

Something Smells Like Marital Waste

By Peter J. Galasso

Reminded of Justice Potter Stewart's now and forever famous definition of pornography,¹ ". . . I know it when I see it . . ." I am of the opinion that beyond the obvious, judges tend to find marital waste only when they smell it. With that in mind, this article is intended as a quick refresher on the confounding world of marital waste.²

Frequently raised to justify a favorable adjustment to the innocent spouse's equitable share of the marital estate, the incongruencies promulgated on the topic of marital waste by our courts leave the practitioner routinely scratching his head. Below are some brain teasers to test your marital waste IQ.

Scenario 1:

Luke loved to go fishing with his buddies. Every weekend during the summer he would cruise the Sound for hungry, overly anxious fish willing to be lured onto a hook. After a day of fishing, he could usually be found at the Marina restaurant, treating his less financially fortunate friends to a beer or two and even an occasional dinner.

All told, after five years of his passion was quantified at trial by his very spiteful wife, she urged an adjustment to her equitable distribution equivalent to one-half of the \$80,000 her husband allegedly wasted on fishing, an activity she had little interest in participating.

Scenario 2:

Mike charted his business success too often on the shoestring of his shady broker deals. He earned enough, however, to purchase a palatial home in upper Westchester, which unfortunately did little to rekindle his relationship with his wife. After enduring several years of acrimony, which was balanced out by his endearing relationship with his children, his wife's habitual vituperations became too much for Mike to stomach and he left.

During the pendency of his divorce, Mike was arrested for violating various banking laws. He later pled guilty to a felony that revoked his license to sell securities. Although the underlying conduct that gave rise to the felony conviction occurred at a time when he and his wife were living together, his wife knew nothing of her husband's business dealings. While having admittedly benefited from her husband's transgressions, Mike's wife nevertheless sought to share in the

value pre-conviction of Mike's now-revoked Series 7 License.

Scenario 3:

Lorraine liked to go to Atlantic City once a month to gamble. Gambling was merely an extension of her courtroom mentality, where her high-wire risk-taking had led to a \$5 million marital estate. Usually, Lorraine broke even; but over the course of her 12-year marriage, she reported losses of nearly \$100,000. Her husband calculated a number more in the neighborhood of \$200,000, for which he sought a credit, decrying his wife's gambling as marital waste.

Scenario 4:

Jake delivered a fatal blow to the parties' already frail marital relationship when he did the inconceivable; he stole from his wife's family business. Despite an annual income of over a quarter of a million dollars, Jake duplicitously diverted clients and other family business to his brother's competing business. Although Jake insisted that he had not personally profited, the trail of diverted profit found its way into six figures. It was therefore hardly a shock that after his betrayal was discovered, Jake was immediately fired. The surprise came when his wife added insult to injury by demanding the lion's share of the marital estate to make up for Jake's wrongdoing.

I. Wasteful Dissipation

When determining the equitable distribution of marital property, the court is to consider, among other factors, any wasteful dissipation of assets by either spouse. DRL § 236 (B)(5)(d)(11) (hereinafter "Factor 11"). "Wasteful dissipation" is a term of art that has never been defined with any real precision, however. It can apparently consist of gambling³ and poor business judgment,⁴ as well as other forms of economic misconduct.⁵ Given the absence of appellate leadership in establishing a reliable equation to which we practitioners can refer, what may or may not constitute marital waste remains as much a mystery as how that waste will ultimately affect equitable distribution.

