis. Ct. App. 1988).

⁵⁷ See *Mikhail*, *supra* note 56.

⁵⁸ See *Johnston*, *supra* note 53.

⁵⁹ See *Tocco v. Tocco*, 567 A.2d 303 (Pa. Super. Ct. 1989).

⁶⁰ See *Grunfeld v. Grunfeld*, 688 N.Y.S.2d 77 (N.Y. App. Div. 1999); *Wilner v. Wilner*, 595 N.Y.S.2d 978 (N.Y. App. Div. 1993).

⁶¹ See *Wilner*, 595 N.Y.S.2d 978.

⁶² See *Hauge v. Hauge*, 427 N.W.2d 154 (Wis. Ct. App. 1988).

⁶³ *Grunfeld*, 688 N.Y.S.2d 77.

⁶⁴ *Hauge*, 427 N.W.2d 154.

⁶⁵ *Wilner*, 595 N.Y.S.2d 978.

[H]igh risk investments are commonplace and do not necessarily equate with wasteful dissipation of marital assets. . . . In the absence of some expert testimony that the investments were foolhardy or imprudent or unreasonable or otherwise so financially unsound at the time they were made so as to evidence a reckless disregard of family assets [there should be no finding of dissipation].⁶⁶

This standard is not a model of clarity.

Other courts have concluded that risky investments after the marriage has broken down can be dissipation.⁶⁷ One court held that a loan made by one spouse to a third party despite the other spouse's objection was dissipation.⁶⁸

Most courts seem to be approving speculative investments made in good faith after the marriage has broken down, but without providing clear rules about what constitutes dissipation. One approach that would be consistent with other aspects of dissipation law would be to approve investments after a marriage has broken down as long as they were no more risky than those made before the marriage broke down.

6. *Gambling*

Gambling losses have been held to be dissipation, when the losses are substantial compared to the size of the marital estate.⁶⁹

⁶⁶ *Id.*

⁶⁷ See *Salten v. Ackerman*, 836 N.E.2d 323, 325 (Mass. App. Ct. 2005) (highly speculative investments); *Gadamski v. Gadamski*, 664 N.Y.S.2d 886 (N.Y. App. Div. 1997) (substantial stock market losses); *Allen v. Allen*, 607 S.E.2d 331 (N.C. Ct. App. 2005) (spouse's day trading losses after separation could be considered dissipation); *Koutroumanos v. Tzeremes*, 865 A.2d 1091, 1099 (R.I. 2005) (\$500,000 in losses); *Booth v. Booth*, 371 S.E.2d 569 (Va. Ct. App. 1988) (substantial stock market losses); *Derr*, *supra* note 28 (\$45,000 lost while "day trading" stocks).

⁶⁸ See *Santiago v. Santiago*, 749 So.2d 584 (Fla. Dist. Ct. App. 2000).

⁶⁹ See *Keathley v. Keathley*, 61 S.W.3d 219 (Ark. Ct. App. 2001) (an estimate of \$100,000 in losses); *DeLorenzo v. DeLorenzo*, 736 So.2d 805 (Fla. Dist. Ct. App. 1999); *In re Marriage of Smith*, 448 N.E.2d 545 (Ill. App. Ct. 1983) (\$15,000 in gambling losses); *Kondanuri v. Kondanuri*, 852 N.E.2d 939 (Ind. Ct. App. 2006); *Newby v. Newby*, 734 N.E.2d 663 (Ind. Ct. App. 2000) (lottery tickets); *Marriage of Martins*, 680 N.W.2d 378 (Iowa Ct. App. 2004); *In re Marriage of Bell*, 576 N.W.2d 618 (Iowa Ct. App. 1998) (loss of \$2,600 in two days); *Kittredge v. Kittredge*, 803 N.E.2d 306 (Mass. 2004) (\$40,000 during divorce); *Salten v. Ackerman*, 836 N.E.2d 323 (Mass. App. Ct. 2005) (\$1,000,000-\$1,700,000 in losses); *Carrick v. Carrick*, 560 N.W.2d 407 (Minn. Ct. App. 1997); *Harrison v. Harrison*, 787 S.W.2d 738 (Mo. Ct. App. 1989) (\$30,000-\$40,000 loss

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The other spouse's consent can be relevant,⁷⁰ as well as whether the other spouse was aware of the gambling.⁷¹

7. *Gifts*

a. *To Third Parties*

As a general rule, gifts for third parties after a marriage has broken down are dissipation.⁷² Whether gifts to children are dissipation is less clear.⁷³

