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All's Fair in Love and Divorce: Why Divorce Attorney's Fees Should Constitute a Dissipation of Marital Assets in Order to Retain Equity in Marital Property Distributions

Sarah C. Acker

American University Washington College of Law

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ALL'S FAIR IN LOVE AND DIVORCE: WHY DIVORCE ATTORNEY'S FEES SHOULD CONSTITUTE A DISSIPATION OF MARITAL ASSETS IN ORDER TO RETAIN EQUITY IN MARITAL PROPERTY DISTRIBUTIONS

SARAH C. ACKER*

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* Note & Comment Editor, *American University Journal of Gender, Social Policy and the Law*, Volume 15; J.D. Candidate, May 2007, *American University Washington College of Law*; B.S. in Business Administration, cum laude, 2003, *Boston University*. Thank you to my parents for their support in everything I do. Many thanks to the great group of people who went through this process with me and made sure I never lost my sense of humor. I would also like to thank Professor Richard Ugelow and Professor Claire Smearman for encouraging me to write this Comment in the first place.

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INTRODUCTION

Two people get married, have two children, and a few years later sit on opposite sides of a courtroom while a judge attempts to divide what remains of their marital assets.¹ The husband sold the most valuable marital asset, the marital home, just prior to the parties' separation.² He sold the house without his wife's knowledge and spent the entire proceeds from this sale.³ In response, the wife brought a claim of dissipation⁴ against her husband, asking the judge to remedy the situation in the final division of marital property.⁵ The

1. See generally Plaintiff's Pre-Trial Memorandum, Rizkallah v. Clem, No. FL 42872 (Cir. Ct. Montgomery County Md. July 22, 2005) [hereinafter Plaintiff's Pre-Trial Memorandaum] (detailing the circumstances under which a divorce claim arose).

2. See *id.* at 1 (describing the circumstances around the husband's sale of the marital home, where the home was in his control and titled only in his name).

3. See *id.* at 1-2 (illustrating how the husband spent the proceeds of the sale on such items as attorney's fees, truck repairs, and rent for a lease-back agreement he signed with the new owners of the marital home).

4. See *infra* Part II(B) (defining dissipation as one spouse using marital property for his or her sole benefit for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown).

5. See Plaintiff's Pre-Trial Memorandum, *supra* note 1, at 13 (seeking a remedy in the form of one half of the proceeds from the sale of the home).

judge pointed out that half of the proceeds from the sale of the house went to pay the husband's legal fees stemming from the divorce proceeding, and, according to the recent Maryland decision in *Allison v. Allison*,⁶ marital funds spent on attorney's fees are a valid expenditure of marital funds that do not constitute dissipation.⁷ Therefore, a court will not consider the funds that the husband spent on attorney's fees when making its property distribution.⁸ Consequently, the wife could not afford to pay for her own representation and was left with very limited assets from the little that remained in the marital estate.⁹

This Comment argues that allowing a spouse to spend marital funds for individual attorney's fees leads to inequitable property distribution if the court does not account for these expended assets in the estate at divorce. Furthermore, courts should account for these transactions through the dissipation doctrine to prevent spouses from effectively paying for half of an expenditure that is clearly against their interests and significantly reduces the value of the estate to be divided. Part II of this Comment provides the background on the doctrine of equitable distribution of property in divorce, the doctrine of dissipation as it pertains to equitable distribution, and how courts approach the problem of dissipation.¹⁰ It also discusses the split in authority between states regarding whether attorney's fees constitute dissipation of marital assets.¹¹

Part III argues that attorney's fees should constitute dissipation for the purposes of property distribution. Specifically, Part III(A) illustrates how a unilateral transaction for attorney's fees fits the

6. See *Allison v. Allison*, 864 A.2d 191, 196 (Md. Ct. Spec. App. 2004) (reasoning that the husband's use of marital funds to pay for attorney's fees was not dissipation because his purpose in spending the funds was to avoid representing himself in the divorce action).

7. See *id.* (stating that while reasonable attorney's fees did not constitute dissipation, unreasonable attorney's fees would constitute dissipation).

8. See Memorandum of Laura Rizkallah Regarding *Allison v. Allison* at 1, *Rizkallah v. Clem*, No. FL 42872 (Cir. Ct. Montgomery County Md. Sept. 6, 2005) [hereinafter Memorandum of Laura Rizkallah] (noting the judge's prior statement to plaintiff's counsel that he would not consider the funds spent by the husband on attorney's fees as dissipation because of the precedent set by the *Allison* case).

9. See *Allison*, 864 A.2d at 196 (holding that attorney's fees were an acceptable expenditure of marital funds because a husband had no other funds besides marital funds from which to pay the attorney's fees).

10. See *infra* Part II (detailing how ideas of property distribution in divorce evolved from separate property rights and title theory to the theory of equitable distribution).

11. See *infra* Part II (discussing the split between states such as Maryland and Virginia, which hold that attorney's fees do not constitute dissipation, with states such as Illinois and South Carolina, which hold that attorney's fees do constitute dissipation).

definition of dissipation.¹² Part III(B) argues that allowing a spouse to use marital assets to pay for his or her individual attorney's fees is contrary to the idea of equitable distribution and the discretion courts traditionally retain in applying it.¹³

Part III(C) explores other theories through which a court in equity can remedy a spouse's use of marital funds for attorney's fees, concluding that the doctrine of dissipation most effectively maintains equity in the outcome of the divorce.¹⁴

I. BACKGROUND

A. *The Doctrine of Equitable Distribution: Marriage as an Equal Partnership*

The history of property division in American divorce law has evolved over time.¹⁵ The early American common law of divorce followed the English tradition in which the spouses' separate property rights merged upon marriage into the legal entity of the husband.¹⁶ In common law states, an eventual movement toward a more equitable distribution of property at divorce took hold.¹⁷ However, it was not until the early 1970s that a major adoption of far-reaching equitable theory in property distribution took place.¹⁸ In 1970, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Marriage and Divorce Act (UMDA).¹⁹ The

12. See *infra* Part III(A) (applying a transaction for attorney's fees to the definition of dissipation and concluding that it is a transaction where one spouse benefits for spending the funds on a non-marital purpose at a time when the marriage is breaking down).

13. See *infra* Part III(B) (analyzing the equitable distribution doctrine and reasoning that not allowing attorney's fees to come under the distribution doctrine limits the courts discretionary power, allows one spouse to benefit, creates a higher burden of proof, and complicates the intent requirement of dissipation).

14. See *infra* Part III(C) (analyzing the theories of constructive trusts, fraud, and preliminary injunctions as other ways in which the court can retain equity in the property division).

15. See generally BRETT TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* 2-18 (Patrick McCahill et al. eds., 1994) (describing the evolution of property distribution and title in American divorce law from common law merger of a husband and wife's property under the husband, to the emergence of a community property system, to the doctrine of equitable distribution).

16. See *id.* at 3 (discussing how the common law merger in identities at marriage limited the property rights of the wife, who often times would only receive alimony at divorce).

17. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 46-49 (1985) (describing the gradual adoption of equitable distribution rules and changes in state divorce law).