A. Intent

In *Andrea v. Andrea*,⁶ the trial court took a stab at coming up with a coherent test under Factor 11 and set forth eleven factors to be considered in determining whether or not a spouse has dissipated marital assets:

- a. the intent involved in the commission of the act;
- b. concealment of a wasting of assets (*Lenczycki v. Lenczycki*, 152 A.D.2d 621, 624, 543 N.Y.S.2d 724 (2d Dep't 1989));
- c. use of the asset by one spouse only or by both spouses for marital purposes (*Seeley v. Seeley*, 135 A.D.2d 703, 522 N.Y.S.2d 603 (2d Dep't 1987));
- d. joint dissipation of property regardless of purpose (*id.*);
- e. time of commission of act, i.e., before or after commencement of divorce action (*Levine v. Levine*, N.Y.L.J., June 7, 1988);
- f. access to asset by one or both parties (*id.*);
- g. existence of asset at time of distribution (*id.*);
- h. whether act constitutes waste in hindsight only (*Willis v. Willis*, 107 A.D.2d 867, 484 N.Y.S.2d 309 (3d Dep't 1985));
- i. whether "guilty" party obtained a profit by the act;
- j. failure to support the family due to the alleged wasteful dissipation;
- k. relationship between the alleged waste and parties' overall financial status. (Scheinkman; *Practice Commentary*, McKinney's Cons. Laws of N.Y., Book 14, Domestic Relations Law, C236B:25, p. 285).

The weight any one of the *Andrea* factors may be due is a veritable unknown. In *Andrea*, the husband was arrested and convicted of grand larceny, and, as a result, lost his police pension. Because there was no showing that the husband intended to deprive his wife of an interest in his pension, the husband's felony conviction was not considered marital waste. Hence, intent appears to be dispositive; or is it?

B. Gambling

Some examples of wasteful dissipation are seemingly easy to identify. Gambling appears to be a vice under Factor 11 where only one's winnings are shared with a spouse. Even though the gambler never intends to lose, the losses are for the unlucky spouse to bear alone.

In *Baker v. Baker*,⁷ the court held that although plaintiff's gambling debts, which the wife satisfied with marital funds, had no relationship to the value of the real property left to be equitably divided, it was properly considered by the Supreme Court in fashioning its equitable distribution award. The intent to gamble is effectively treated as the legal equivalent of an intent to deprive one's spouse of those marital assets used to cover gambling losses. Not surprisingly, when the gam-

bling produces a winning lottery ticket, Factor 11 never enters the discussion.⁸

While it would appear logical to quantify actual losses to particularize the marital funds that were wasted on this allegedly bad habit, not every loss has a trail. In such cases, the outcome appears to spring from pure judicial discretion. For example, in *Conceicao v. Conceicao*,⁹ without any mathematical justification, the court awarded the wife 70% of the marital estate as an offset for her husband's gambling losses.

C. Improvident or Unaffordable Activities

What activities constitute forbidden marital waste appears to be evolving. Can any marital excess potentially justify a Factor 11 adjustment? For example, because activities such as snowmobiling and flying were enjoyed by both spouses and only seemed improvident in hindsight, the court, in *Willis v. Willis*,¹⁰ found that those expenditures did not warrant a finding of wasteful dissipation. Had the husband in *Willis v. Willis* not brought his wife snowmobiling, would the court have reached a different conclusion? What if, like Luke, a spouse overspends on an activity in which the other spouse does not engage? Would Luke's wife's disinterest transform a lifestyle choice into a dissipation issue? What if Luke's wife objected to his overspending? Without a hard and fast rule, these variations on the original fact pattern become fodder for a law school exam and a potential headache for Luke.

D. Poor Judgment

A potential dissipater's intent is obviously not the only litmus test. A finding of marital waste can also turn on issues such as what constitutes "poor business judgment" or a "reasonable investment risk." Factor 11's business judgment rule, however, is rarely without controversy. For example, in *Fielder v. Fielder*,¹¹ the husband's questionable tax shelters were treated as marital waste even though there was no evidence of fraud, misconduct, or bad faith. Conversely, in *Grunfeld v. Grunfeld*,¹² the Appellate Division held that taking reasonable investment risks that fail does not constitute wasteful dissipation, where the husband's losses incurred in trading commodities resulted from his good faith belief in the profitability of the challenged transactions.

Good faith often gives way to a poor sense of timing. In *Maharam v. Maharam*,¹³ the husband invested a large portion of the marital estate after commencement but before trial into a real estate venture and lost it all. There it was the timing of the investment that apparently led the court to find wasteful dissipation, not whether the husband exercised poor judgment in the investment or whether the investment was a reasonable one.