Some courts have evaluated this issue based on the parties' expenditures before the marriage broke down. In a Minnesota case, after the marriage broke down the husband funded education accounts for his grandchildren and paid for his daughter's wedding. The trial court found that this did not constitute dissipation. In finding this ruling not an abuse of discretion, the appellate court noted that the spouses during marriage had been generous to their children and grandchildren.⁷⁴ Another case found that the payment of the costs of a daughter's wedding could constitute dissipation, at least in part.⁷⁵

in one day); *Harris v. Harris*, 621 N.W.2d 491 (Neb. 2001); *Siegel v. Siegel*, 574 A.2d 54 (N.J. Super. Ct. Ch. Div. 1990) (\$227,000 in losses); *Wilner v. Wilner*, 595 N.Y.S.2d 978 (N.Y. App. Div. 1993); *Downey v. Downey*, 2007 WL 4179863 (Ohio Ct. App.) (\$80,000 gambling debt).

⁷⁰ See *Rosenfeld v. Rosenfeld*, 597 So.2d 835 (Fla. Dist. Ct. App. 1992).

⁷¹ See *Askinazi v. Askinazi*, 641 A.2d 413 (Conn. App. Ct. 1994); *Salten*, 836 N.E.2d 323.

⁷² See *TURNER*, *supra* note 28, § 6:107, at 595. See also *Forshee*, *supra* note 50; *Brooks v. Brooks*, 677 P.2d 1230 (Alaska 1984); *In re Marriage of Goodwin*, 606 N.W.2d 315 (Iowa 2000); *Kleet v. Kleet*, No. 2006-CA-000035-MR, 2007 WL 2332061 (Ky. Ct. App. Aug. 3, 2007); *Kothari*, *supra* note 53; *Xikis v. Xikis*, 841 N.Y.S.2d 692 (N.Y. App. Div. 2007); *Goswami v. Goswami*, 787 N.E.2d 26 (Ohio Ct. App. 2003).

⁷³ See *Brooks v. Brooks*, 677 P.2d 1230 (Alaska 1984) (yes); *Greco v. Greco*, 880 A.2d 872, 880 n.10 (Conn. 2005); *In re Marriage of Lee*, 615 N.E.2d 1314 (Ill. App. Ct. 1993) (transfer of \$266,000 to children 3 months before separation was dissipation); *In re Marriage of Coyle*, 671 N.E.2d 938 (Ind.Ct.App.1996) (no); *Baker*, 733 N.W.2d 815 (funding of education accounts for grandchildren not dissipation when consistent with behavior before the marriage broke down); *Herron v. Herron*, 936 So.2d 956 (Miss. Ct. App. 2006).

⁷⁴ See *Baker*, 733 N.W.2d 815.

⁷⁵ See *Altieri v. Altieri*, 827 N.Y.S.2d 735 (N.Y. App. Div. 2006).

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If a spouse sells property for nominal value to a third party, this is effectively a gift and is dissipation.⁷⁶

b. *To Paramours*

All courts agree that expenditures on paramours after a marriage has broken down constitute dissipation.⁷⁷

8. *Paying Legal Fees in the Parties' Divorce*

A split of authority has developed in this area. Some find such a use to be dissipation;⁷⁸ others permit marital funds to be used to pay divorce fees.⁷⁹

9. *Initiating Litigation*

Some courts have concluded that if a spouse initiates other litigation after the marriage breaks down, and this litigation is paid for with marital assets, such litigation can constitute dissipation, particularly if the court determines the litigation was initiated in bad faith.⁸⁰

10. *Losses Resulting from Criminal Acts*

Some courts have held that a spouse must reimburse the marital estate for losses incurred as a result of criminal convic-

⁷⁶ See *In re Marriage of Hilkovitch*, 464 N.E.2d 795 (Ill. App. Ct. 1984); *Pitman v. Pitman*, 721 N.E.2d 260 (Ind. Ct. App. 1999).

⁷⁷ See *Romano v. Romano*, 632 So.2d 207 (Fla. App. 1994); *In re Marriage of Meadow*, 628 N.E.2d 702 (Ill. App. Ct. 1993); *In re Marriage of Osborn*, 564 N.E.2d 1325 (Ill. App. Ct. 1990); *Brosick v. Brosick*, 974 S.W.2d 498 (Ky. Ct. App. 1998); *McNair v. McNair*, 987 S.W.2d 4 (Mo. Ct. App. 1998); *Watson v. Watson*, 31 FAM. L. REP. (BNA) 1477 (Tenn. Ct. App. 2005).