18. See TURNER, *supra* note 15, at 14 (stating that New Jersey was the first state to adopt an equitable distribution statute in 1971, and the last state was Virginia in 1982).

19. See Stephen J. Brake, Note, *Equitable Distribution vs. Fixed Rules: Marital*

UMDA codified the system of equitable distribution.²⁰ Equitable distribution rests on the notion that marriage is an equal partnership, and, at divorce, each spouse is entitled to an equitable share of the marital property based on the spouse's contributions to the marriage.²¹ Although most states have not formally adopted the UMDA, many have enacted statutes that provide for the equitable distribution of property in divorce using similar language.²² Other common law states that have not adopted formal equitable distribution statutes slowly adopted the doctrine of equitable distribution in marital property at common law.²³

The equitable distribution doctrine is based on the generally held idea of marriage as an equal partnership to which both spouses contribute.²⁴ Equitable distribution states generally hold that each spouse has an equal claim to the marital property.²⁵ These jurisdictions focus on what constitutes an equitable or "fair" distribution of property as opposed to simply dividing the assets in half.²⁶ Many statutes list factors that a court should consider in an

Property Reform and the Uniform Marital Property Act, 23 B.C.L. REV. 761, 761 (1981-82) (stating that the National Conference of Commissioners on Uniform State Laws attempted to find a proper method through which to distribute property in divorce).

20. See UNIF. MARRIAGE AND DIVORCE ACT § 307 (amended 1973) (providing a template for codification of a property distribution scheme that divided property equitably without considering marital misconduct and without considering which spouse was the title holder to the property).

21. See *Forcucci v. Forcucci*, 83 A.D.2d 169, 171 (N.Y. App. Div. 1981) (stating that equitable distribution resulted from defining the marriage as an economic partnership).

22. See, e.g., MINN. STAT. ANN. § 518.58 (2005) ("Upon a dissolution of a marriage, . . . the court shall make a just and equitable division of the marital property of the parties without regard to marital misconduct[.]"); N.C. GEN. STAT. ANN. § 50-20 (2005) ("Upon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property. . .").

23. See, e.g., *Canakaris v. Canakaris*, 382 So.2d 1197, 1202-03 (Fla. 1980) (holding that the court had discretionary equitable authority in distribution of property).

24. See K. Edward Greene, *A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?*, 18 CAMPBELL L. REV. 203, 203 (1996) (stating that the concept of treating husband and wife as a partnership is evident at divorce according to North Carolina's equitable distribution laws).

25. See *Brake*, *supra* note 19, at 767 (stating that equitable distribution does empower the courts to take into consideration the separate property of each spouse).

26. See *Ex parte Drummond*, 785 So.2d 358, 361 (Ala. 2000) (stating that property divisions do not need to be equal, but instead must be equitable in light of the facts of the case); see also *Jenkins v. Jenkins*, 781 So.2d 986, 988 (Ala. 2000) (stating that an equitable division of assets is not necessarily an equal division and holding that where an equal division of property would render husband's business insolvent, the assets should be divided unequally so as to prevent an unfair outcome for the husband); *Brewer v. Brewer*, 846 A.2d 1, 17 (Md. Ct. Spec. App. 2004) (holding that the law did not require the court to divide marital property equally but only that the division must be fair and equitable).

equitable distribution decision.²⁷ In addition to this list of statutory factors, courts in these states receive a tremendous amount of discretion in dividing property between the spouses.²⁸ In many cases, because of the large amount of discretion given to the court, equitable distribution does not result in a fifty/fifty division of the party's marital assets.²⁹ One problem that inevitably arises in many cases is how to account for spousal expenditures of marital funds around the time of divorce when the court is attempting to separate property.³⁰

B. Dissipation: A Factor In Equitable Distribution

A significant problem that arises under the theory that both spouses share an interest in property within a marriage is in the dissipation of those assets in anticipation of a divorce and property division.³¹ Dissipation is commonly defined as one spouse using marital property for his or her sole benefit for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown.³² Courts' views and responses to dissipation developed long before the

27. See, e.g., ILL. STAT. ANN. CH. 750 §5/503 (2005) (listing duration of marriage, relevant economic circumstances of each spouse, and any obligations arising from a prior marriage of either party, as some of the factors that the court considered upon distribution); S.C. STAT. CODE ANN. § 20-7-472 (2004) (listing that the court should take into consideration marital misconduct, duration of the marriage, income and earning potential of the spouses, non-marital property of each spouse and health).

28. See *Widman v. Widman*, 557 S.E.2d 693, 701 (S.C. Ct. App. 2001) (holding that the court can use any means reasonable to determine an equitable distribution of property).

29. See, e.g., *Isham v. Isham*, 464 So.2d 109, 112 (Ala. 1985) (awarding 40% of the estate to the wife in an equitable distribution determination where wife had assisted husband in running his business); *Roberts v. Roberts*, 520 So.2d 598, 599 (Fla. Dist. Ct. App. 1988) (awarding the wife 58.7% of the marital home value where she provided the sole initial capital investment in the property and the remaining mortgage payments were made jointly by both spouses); *Burbs v. Burbs*, 739 S.W.2d 582, 585 (Mo. Ct. App. 1987) (awarding the wife 57% of the marital estate where the wife had little education or work experience because the husband had encouraged her to stay home).

30. See TURNER, *supra* note 15, at 467-77 (stating that asset-related misconduct has become more common as the general public becomes aware that all property is subject to division); see also Lewis Becker, *Conduct of a Spouse That Dissipates Property Available for Equitable Property Distribution: A Suggested Analysis*, 52 OHIO ST. L. J. 95, 95-96 (1991) (asserting that there has been an increase in equitable distribution claims by one spouse alleging that the other spouse has in some way interfered with the amount of property available for equitable distribution by mismanaging or misusing the property).

31. See Becker, *supra* note 30, at 96 (stating that a variety of difficult issues arise as to the extent to which a court can protect a spouse from conduct of the other spouse regarding marital property).

32. *Sharp v. Sharp*, 473 A.2d 499, 506 (Md. Ct. Spec. App. 1984) (discussing various jurisdictional definitions of dissipation and effectively agreeing upon the definition that Illinois courts granted).

equitable distribution doctrine's viability.³³ Under the theory of dissipation, the court may take property that no longer exists within the marital estate into consideration when dividing the estate as though the property still existed in front of the court.³⁴ Dissipation has become a more prevalent issue in distribution of assets over time and is now commonly incorporated into state equitable distribution statutes.³⁵ Most states list dissipation of assets as a factor that courts should take into account when making an equitable distribution.³⁶ The technical definition of dissipation is not given in the state statutes, but instead is found in state case law, where most states have almost identical definitions and elements of dissipation.³⁷

The doctrine of dissipation falls under the court's broad discretion in distributing the marital estate.³⁸ Dissipation is often analogized to fraud that one spouse commits against another.³⁹ However, proving dissipation does not require the same elements as proving fraud.⁴⁰ In

33. See, e.g., *Oles Envelope Corp. v. Oles*, 65 A.2d 899, 903 (Md. 1984) (holding that a conveyance by a husband in anticipation of his wife's suit for alimony was fraudulent); *Levin v. Levin*, 171 A. 77, 78 (Md. 1934) (finding that intentionally dissipated property constitutes a fraud on marital rights).