The question of dissipation appears to run the business judgment gamut between the unlucky and the reckless. In *Murray v. Murray*,¹⁴ Justice Leonard Austin refused to adjust the value of the husband's business based on a lawsuit that could have a potentially catastrophic impact on that value. Because it was the husband who recklessly failed to maintain insurance coverage against potential accident liability, the court, citing Factor 11, held that the "resulting financial sword of Damocles which [hung] over plaintiff's head was not of her doing [and therefore] she would not be made to suffer for it."

In *Murray*, the court distinguished the Court of Appeals' decision in *Hartog v. Hartog*,¹⁵ noting that the losses in *Hartog* resulted from the unpredictability of the real estate market and could only be discerned in hindsight, while, in *Murray*, the husband's reckless disregard of the risks connected with running a building without liability insurance could never be justified.

Because hindsight is 20-20, courts generally employ the proverbial smell test in determining whether to make a waste adjustment. For example, where commercial property has been completely mismanaged¹⁶ to the point of it appearing to have been sabotaged, the courts are not reluctant to adjust the parties' equitable distribution accordingly. Similarly, where a husband deliberately refused to address housing code violations¹⁷ that led to diminution in the value of the parties' commercial property and where a husband's intentional default on certain notes led to an auction and loss on heavy equipment,¹⁸ judges were quick to impose a Factor 11 adjustment.

However, when it came to penalizing an errant spouse for refusing to refinance the mortgage on the marital residence at a lower rate, in *Graves v. Graves*,¹⁹ the court refused to act, effectively applying a different standard to relating to personal and residential property decisions as opposed to those that affect the value of commercial property. For example, in *Corbett v. Corbett*,²⁰ the husband failed to apply early enough to get a disability pension from his former employer. The court found that this action was not marital waste because there was no evidence that the husband *purposefully* did not apply for the disability benefits; effectively holding that wasteful dissipation needs to be willful.²¹ Similar to *Andrea v. Andrea*,²² where there was no evidence that the husband intended to deprive his wife of his pension by getting arrested, the Court in *Corbett* elected not to penalize the husband for his clearly reckless but unintentional conduct.

Wasting Employment Opportunities

Marital waste can also be found where a party intentionally abandons lucrative employment or refuses

to pursue employment. In *Southwick v. Southwick*,²³ wasteful dissipation was found when the husband refused to obtain employment following the commencement of the matrimonial action. In *Gastineau v. Gastineau*,²⁴ because the former New York Jet standout defensive end quit his otherwise lucrative employment as a professional football player without a rational explanation, Justice Leis arbitrarily awarded his wife two-thirds of the marital estate. However, when a husband sabotaged his career by diverting money away from his father-in-law's business, Justice Dana Winslow, in *Klipper v. Klipper*, held that Factor 11 did not apply.²⁵

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F. Transfers Without Just Compensation

While a spouse cannot transfer marital assets without fair compensation,²⁶ applying marital money to legitimate expenses does not constitute marital dissipation.²⁷ For example, in *Grotsky v. Grotsky*,²⁸ the husband sold \$250,000 worth of shares in a Franklin Fund just four months before his divorce action commenced, which dwindled down to \$33,510.44 by the date of commencement. The court held that "the husband dissipated the proceeds from the sale of the Franklin Fund shares" based upon the husband's excessive withdrawals, which reached over \$1,000 per day.²⁹ The timing and amount of the husband's withdrawals in *Grotsky* were interpreted as a scheme to deprive the wife of her rightful share of the parties' \$250,000 in savings.