⁷⁸ See 750 ILL. COMP. STAT. ANN. § 5/501 (2007); *Grimm v. Grimm*, 844 A.2d 855 (Conn. App. Ct. 2004); *In re Marriage of DeLarco*, 728 N.E.2d 1278 (Ill. App. Ct. 2000); *Baker v. Baker*, 733 N.W.2d 815 (Minn. Ct. App. 2007); *Jones v. Jones*, 904 So.2d 1143 (Miss. Ct. App. 2004); *Franeka v. Franeka*, 951 S.W.2d 685 (Mo. Ct. App. 1997); *Altomer v. Altomer*, 753 N.Y.S.2d 174 (N.Y. App. Div. 2002).

⁷⁹ See *Levy v. Levy*, 900 So.2d 737 (Fla. Dist. Ct. App. 2005); *Allison v. Allison*, 864 A.2d 191 (Md. Ct. Spec. App. 2004); *Romkema v. Romkema*, 918 S.W.2d 294 (Mo. Ct. App. 1996); *Sinha v. Sinha*, 793 N.Y.S.2d 347 (N.Y. App. Div. 2005); *Anderson v. Anderson*, 514 S.E.2d 369 (Va. Ct. App. 1999).

⁸⁰ See *In re Marriage of Campbell*, 140 P.3d 320 (Colo. Ct. App. 2006) (bankruptcy filing).

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tions. This could include legal fees and lost wages while in jail,⁸¹ property forfeited to the government due to criminal activity,⁸² the payment of fines and restitution payments,⁸³ the loss of a pension that resulted from the spouse being terminated from his job as a result of the conviction,⁸⁴ and lost wages, lost health insurance, and the foreclosure of the parties' home.⁸⁵

11. *Liquid Assets That Disappear or Substantial Debts That Are Created While the Marriage Is Breaking Down*

Courts generally accept the rule that if a spouse has control of a liquid asset when the marriage is breaking down, and by the time of trial the asset no longer exists, the managing spouse has the duty to show that marital funds were expended on appropriate things. If the manager cannot make such a showing, dissipation will be presumed.⁸⁶

⁸¹ See *In re Marriage of Rodriguez*, 969 P.2d 880 (Kan. 1998); *Dragojevic-Wiczen v. Wiczen*, 655 N.E.2d 222 (Ohio Ct. App. 1995).

⁸² See *In re Marriage of Rodriguez*, 969 P.2d 880 (Kan. 1998).

⁸³ See *Miles v. Werle*, 977 S.W.2d 297 (Mo. Ct. App. 1998) (spouse incurred expenses to bail the other out of jail and to relocate due to his violent behavior); *Budnick v. Budnick*, 595 S.E.2d 50 (Va. Ct. App. 2004) (payment of \$395,000 in restitution after marriage had broken down).

⁸⁴ See *Leadingham v. Leadingham*, 698 N.E.2d 465 (Ohio Ct. App. 1997).

⁸⁵ See *Taylor v. Taylor*, No. 17727, 1999 WL 1043934 (Ohio Ct. App. Nov. 19, 1999).

⁸⁶ See *Foster v. Foster*, 883 P.2d 397 (Alaska 1994); *White v. White*, 965 So.2d 164 (Fla. Dist. Ct. App. 2007); *In re Marriage of Zweig*, 798 N.E.2d 1223 (Ill. App. Ct. 2003); *In re Marriage of Adams*, 538 N.E.2d 1286 (Ill. App. Ct. 1989); *Newby v. Newby*, 734 N.E.2d 663 (Ind. Ct. App. 2000); *In re Marriage of Romey*, No. 02-1539, 2004 WL 57566 (Iowa Ct. App. Jan. 14, 2004); *Heskett v. Heskett*, No. 2006-CA-001900-MR, 2008 WL 53873 (Ky. Ct. App. Jan. 4, 2008); *Bratcher v. Bratcher*, 26 S.W.3d 797 (Ky. Ct. App. 2000); *Rock v. Rock*, 587 A.2d 1133 (Md. Ct. Spec. App. 1991); *Rohling v. Rohling*, 379 N.W.2d 519 (Minn. 1986); *In re Marriage of Barton*, 158 S.W.3d 879 (Mo. Ct. App. 2005); *In re Marriage of Walls*, 925 P.2d 483 (Mont. 1996); *Harris v. Harris*, 621 N.W.2d 491 (Neb. 2001); *Brunges v. Brunges*, 619 N.W.2d 456 (Neb. 2000); *Dahl v. Dahl*, 406 N.W.2d 639 (Neb. 1987); *Heinl v. Heinl*, 671 A.2d 147 (N.J. Super. Ct. App. Div. 1996); *McComish v. McComish*, 642 N.Y.S.2d 921 (N.Y. App. Div. 1996);) *Mir v. Birjandi*, Nos. 2006 CA 63, 2006 CA 71, 2006 CA 72, 2007 WL 4170868 (Ohio Ct. App. Nov. 21, 2007); *Babka v. Babka*, 615 N.E.2d 247 (Ohio Ct. App. 1992); *Parker v. Parker*, 996 P.2d 565 (Utah Ct. App. 2000); *Clements*