34. See Becker, *supra* note 30, at 97-99 (listing the ways in which a court may take dissipated property into consideration by either considering it as a factor in dividing the remaining property or by offsetting the property by considering the property as though it still exists for distribution and assigning it to the dissipating spouse).

35. E.g., ILL. STAT. ANN. CH. 750 §5/503 (2005) (stating that the court can look at the dissipation of marital and non-marital property as a consideration in equitable distribution); VA. CODE ANN. § 20-107.3 (2005) (listing the use of marital property by either of the spouses for nonmarital separate purpose or dissipation of funds, as a factor to consider in equitable distribution).

36. See, e.g., LAWRENCE J. GOLDEN, *EQUITABLE DISTRIBUTION OF PROPERTY* 259 (1983) (stating some states have statutes that specifically say courts can consider dissipation or fraudulent conveyances as factors in distribution, while other state statutes allow for considering dissipation through a statutory catch-all factor or listing a factor that allows consideration of contributions to the preservation of marital assets).

37. See, e.g., *In re Marriage of O'Neill*, 563 N.E.2d 494, 498-99 (Ill. 1990) (listing the elements of dissipation as the expenditure of a spouse for a non-marital purpose that is for his or her sole benefit when the marriage is undergoing irreconcilable breakdown).

38. See Lori D. Hall, *Dissipation of Marital Assets: How South Carolina and Other States Prevent and Remedy the Problem*, *SOUTH CAROLINA LAWYER*, May/June 1999, at 42 (stating that South Carolina law lets family court judges consider how spouses handle marital property when making an equitable distribution); see also Richard W. Zuckerman, *Dissipation of Marital Assets In Illinois: A Review*, 91 ILL. B.J. 440, 441 (2003) (stating that Illinois courts can remedy the innocent party's dissipation by one-half of the value of the dissipated property either through a cash award or other marital property).

39. See *Sharp*, 473 A.2d at 505 (citing *Levin v. Levin*, 171 A. 77 (Md. 1934) (quoting "Therefore, where a chancellor finds that property was intentionally dissipated in order to avoid inclusion of that property towards consideration of a monetary award, such intentional dissipation is no more than a *fraud* on marital rights") (emphasis added)).

40. See TURNER, *supra* note 15, at 479 (stating that courts do not require proof

most jurisdictions, the spouse alleging dissipation of assets bears the initial burden of proving dissipation.⁴¹ Once a spouse makes a prima facie case for dissipation, the burden shifts to the other spouse to prove the reasonableness of his or her expenditures.⁴²

Usually, determining whether a transaction falls under the doctrine of dissipation will depend on the nature and timing of the transaction.⁴³ Courts will often focus on whether or not one spouse benefited or was unjustly enriched by the transaction.⁴⁴ Courts will typically find dissipation where one spouse spent marital funds for his or her benefit when the marriage was falling apart, and the transaction affects the funds available for distribution.⁴⁵ Often, the court must decide whether a particular expenditure constitutes a “necessity of life,” such as basic living expenses once spouses physically separate, and when those expenditures constitute dissipation.⁴⁶ Once one spouse shows a prima facie case of dissipation, the allegedly dissipating spouse must then mount a defense in which he or she presents sufficient evidence and receipts of how the assets were spent and that the expenditure was reasonable.⁴⁷

that the dissipating spouse acted with fraudulent intent in order to hold that the spouse dissipated assets).

41. See *Jeffcoat v. Jeffcoat*, 649 A.2d 1137, 1142 (Md. Ct. Spec. App. 1994) (stating that the spouse alleging dissipation has the initial burden of proof and needs to establish a prima facie case in order to shift the burden).

42. See *id.* at 1142 (holding that a wife established a prima facie case for dissipation where she claimed that her husband borrowed funds in the couple’s name and placed the funds in accounts under his own name, spending approximately \$300,000 in marital funds during the one year period of the couple’s separation thereby shifting the burden); *Clements v. Clements*, 397 S.E.2d 257, 261-62 (Va. 1990) (remanding the issue when the wife established a prima facie case, and the lower court held that there was no dissipation even though the husband provided no evidence in regards to the disposition of the allegedly dissipated funds).

43. See TURNER, *supra* note 15, at 479-88 (discussing what a court considering dissipation will look at, such as the purpose of the transaction, whether it fits the definition of marital or non-marital purpose, and whether or not the transaction occurred before or after the marital breakdown).

44. See *Allgood v. Allgood*, 473 So.2d 416, 421 (Miss. 1985) (discussing the prevention of unjust enrichment in a marital relationship).

45. See TURNER, *supra* note 15, at 483-84 (stating that a majority of courts find dissipation where spouses make gifts to their children); see, e.g., *Hellwig v. Hellwig* 426 N.E.2d 1087, 1095 (Ill. App. Ct. 1981) (finding dissipation where a husband transferred funds and real estate to the parties’ son).

46. See *Volesky v. Volesky*, 412 N.W.2d 750, 752 (Minn. Ct. App. 1987) (holding that if a party uses assets to meet necessary living expenses, he or she is not accountable for dissipation of those funds); *Judy v. Judy*, 998 S.W.2d 45, 52 (Mo. Ct. Spp. 1999) (holding that funds spent for payment of marital bills, both parties’ debts, and support for both parties did not constitute dissipation); *Thomas v. Thomas*, 580 S.E.2d 503, 506 (Va. Ct. App. 2003) (holding that expenditures out of marital funds for everyday items and necessities of life is a valid marital purpose and is not considered dissipation).

47. See *Amburn v. Amburn*, 414 S.E.2d 847, 850 (Va. Ct. App. 1992) (holding that wife met her burden of proof by presenting a complete account of how she used

C. Equitable Remedies for Dissipation

Courts have a number of different remedies they can implement to account for spouses' transactions near the time of divorce.⁴⁸ In a typical dissipation remedy, the court will simply treat the expended asset as though it still existed within the estate and will account for the funds in the equitable distribution by including the extant property in the equitable share of the spouse who spent the funds.⁴⁹ A court could also impose a constructive trust on assets within the marriage.⁵⁰ The court will use the remedy of constructive trust where a fiduciary duty exists between the spouses as the result of a confidential relationship, and one spouse controls an asset for the benefit of the marriage as a whole and will be unjustly enriched if he or she is allowed to dispose of the asset.⁵¹ A court can also remedy a dissipation situation by rescinding the entire transaction if they find that the transaction was fraudulent.⁵² A finding of fraudulent conveyance requires that the court determine that a spouse and the third party in the transaction of marital funds acted with a fraudulent intent.⁵³ A court can use a preliminary injunction on marital assets to attempt to pre-empt dissipation altogether.⁵⁴ A preliminary injunction freezes marital assets and prevents a spouse from using them while the court is in the process of distributing the estate.⁵⁵

the allegedly dissipated funds and therefore had not committed dissipation).

48. See TURNER, *supra* note 15, at 467-70 (setting out the element's of fraud and constructive trust as remedies a court may employ in given situations to retain equity in the divorce).