Conclusion

Attorneys seeking to avoid being a waste of marital funds themselves tend to mine any negative impact on the marital estate that can be traced to the dubious conduct of the other spouse. Hopeful that an adjustment to a client's equitable entitlement might be sparked by blaming the other spouse for a decline in the overall value of the marital estate, an unpredictable Factor 11 claim all too frequently becomes an opportunity to leverage an outcome on a whim or whiff. Until an ambitious Appellate Court commits itself to developing a more reliable methodology for sniffing out marital waste, the lower courts can be assured that the litigious will continue to make a stink.³⁰

Endnotes

1. *Jacobellis v. Ohio*, 378 U.S. 184 at 197, 84 S. Ct. 1676 (U.S. Ohio June 22, 1964).
2. *Sandra N. Jacobson, Gone with the Wind or the Wasteful Dissipation of Marital Assets*, Fam. L. Rev. vol. 26, no. 2 (June 1994).
3. *Conceicao v. Conceicao*, 203 A.D.2d 877, 611 N.Y.S.2d 318 (3d Dep't 1994).
4. *Wilner v. Wilner*, 192 A.D.2d 524, 595 N.Y.S.2d 978 (2d Dep't 1994); *Fiedler v. Fiedler*, 230 A.D.2d 822, 646 N.Y.S.2d 839 (2d Dep't 1996).
5. *Grotzky v. Grotzky*, 208 A.D.2d 676, 617 N.Y.S.2d 517 (2d Dep't 1994); *Ferraro v. Ferraro*, 684 N.Y.S.2d 274, 257 A.D.2d 596 (2d Dep't 1999).
6. 152 Misc. 2d 100, 575 N.Y.S.2d 240 (Sup. Ct., Nassau Co. 1991).
7. 188 A.D.2d 710, 590 N.Y.S.2d 603 (3d Dep't 1992).
8. *Ullah v. Ullah*, 161 A.D.2d 699, 555 N.Y.S.2d 834 (2d Dep't 1990); *Campbell v. Campbell*, 213 A.D.2d 1027, 624 N.Y.S.2d 493 (4th Dep't 1995).
9. 203 A.D.2d 877, 611 N.Y.S.2d 318 (3d Dep't 1994).
10. 107 A.D.2d 867, 484 N.Y.S.2d 309 (3d Dep't 1985).
11. 280 A.D.2d 822, 646 N.Y.S.2d 839 (2d Dep't 1996).
12. 255 A.D.2d 12, 688 N.Y.S.2d 77 (1st Dep't 1999).
13. 245 A.D.2d 94, 666 N.Y.S.2d 129 (1st Dep't 1996).
14. Index No. 93021/98 Qbs: 82702333 (Unpublished).
15. *Hartog v. Hartog*, 85 N.Y.S.2d 36, 647 N.E.749, 623 N.Y.S.2d 537 (February 14, 1995).
16. *Berrios v. Berrios*, 159 A.D.2d 401, 553 N.Y.S.2d 100 (1st Dep't 1990).
17. *Hansen v. Hansen*, 207 A.D.2d 401, 616 N.Y.S.2d 637 (2d Dep't 1994).
18. *Baker v. Baker*, 188 A.D.2d 710, 590 N.Y.S.2d 603 (3d Dep't 1992).
19. 307 A.D.2d 1022, 763 N.Y.S.2d 774 (2d Dep't 2003).
20. 6 A.D.3d 766, 775 N.Y.S.2d 774 (3d Dep't 2004).
21. *Id.* at 767.
22. *Andrea* at 241.
23. 202 A.D.2d 996, 612 N.Y.S.2d 704 (4th Dep't 1994).
24. 151 Misc. 2d 813, 573 N.Y.S.2d 819 (N.Y. Sup. 1991).
25. Unpublished (Justice Dana Winslow).
26. *Ferraro v. Ferraro*, 684 N.Y.S.2d 274, 257 A.D.2d 596 (2d Dep't 1999).
27. *Gonzalez v. Gonzalez*, 291 A.D.2d 373, 737 N.Y.S.2d 111 (2d Dep't 2002).
28. 208 A.D.2d 676, 617 N.Y.S.2d 517 (2d Dep't 1994).
29. *Id.* at 678.
30. If you opined that marital waste would be found in Scenario 3 only, you win a kewpie doll. Scenarios 1 and 2 have yet to be decided and in Scenario 4, Justice Winslow held there was no marital waste.

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