If a spouse creates substantial debts while the marriage is breaking down, that spouse will be responsible for those debts unless he or she can show they were for a reasonable purpose.⁸⁷

12. *Payment of Support Obligations to Other Children or a Previous Spouse*

Some courts have held that using marital funds to pay child support to children living in other households is not dissipation.⁸⁸ Others have disagreed.⁸⁹

If paying family law obligations with marital funds is held to be dissipation, this could have a significant impact on many divorce property divisions. If the aggregate amount of such payments during the marriage could be charged against the obligor's share of the marital estate, this would significantly reduce the obligor's share of the marital estate and is inconsistent with the theory of dissipation. A spouse is held liable for dissipation for reckless or intentional diminution of the marital estate. Complying with orders from a family court hardly fits into that category. The spouses marry with an awareness of each other's obligations. It is not unfair to consider family law obligations legitimate marital expenses.⁹⁰

C. *The Effect of a Finding of Dissipation*

A number of state statutes provide that one of the many factors that should be considered in connection with the division of

v. Clements, 397 S.E.2d 257 (Va. Ct. App. 1990); *Brady v. Brady*, 39 S.W.3d 557 (Mo. Ct. App. 2001).

⁸⁷ See *In re Marriage of Fennelly and Breckenfelder*, 737 N.W.2d 97 (Iowa 2007); *In re Marriage of McLean*, 849 P.2d 1012 (Mont. 1993); *Brzuskiwicz v. Brzuskiwicz*, 813 N.Y.S.2d 793 (N.Y. App. Div. 2006).

⁸⁸ See *Rosenfeld v. Rosenfeld*, 597 So.2d 835 (Fla. Dist. Ct. App. 1992); *In re Marriage of Burgess*, 568 N.W.2d 827 (Iowa Ct. App. 1997); *Ballard v. Ballard*, 77 S.W.3d 112 (Mo. Ct. App. 2002).

⁸⁹ See *Jensen v. Jensen*, 877 S.W.2d 131 (Mo. Ct. App. 1994) (husband paid child support regarding both a child conceived before marriage and a child conceived during marriage) *McGee v. McGee*, 648 A.2d 1128 (N.J. Super. Ct. App. Div. 1994); *Barker v. Barker*, 500 S.E.2d 240 (Va. Ct. App. 1998) (considering this a use of marital funds to pay a "separate" debt).

⁹⁰ It may not be unfair to distinguish between children conceived before marriage and children conceived during marriage with another.

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the marital estate is whether a spouse dissipated marital assets.⁹¹ These statutes do not give any more guidance about the impact of dissipation.

Courts in equitable distribution states now treat dissipation in one of two ways. One method is to charge the dissipating spouse with the full amount of the loss resulting from the dissipation.⁹² Others consider dissipation to be one factor to be assessed when dividing the marital estate or awarding spousal support.⁹³

In my view, the best approach would be to fashion an approach so the dissipating spouse bears the total financial loss resulting from the dissipation.⁹⁴ If there are no sufficient assets remaining, the court could award all the remaining assets to the

⁹¹ See FLA. STAT. § 61.075; ILL. COMP. STAT. ANN. § 750/503; N.Y. DOM. REL. L. § 236; N.C. GEN. STAT. ANN. § 50-20; 23 PA. STAT. § 3502; VA. CODE § 20-107.3; W. VA. CODE § 48-7-103.

⁹² See *In re Marriage of DeLarco*, 728 N.E.2d 1278 (Ill. App. Ct. 2000); *In re Marriage of Smith*, 448 N.E.2d 545 (Ill. App. Ct. 1983); *In re Marriage of Fennelly and Breckenfelder*, 737 N.W.2d 97 (Iowa 2007); *Kleet v. Kleet*, 2007 WL 2332061 (Ky. App.); *Kittredge v. Kittredge*, 803 N.E.2d 306 (Mass. 2004); *Baker v. Baker*, 733 N.W.2d 815 (Minn. Ct. App. 2007); *Carrick v. Carrick*, 560 N.W.2d 407 (Minn. Ct. App. 1997); *In re Marriage of Barton*, 158 S.W.3d 879 (Mo. Ct. App. 2005); *Xikis v. Xikis*, 841 N.Y.S.2d 692 (N.Y. App. Div. 2007); *Altieri v. Altieri*, 827 N.Y.S.2d 735 (N.Y. App. Div. 2006); *Downey v. Downey*, No. 23687 2007 WL 4179863 (Ohio Ct. App. Nov. 28, 2007); *Mir v. Birjandi*, Nos. 2006 CA 63, 2006 CA 71, 2006 CA 72, 2007 WL 4170868 (Ohio Ct. App. Nov. 21, 2007); *Forshee v. Forshee*, 145 P.3d 492 (Alaska 2006).