49. See *In re Marriage of Walls*, 925 P.2d 483, 486 (Mont. 1996) (including \$5000 dissipated by the wife in her share of the estate as though the asset still existed).

50. See *Tomaino v. Tomaino*, 68 A.D.2d 267, 269-70 (N.Y. App. Div. 1979) (imposing a constructive trust on real property owned by the husband when the wife had advanced funds toward the improvement of the real estate).

51. See *id.* (holding that a constructive trust existed because the husband owned the real property for the benefit of the marriage and that the wife relied, due to the confidential relationship within the marriage, on her husband to maintain the property).

52. See *Patterson v. Patterson*, 277 S.E.2d 709, 718 (W.Va. 1981) (setting aside the husband's conveyance of his business to his daughter as fraudulent, where he retained power of attorney and control over the business operations).

53. See *Gaudio v. Gaudio*, 580 A.2d 1212, 1223-24 (Conn. App. Ct. 1990) (ruling that the trial court was correct in holding a stock transfer by husband to a third party fraudulent and that the wife needed to show fraudulent intent in order to prove fraud).

54. See *Kahn v. Kahn*, 559 N.Y.S.2d 103, 104 (N.Y. App. Div. 1990) (stating that wife sought a preliminary injunction to stop her husband from spending marital property in his control during the divorce proceedings where husband controlled over \$5 million in assets).

55. See *id.* at 105-06. (refraining from granting a preliminary injunction on marital assets in the husband's control, where the court decided that freezing the assets might actually result in more harm).

D. Are Attorney's Fees Dissipation?: A Split Between States

A split in state authority exists regarding whether the use of marital funds to pay a spouse's unilateral attorney's fees constitutes dissipation of assets.⁵⁶ Some states hold that the use of marital funds to pay one party's divorce attorney's fees constitutes a dissipation of marital assets, reasoning that either the expenditure was not a marital purpose or that it was for the sole benefit of one spouse.⁵⁷ Other jurisdictions hold that such action does not constitute dissipation because attorney's fees are a necessity and the funds are spent for a marital purpose, the divorce; thus, it is reasonable.⁵⁸

In the recent case, *Allison v. Allison*, a Maryland court without precedent on the issue held that no dissipation of marital assets occurred.⁵⁹ In arriving at its conclusion, the court cited various state authorities and a legal article supporting the view that attorney's fees should not constitute dissipation, so long as the fees were reasonable.⁶⁰ The court reasoned that because Maryland law considers a spouse's earnings a marital asset throughout the separation period, any expenditure for attorney's fees would derive from the marital estate.⁶¹ Therefore, regardless of which marital asset

56. Compare *Head v. Head*, 523 N.E.2d 17, 21 (Ill. App. Ct. 1988) (holding that a portion of the husband's attorney's fees constituted part of the wife's share of the estate when she was forced to borrow money to pay for her attorney's fees, and as such was dissipation), and *In re Marriage of Walls*, 925 P.2d 483, 486 (Mont. 1996) (holding that the attorney's fees the wife spent to procure the divorce constituted a dissipation of assets that required consideration when dividing the marital assets), with *Decker v. Decker*, 435 S.E.2d 407, 412 (Va. Ct. App. 1993) (holding that expenditures for living expenses and attorney's fees constitute a valid marital purpose and are not dissipation), and *Hortis v. Hortis*, 367 N.W.2d 633, 636-37 (Minn. Ct. App. 1985) (holding that it was reasonable for the wife to spend marital funds on attorney's fees because seeking a divorce did not constitute an improper purpose, and, therefore, the expenditure did not constitute dissipation).

57. See *Head*, 523 N.E.2d at 21 (holding the husband's use of marital funds to pay attorney's fees was dissipation when the wife had to borrow money to pay for her attorney's fees); *In re Marriage of Walls*, 925 P.2d 483, 486 (Mont. 1996) (including the wife's payment of retainer to her attorney in her share of the marital estate).

58. See *Expenditures For Attorney's Fees As Dissipation: Spending Marital Funds For Attorney's Fees*, 15 No. 8 *EQUITABLE DISTRIBUTION J.* 85 (1998) [hereinafter *Expenditures*] (listing authority from several states holding that attorney's fees do not constitute dissipation).

59. See *Allison*, 864 A.2d at 196 (holding that reasonable attorney's fees do not constitute dissipation where husband used marital funds in a 401(k) plan to pay for his attorney's fees).

60. See *id.* at 195-96 (pointing out that jurisprudence in Illinois and Virginia differs as to whether or not attorney's fees constitute dissipation and relying on an article on the topic, reasoning that attorney's fees should not constitute dissipation because a spouse should not have seek alternative sources of funds that are non-marital in order to pay for an attorney).

61. See *id.* (illustrating that under Maryland law if a separated spouse used his or her own income before the court finalized the divorce decree, technically that expenditure would derive from marital funds).

the funds derived from, attorney's fees were a reasonable expenditure and did not meet the definition of dissipation.⁶² The court held that in distributing the couple's assets under the theory of equitable distribution, it would not value the money that the husband spent on legal fees as part of the marital estate.⁶³

II. ANALYSIS

A. Expenditures for Attorney's Fees Fit the Dissipation Definition

Attorney's fees first need to be examined in the context of a dissipation claim. An analysis and application of the common law definition of dissipation indicates that expenditures for attorney's fees fit the definition of dissipation.⁶⁴

1. Use of Marital Property for a Spouse's Sole Benefit

The first requirement for a dissipation claim is that the expending spouse uses the funds for his or her sole benefit.⁶⁵ Payment of attorney's fees from marital assets can solely benefit the expending spouse.⁶⁶ One spouse spends the funds on his or her own attorney for purposes of a divorce action. The attorney only protects the interests of the hiring spouse regarding the financial division of the estate and in the non-financial matters of securing the actual divorce.⁶⁷ The result is that one spouse benefits from expending marital funds when he or she uses those funds to protect individual interests in the divorce and property division.⁶⁸ Divorce litigation

62. See *id.* (holding that the husband's \$13,665.31 expenditure on attorney's fees did not meet the court's definition of dissipation as it derived directly from what the court considered cash property of the marital estate).

63. See *id.* (valuing the pension plan from which the attorney's fees derived at \$15,569, as opposed to the \$29,235 value before the funds were spent).

64. See generally *In re Marriage of Delarco*, 728 N.E.2d 1278 (Ill. App. Ct. 2000) (holding that the husband's expenditures for his attorney's fees were dissipation, noting that Illinois law considers spouses' payments to their attorneys personal not marital debt, and, therefore, the payments are advances from the marital estate because they are for one spouse's benefit during the breakdown).

65. See, e.g., *McCleary v. McCleary*, 822 A.2d 460, 469-71 (Md. Ct. Spec. App. 2001) (holding that the husband's charitable donation, derived from marital assets, did not constitute dissipation).

66. See *In re Marriage of Schriener*, 410 N.E.2d 572, 576 (Ill. App. Ct. 1980) (calculating that the \$2000 the husband had liquidated and spent on attorney's fees was dissipation and that he benefited by spending \$1000 to which the wife was legally entitled).

67. See *Allison*, 864 A.2d at 196 (stating that one of the obvious purposes for spending marital funds on attorney's fees was so the husband could avoid representing himself in the divorce action).

68. See *Head*, 523 N.E.2d at 21 (holding that the husband's attorney's fees paid out of marital assets resulted in an inequitable benefit to him and as such constituted

creates an adversarial situation.⁶⁹ Protection of one spouse's interests is not the only effect of hiring an attorney; it also directly pits these interests against the conflicting interests of the other spouse.⁷⁰ Therefore, a spouse using marital funds to pay for attorney's fees benefits from the protection and representation of his or her individual interests.⁷¹

In states that do not consider attorney's fees to constitute dissipation, a numeric breakdown reveals that the expending spouse receives an actual nominal benefit from the transaction.⁷² *Allison* demonstrates this unfortunate trend. The alleged dissipation was in the amount of \$13,665 out of a marital asset valued at \$29,235 before the transaction for attorney's fees occurred.⁷³ After the transaction, the asset was worth \$15,569.⁷⁴ Each spouse received 50% of the balance of the asset or \$7,784.⁷⁵ The court effectively split the husband's costs between himself and his wife, for a purpose that entirely protected his own interests.⁷⁶ He benefited from the transaction, while his wife did not.⁷⁷

dissipation, where his wife borrowed money to pay her attorney's fees).

69. See generally WEITZMAN, *supra* note 17, at 46-49 (discussing the evolution of no-fault divorce which eliminates the adversarial situation with respect to marital fault; however, even in the no-fault context, attorney's fees have increased regarding property distribution due to the necessity to value and distribute the assets equitably). Given that one party's receipt of a marital asset constitutes the other party's loss, property division is inherently adversarial upon divorce. *Id.*

70. See *Ray v. Ray*, 336 S.W.2d 731, 738-39 (Mo. Ct. App. 1960) (holding that the husband's expenditures for attorney's fees were antagonistic to the wife's interests and therefore that she should receive her equitable share of the expended funds).

71. See *Brake*, *supra* note 19, at 775-77 (discussing individualized justice and spouses' individual interests in property considered in equitable distribution awards).

72. See, e.g., *Anderson v. Anderson*, 514 S.E.2d 369, 380 (Va. Ct. App. 1999) (illustrating that the husband received a monetary benefit when he withdrew \$15,288 from marital funds valued at \$18,744, some of which he spent on attorney's fees, where only the remaining account balance was available for distribution).

73. See *Allison*, 864 A.2d. at 194 (stating the undisputed fact from the lower court that the 401(k) plan from which Mr. Allison withdrew funds was valued at \$29,235 at the time he made the withdrawal).

74. See *id.* (detailing the calculation Mr. Allison made to counter the value of the asset that the trial court decided by subtracting his \$13,665 withdrawal from the \$29,235 value of the 401(k)).

75. See *id.* at 196 (ruling in favor of Mr. Allison's calculation of the proper amount each spouse was entitled to receive from the 401(k) based on the holding that his expenditure for attorney's fees did not constitute dissipation).

76. See *id.* (reasoning that Mr. Allison's expenditure for attorney's fees was to avoid having to represent himself and his own interests, where Mrs. Allison was seeking alimony and other assets).

77. See *id.* at 194-96 (permitting the cost of Mr. Allison's attorney's fees to decrease the amount of both spouses' share of the 401(k) account instead of taking it out of his share of the initial value of \$29,235, which resulted in Mrs. Allison receiving about 50% less from the 401(k) asset).

2. *Use of Marital Property for a Purpose Unrelated to the Marriage*

Courts are reluctant to give the term marital purpose a particular concrete definition.⁷⁸ The overall authority suggests that a marital purpose constitutes a transaction that is typical or normally flows from the marriage entity.⁷⁹ Expenditures on attorney's fees are not a typical or normal expense within a marriage and do not come into play in the finances of a marriage until the marriage is breaking down.⁸⁰ Attorney's fees are in essence an expenditure that is the opposite of a marital purpose.⁸¹ In the context of divorce, an individual spends attorney's fees when the court is in the process of dividing up the marital estate and creating two separate entities out of the assets, dissolving the marriage.⁸² Therefore, upon divorce the partners incur attorney's fees for the purpose of ending the marriage, not maintaining or benefiting the marital partnership.⁸³ Attorney's fees are also distinguishable from typical marital expenditures because they are significant in amount and "one time" in nature.⁸⁴

3. *Marital Funds Spent During an Irreconcilable Breakdown*

Dissipation for equitable distribution purposes can only occur when the marriage is falling apart and heading toward eventual separation

78. See Becker, *supra* note 30, at 111-16 (discussing expenditures and categories courts define as a marital or non-marital purpose, such as distinguishing one time gifts given to third parties and loans made for various purposes as non-marital expenditures, as compared to routine living expenses, which typically constitute funds spent for a marital purpose).

79. Compare *In re Marriage of Calisoff*, 531 N.E.2d 810, 815 (Ill. App. Ct. 1988) (reversing the trial court's finding of dissipation where there was evidence that the marital funds were spent on an income tax lien on the marital home and other living expenses), with *Klingberg v. Klingberg*, 386 N.E.2d 517, 521 (Ill. App. Ct. 1979) (reasoning that the husband's use of marital funds to pay child support to his former wife, for which he was not in arrears, was dissipation because it was an atypical expenditure for a purpose unrelated to the current marriage).

80. See *Booth v. Booth*, 371 S.E.2d 569, 573 (Va. Ct. App. 1988) (noting that the husband's complaint on appeal argued that the court should consider the \$86,000 spent by the wife on attorney's fees and living expenses, which she removed from marital assets at the time of separation).

81. See *Ray*, 336 S.W.2d at 738-39 (holding that attorney's fees resulting from the divorce proceedings were dissipation because they were spent not for a joint purpose, but for a purpose that was antagonistic to the wife).

82. See *Palmer v. Palmer*, 841 So.2d 185, 189 (Miss. Ct. App. 2003) (voicing the idea of severance of the relationship as a main goal in divorce and property distribution, so that husband and wife could begin separate lives).

83. See *In re Marriage of Toth*, 586 N.E.2d 436, 440 (Ill. App. Ct. 1991) (holding that the wife's \$12,000 expenditure for attorney's fees was dissipation, and the wife admitted that the fees paid to her attorney for the divorce litigation constituted a purpose that was unrelated to the marriage).