⁹³ See *Keathley v. Keathley*, 61 S.W.3d 219 (Ark. Ct. App. 2001); *DeLorenzo v. DeLorenzo*, 736 So.2d 805 (Fla. Dist. Ct. App. 1999); *In re Marriage of Tobassum*, No. 2-06-0843, 2007 WL 4336101 (Ill. App. Ct. Dec. 7, 2007); *In re Marriage of Lee*, 615 N.E.2d 1314 (Ill. App. Ct. 1993); *Kondanuri v. Kondanuri*, 852 N.E.2d 939 (Ind. Ct. App. 2006); *In re Marriage of Bartley*, 712 N.E.2d 537 (Ind. Ct. App. 1999); *In re Marriage of Scott*, 742 N.W.2d 605 (Iowa Ct. App. 2007); *Hart v. Hart*, 210 S.W.3d 480 (Mo. Ct. App. 2007); *Miles v. Werle*, 977 S.W.2d 297 (Mo. Ct. App. 1998); *Harrison v. Harrison*, 787 S.W.2d 738 (Mo. Ct. App. 1989); *Matwijczuk v. Matwijczuk*, 261 A.D.2d 784 (N.Y. App. Div. 1999); *Wilner v. Wilner*, 192 A.D.2d 524 (N.Y. App. Div. 1993); *Napier v. Napier*, No. 2005 AP 05 0030, 2006 WL 242556 (Ohio App. Jan. 27, 2006); *Modon v. Modon*, 686 N.E.2d 355 (Ohio Ct. App. 1996); *DeAngelis v. DeAngelis*, 923 A.2d 1274 (R.I. 2007); *Roe v. Roe*, 311 S.C. 471 (S.C. Ct. App. 1993); *Barker v. Barker*, 500 S.E.2d 240 (Va. Ct. App. 1998); *Breitenstine v. Breitenstine*, 62 P.3d 587 (Wyo. 1983).

⁹⁴ Cases in community property states adopting such an approach include, *Devine v. Devine*, 869 S.W.2d 415 (Tex. App. 1993), and *Arrington v.*

non-dissipating spouse and also render a money judgment against the dissipating spouse in favor of the other spouse.⁹⁵ This is fair, and should also deter spouses from engaging in dissipation.

IV. Conclusion

Equitable distribution states have largely replicated community property doctrine when fashioning rules applicable to a spouse's management duties when a marriage is breaking down. I have noted above some rules that appear unclear or unwise.

Perhaps the most significant pertains to investment losses. Courts have yet to clarify when a spouse needs to reimburse the marital estate. I suggested that it would be appropriate to hold the manager liable only if the level of risk of the investments while the marriage was breaking down was substantially greater than the investment practices of the spouse during the intact marriage.⁹⁶

Another potentially significant issue relates to whether using marital assets to comply with family law obligations to others constitutes dissipation. I argued that this would be quite unfair, particularly if the obligor had no non-marital assets from which to satisfy such obligations.⁹⁷

The third matter commented on pertained to the effect of a finding of dissipation. Some courts consider dissipation as a factor that can influence the property division, while others impose the full dissipation loss on the dissipating spouse. I argued that the second approach would be preferable for a number of reasons, not the least of which would be its deterrent effect.⁹⁸

Arrington, 613 S.W.2d 565 (Tex. App. 1981). *See also supra* notes 26 and 27 and accompanying text.

⁹⁵ *See Mir v. Birjandi*, Nos. 2006 CA 63, 2006 CA 71, 2006 CA 72, 2007 WL 4170868 (Ohio Ct. App. Nov. 21, 2007); *Pride v. Pride*, 318 S.W.2d 715 (Tex. App. 1958); *Swisher v. Swisher*, 190 S.W.2d 382 (Tex. App. 1945); . *See also* ALI Principles, *supra* note 30, § 4.10, Comment i, at 763.

⁹⁶ *See supra* text accompanying notes 56-68.

⁹⁷ *See supra* text accompanying notes 88-90.

⁹⁸ *See supra* text accompanying notes 92-93.