84. See WEITZMAN, *supra* note 17, at 48 (discussing the high attorney's fees associated with divorce in equitable distribution states, and the strain this can place on a spouse trying to obtain access to cash to pay for lawyer's retainers and discovery fees).

and divorce.⁸⁵ Attorney's fees, in the divorce context, only arise at the final stages of breakdown.⁸⁶ In the context of divorce, parties hire legal assistance to end the marriage and distribute the assets; therefore, attorney's fees clearly meet this requirement for a finding of dissipation.⁸⁷ Attorney's fees for divorce proceedings do not exist unless the irreconcilable breakdown required for a finding of dissipation already occurred.⁸⁸

Jurisdictions holding that attorney's fees are not dissipation still find that attorney's fees satisfy this particular element of dissipation.⁸⁹

4. Intent

At common law, the majority of states hold that a spouse's state of mind or intent is irrelevant as to whether or not dissipation occurred.⁹⁰ Evidence of a bad faith intentions and state of mind can result in a more clear-cut case of dissipation, but it is not a prerequisite.⁹¹ The intent to spend the funds for a non-marital purpose is usually sufficient for a finding of dissipation.⁹² The

85. See generally *In re Marriage of Hazel*, 579 N.E.2d 1265 (Ill. App. Ct. 1991) (stating that the court could consider the irreconcilable breakdown as the prolonged and gradual process starting with the initial signs of trouble in the marriage until the actual breakdown and divorce itself). In this case, the husband and wife had a history of marital problems for a number of years before the actual separation and divorce. *Id.*

86. See generally *Francka v. Francka*, 951 S.W.2d 685 (Mo. Ct. App. 1997) (holding that the trial court did not abuse its discretion because the dissipation occurred when the husband spent significant amounts of marital funds on his attorney's fees and litigation expenses resulting from the filing of the divorce action).

87. See *Expenditures*, *supra* note 58, at 85 (stating that it is entirely appropriate for couples facing divorce to obtain legal advice needed to distribute marital assets).

88. See *In re Marriage of O'Neill*, 563 N.E.2d. 494, 499 (Ill. App. Ct. 1990) (holding that an expenditure for attorney's fees to defend a husband against a criminal charge that occurred at a time when the marriage was not undergoing irreconcilable breakdown did not constitute dissipation).

89. See *Anderson v. Anderson*, 514 S.E.2d 369, 380 (Va. Ct. App. 1999) (holding that the burden rested on the husband to prove he spent marital funds after the breakdown for a proper marital purpose, but the attorney's fees he spent over the course of the divorce constituted a valid post-separation expense).

90. See, e.g., *E. E. C. v. E. J. C.*, 457 A.2d 688, 695-96 (Del. 1983) (holding that a husband dissipated assets because his business produced assets of over \$400,000 during the seventeen year marriage, yet at the time of divorce he had a negative net worth). The court found dissipation regardless of the fact that the husband claimed that his transactions did not have the requisite intent to satisfy the level of dissipation. *Id.* See also *TURNER*, *supra* note 15, at 479 (stating that dissipation does not typically depend on the state of mind of the dissipating spouse.) For example, proving a fraudulent intent is not required for a finding of dissipation. *Id.*

91. See, e.g., *Barriger v. Barriger*, 514 S.W.2d 114, 115 (Ky. 1974) (finding a clear case of dissipation, despite the absence of explicit showing, where the husband sold \$25,000 in stock after his wife informed him that she was filing for divorce and not accounting for the money that he testified he spent on gambling trips and vacations).

92. See *Klingberg v. Klingberg*, 386 N.E.2d 517, 517-18 (Ill. App. Ct. 1979) (reasoning that dissipation occurred because the expenditure was made for a non-

intention of any spouse in retaining legal counsel for a divorce is to ensure protection of his or her own individual interests in the divorce and division of property.⁹³ In spending marital assets on attorney's fees, a spouse intends to secure his or her own personal interests separate from that of the marriage. Specifically, the divorcing spouse intends to spend marital funds for the protection of his or her individual interests and dissolve the marriage entirely during the irreconcilable breakdown.⁹⁴ This construction of intent derived from the facts and circumstances involved in a divorce proceeding should be sufficient to demonstrate the element of intent necessary to find dissipation.⁹⁵

B. Holding That Attorney's Fees Are Not Dissipation Results In Outcomes That Conflict with the Purpose of Equitable Distribution

The doctrine of equitable distribution is a vital tool for separating a marital partnership into two distinct, separate entities and allowing the divorced parties to achieve a complete, final, and fair outcome.⁹⁶ Allowing one spouse to unilaterally spend marital funds on attorney's fees without allowing the court to consider the transaction in the property division is in conflict with the equitable distribution doctrine.⁹⁷

marital purpose of paying child support from a previous marriage).

93. See *Little v. Superior Court of Arizona*, 884 P.2d 214, 215-16 (Ariz. Ct. App. 1994) (demonstrating a spouse's individual interest upon securing a divorce attorney where the husband argued that it was necessary that he obtain legal services in the divorce to protect his rights in the divorce proceeding and because the expense constituted a "necessity of life" which the injunction on marital assets did not preclude).

94. See *Allison v. Allison*, 864 A.2d 191, 196 (Md. Ct. Spec. App. 2004) (stating that the husband's obvious purpose of spending funds for attorney's fees was to avoid having to represent himself and protect his interests where his wife sought indefinite alimony).

95. See *In re Marriage of Walls*, 925 P.2d 483, 486 (Mont. 1996) (finding that the trial court properly held the wife responsible for the \$5000 in attorney's fees that she incurred during the divorce for the purpose of protecting her interests in the divorce).

96. See *In re Marriage of Lakin*, 662 N.E.2d 617, 620 (Ill. App. Ct. 1996) (declaring that trial courts should distribute property to establish a high degree of finality so that the spouses do not feel the need to return repeatedly to the courts and can rely on the finality of the outcome to plan accordingly for their financial future).

97. See *In re Marriage of Mouschovias*, 831 N.E.2d 1222, 1229 (Ill. App. Ct. 2005) (affirming the trial court's denial of the wife's post-trial motion for reconsideration where the husband spent \$184,324 of marital funds on attorney's fees and only divided the remainder of the estate in the divorce because the wife had not raised a dissipation claim at trial).

1. Excluding Attorney's Fees From Dissipation Incorrectly Places Limits on the Court's Discretionary Authority Under Equitable Distribution

What is equitable and fair does not always constitute an equal division of the marital estate.⁹⁸ The reason that so many states use the model of equitable distribution is because it gives the court broad discretionary power.⁹⁹ It is extremely important to the underlying doctrine to allow the court to make equitable decisions on a case-by-case and fact specific basis.¹⁰⁰ Holding that attorney's fees do not constitute dissipation reduces the court's discretionary power because a court cannot consider property that no longer exists when making its final equitable distribution, unless one spouse dissipated the property.¹⁰¹ If a court does not consider attorney's fees dissipated, it cannot evaluate the financial impact of that transaction because the court is not allowed to consider the expended asset.¹⁰² Such events diminish the effectiveness of the court's discretionary powers, which are an integral part of the equity holding.¹⁰³ A large transaction that occurs at the breakdown of the marriage is precisely what the court should be allowed to consider.¹⁰⁴

When a court considers attorney's fees under the dissipation doctrine, the court retains its full discretionary power because it is then able to consider all of the facts pertaining to the value and

98. See, e.g., *In re Marriage of Wentink*, 476 N.E.2d 1109, 1114 (Ill. App. Ct. 1984) (allowing the trial court to make an unequal division of the estate where the husband contributed all earnings to the marriage, but where wife held a non-marital estate valued at over \$1,000,000 and had future earning capacity given her age and education).

99. See *Brake*, *supra* note 19, at 763 (discussing that the essential element of equitable distribution is that it gives the court a tremendous amount of discretion because there are few fixed rules for property distribution).

100. See *In re Marriage of Vernon*, 625 N.E.2d 823, 825 (Ill. App. Ct. 1993) (emphasizing that the touchstone of property distribution was whether or not it was equitable and that this will rest on the individual facts of each case).

101. See *Akers v. Akers*, 582 So.2d 1212, 1216-17 (Fla. Dist Ct. App. 1991) (holding that the trial court erred when it included \$11,000 that the wife spent on attorney's fees into her equitable share of the estate because the husband did not challenge the expenditure as dissipation and therefore the court would not consider the funds in the distribution).

102. See *Brandal v. Shangin*, 36 P.3d 1188, 1194-95 (Alaska 2001) (stating that an asset that does not exist at the time of trial will not be available for distribution and cannot be brought into the court's consideration, unless there is evidence of dissipation).

103. See *Arp v. Arp*, 572 S.W.2d 232, 234-35 (Mo. Ct. App. 1978) (holding that the court had a significant amount of discretion and was not just limited by factors listed in the statute when making a property distribution).

104. See *Becker*, *supra* note 30, at 108-09 (stating that one of the policy reasons for a court to analyze dissipation around the time of the break down of the marriage is that it is a right to protect one spouse from his or her partner's expenditures that may unfairly reduce marital funds).

distribution of the marital estate.¹⁰⁵ By considering the dissipation amount in making an equitable distribution determination, the court can still fulfill its function of placing both spouses in a financial position sufficient to start over outside of the marriage.¹⁰⁶ By classifying attorney's fees as dissipation, the transaction and expended assets come before the court as part of the estate that requires division.¹⁰⁷ The court can automatically consider the transaction and the facts and details of the case surrounding it.¹⁰⁸ The court still retains its discretion on how to make the transaction for attorney's fees out of the marital estate equitable.¹⁰⁹ There is no reduction in the court's discretionary power, and this is especially important when dealing with the events surrounding the divorce.¹¹⁰

Divorce is a unique and very costly procedure that can significantly affect the financial standing of either spouse.¹¹¹ Therefore, it is an important function of the court to be able to assess the large transactions that occur during the breakdown of the marriage and decide when to take the extant marital assets into consideration in making equitable awards.¹¹² Whereas transactions such as living

105. See *In re Marriage of Weiler*, 629 N.E.2d 1216, 1220-23 (Ill. App. Ct. 1994) (remanding the case for reconsideration of the division of marital assets because the lower court failed to consider the dissipation caused by both spouses expending \$17,000 each in marital funds on attorney's fees and requiring the court to examine and account for these transactions when distributing the estate).

106. See *Palmer v. Palmer*, 841 So.2d 185, 189 (Miss. Ct. App. 2003) (upholding the chancellor's division of property awarding the wife the marital home and one half of her husband's 401(k) plan due to the fact that her living and medical expenses outpaced her income by several hundred dollars a month). In order to achieve the primary goal of equitable distribution, which is the severance of the marriage in a way that allows each spouse to begin separate independent lives, the court was justified giving the chancellor such discretion. *Id.*

107. See *Solomon v. Solomon*, 857 A.2d 1109, 1124 (Md. 2004) (noting that if a spouse proves dissipation, the court includes the dissipated property as part of the marital estate for the court's consideration in its final award).

108. See *McCleary v. McCleary*, 822 A.2d 460, 468-71 (Md. Ct. Spec. App. 2002) (remanding the case for reexamination of why the expenditures constituted dissipation).

109. See *In re Marriage of Schriener*, 410 N.E.2d 572, 575-76 (Ill. App. Ct. 1980) (analyzing the dissipation doctrine regarding husband's expenditures for a new car and attorney's fees around the time his wife left him and holding that the trial court did not abuse its discretion in including these facts in its final distribution of property).

110. See *Booth v. Booth*, 371 S.E.2d 569, 572 (Va. Ct. App. 1988) (holding that until parties contemplate divorce both spouses are free to spend marital funds; however, when the parties opt for divorce, the court needs to accommodate the spouses' conflicting interests using the dissipation doctrine and not allow one spouse to unfairly spend marital assets).

111. See Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN'S L.J. 141, 161 (2004) (noting that women typically experience a decline of at least thirty percent in their standard of living after divorce).

112. See Becker, *supra* note 30, at 101 (stating that the primary purpose of

expenses are likely to be more routine and less of a drain on the estate, attorney's fees can constitute a major portion of the assets.¹¹³ In marriages where assets are few, attorney's fees can have an enormous impact on what actually appears before the court at the time of distribution.¹¹⁴

2. Holding That Attorney's Fees are Not Dissipation Creates Inequity in the Property Distribution For the Non-Spending Spouse

As noted, attorney's fees in equitable distribution states constitute a very large expenditure of funds and can significantly reduce the marital assets.¹¹⁵ When a spouse's expenditure on attorney's fees reduces the estate value, the expenditure inevitably reduces the amount the other spouse can claim from the remaining estate.¹¹⁶ The spouse spending funds on attorney's fees is ultimately put in a better financial position if attorney's fees do not receive dissipation status.¹¹⁷ There is not a proportional reduction in that spouse's share of the estate to account for the assets he or she previously spent on attorney's fees, and this effectively spreads the cost of attorney's fees between the two spouses.¹¹⁸ The non-expending spouse, who is in an adversarial position to the expending spouse, bears part of the burden for an expense that is not in his or her best interests.¹¹⁹ The division

equitable distribution is to reach a fair system of property division; thus a court needs to protect one spouse from the other's transactions that adversely affect his or her interests, and dissipation meets this need).

113. See Plaintiff's Memorandum, *Rizkallah v. Clem*, No. FL 42872, at 6 (Cir. Ct. Montgomery County Md. Sept. 6, 2005) (stating that the husband had incurred \$19,000 in attorney's fees).

114. See, e.g., Plaintiff's Pre-Trial Memorandum, *supra* note 1, at 5-6 (listing the remaining assets the court should consider in distribution, which included only the remaining funds from the sale of the house, a truck, trailer, car, ATV, computer, camera, various household items and furniture, and outstanding debt).

115. See Angel Castillo, *Divorce Costs Rise Under New Law*, N.Y. TIMES, Feb. 2, 1981, at A1 (examining the cost of legal fees after the implementation of New York's equitable distribution statute and finding that fees in general rose anywhere from twenty to fifty percent under the new law).

116. See *Booth v. Booth*, 371 S.E.2d 569, 573 (Va. Ct. App. 1988) (holding that the \$86,000 that the wife spent on attorney's fees and living expenses was not a factor that the court should consider in the final distribution).

117. See *Amburn v. Amburn*, 414 S.E.2d 847, 848-49 (Va. Ct. App. 1992) (refusing to deduct wife's unilateral withdrawal of \$95,000, some of which she used to pay her attorney's fees, from her share of the marital estate, thus leaving the wife with a significant financial benefit due to the fact that the court did not include the funds she spent in the final distribution).

118. See *Anderson v. Anderson*, 514 S.E.2d 369, 380 (Va. Ct. App. 1999) (affirming the trial court's decision that the \$15,000 the husband withdrew from a marital account worth \$18,000, some of which he used to pay attorney's fees, did not constitute dissipation; therefore, only the remainder of the account was subject to distribution between the spouses).

119. See *Akers v. Akers*, 582 So.2d 1212, 1216-17 (Fla. Dist. Ct. App. 1991) (holding that the court should not exclusively include the \$11,000 the wife spent

is not truly equitable if it reduces one spouse's share as a result of the other spouse's payment for an attorney to protect individual interests.¹²⁰

3. Holding That Attorney's Fees are Not Dissipation Uses the Doctrine For an Incorrect Legal Purpose Against The Spending Spouse

The ultimate purpose of permitting dissipation claims is not solely to punish one spouse for economic misconduct but to allow for the most equitable and fair distribution of property.¹²¹ Courts should view dissipation as a tool to achieve equity and, therefore, a doctrine sharing the policy and purpose supporting equitable distribution.¹²² Courts that determine attorney's fees do not constitute dissipation restrict the idea of dissipation to a mere deterrent of economic misconduct, whereas a broader view of dissipation allows a court to consider all of the facts surrounding the divorce to achieve an equitable outcome.¹²³ Classifying the dissipation doctrine in a narrow way is erroneous. Punishment should not be the object of dissipation because it is a factor of consideration in the no-fault context of equitable distribution, where equity is the overriding purpose of the doctrine.¹²⁴ A spouse does not have to intend economic harm for the dissipation to have occurred.¹²⁵ Dissipation is not a punishment tool;

from marital funds for her attorney's fees in her distributive share of the assets, thereby spreading the cost of her attorney's fees between the husband and wife).

120. See *id.* (refusing to include the amount expended by wife on attorney's fees from the marital funds when making the distribution of assets where the court referred to the divorce as bitter and protracted).

121. See TURNER, *supra* note 15, at 467-68 (stating that states agree that an innocent spouse who does not dissipate assets needs to receive a remedy after the dissipation takes place to make the property distribution fair).

122. See Henry H. Foster, *Commentary on Equitable Distribution*, 26 N.Y.L. SCH. L. REV. 1, 58 (1981) (stating that the objective of dissipation is restitution and not punishment).

123. Compare Allison v. Allison, 864 A.2d 191, 195-96 (Md. Ct. Spec. App. 2004) (holding that attorney's fees do not constitute dissipation because they do not demonstrate economic misconduct and therefore do not need to be remedied), with Head v. Head, 523 N.E.2d 17, 21 (Ill. App. Ct. 1988) (holding that attorney's fees did constitute dissipation, but that whether a particular course of conduct would constitute dissipation would depend upon the facts and circumstances of the particular case and whether the conduct requires judicial remedy to make the distribution equitable).

124. See WEITZMAN, *supra* note 17, at 29 (discussing that in the no-fault context of divorce there is no punishment or reward for either party and that both spouses benefit when the court considers economic situations instead of guilt or innocence in the property distribution).

125. See *In re Marriage of Jerome and Martinez*, 625 N.E.2d 1195, 1210 (Ill. App. Ct. 1994) (maintaining that once the wife alleging dissipation showed that the husband had exclusive control over and spent the funds in his possession, his general and vague statements accounting for how the money was spent were not enough to avoid the court holding that dissipation occurred).

it is a tool for achieving equity between the two parties with conflicting interests.¹²⁶ A court should not punish a spouse for spending marital funds towards attorney's fees, but it should adequately allocate the assets spent by a spouse to his or her share of the divided marital estate.¹²⁷ The doctrine of dissipation allows the court to account for these assets as though they still existed and to make a significantly more equitable division that does not strive to punish one spouse but ensures the fair outcome of the divorce to both spouses in light of the surrounding circumstances.¹²⁸

4. Holding That Attorney's Fees Are Not Dissipation Inappropriately Restricts a Spouses Ability to Make a Dissipation Claim

Jurisdictions that do not consider attorney's fees dissipation will only allow such a claim if the alleging spouse can show that the fees were unreasonable.¹²⁹ The creation of this exception, in an effort to allow the court to exercise discretion, actually has the opposite effect.¹³⁰ Courts that require a showing that attorney's fees are unreasonable before classifying the transaction as dissipation create a higher initial burden of proof, making it more difficult for the spouse alleging dissipation to shift the burden.¹³¹ Instead of requiring a spouse to show that the expenditure is for a non-marital purpose, he

126. See Foster, *supra* note 122, at 58 (reasoning that dissipation is not a punishment tool but one for restitution for the detrimentally affected spouse).

127. See DeLarco v. DeLarco, 728 N.E.3d 1278, 1283-84 (Ill. App. Ct. 2000) (remanding the case to the trial court to determine the amount the husband expended from marital assets for his attorney). Given that the wife borrowed money from her father to pay for attorney's fees rather than paying for them out of marital assets, equity required that the husband's expenditures for attorney's fees be considered an advance against his share of the estate. *Id.*

128. See Head, 523 N.E.2d at 21-22 (upholding the trial court's property distribution which held that the husband had dissipated assets that he spent on attorney's fees and concluding that an unequal division of marital assets was warranted when the husband created a trust for the children that reverted back to his possession, used marital assets without his wife's knowledge, and loaned \$6000 to his brother out of marital funds).

129. See Booth v. Booth, 371 S.E.2d 569, 573-74 (Va. Ct. App. 1988) (holding that the wife's attorney's fees did not constitute dissipation because the husband failed to make any allegation that the fees were unreasonable and the trial judge recognized that the attorney's fees incurred by the wife were necessary).

130. See Allison v. Allison, 864 A.2d 191, 196 (Md. Ct. Spec. App. 2004) (holding that dissipation should provide a remedy only when a court decides that the attorney's fees are unreasonable).

131. Compare DeLarco, 728 N.E.2d at 1284 (holding that husband's attorney's fees were dissipation because they were expenditures from the marital estate for a purpose unrelated to the marriage when the marriage had broken down irregardless of the size of the expenditure), with Booth, 371 S.E.2d at 573-74 (holding that dissipation occurs where marital funds are spent for a purpose unrelated to the marriage for one spouse's benefit when the marriage is in jeopardy, but that in order for attorney's fees to constitute dissipation a trial judge would be required to find that the fees were excessive or unreasonable).

or she must now show that the attorney's fees were unreasonable, having no clear indication of what constitutes unreasonable fees.¹³² The correct and judicially established prima facie case for dissipation requires the alleging spouse to show that the funds are not properly accounted for or that the purpose of the transaction is not a typical marital expenditure.¹³³ However, now the alleging spouse must not only show where the other spouse spent the money but also that the fees themselves were unreasonable.¹³⁴ Attorney's fees are more than likely well-documented expenditures, and, therefore, without a clear judicial direction on what would or would not constitute unreasonable fees, it becomes a much more difficult case to make for a spouse alleging dissipation.¹³⁵

C. Dissipation is the Best Judicial Tool to Retain Equity When Funds Are Spent On Attorney's Fees As Compared to Other Remedies at Common Law

Other equitable remedies are available in lieu of applying the dissipation doctrine to transactions for divorce attorney's fees in order to make the property distribution equitable.¹³⁶ However, further analysis of each of these remedies reveals that they will not apply to a majority of typical divorce circumstances and, therefore, are far less effective tools for accounting for unilateral attorney's fees expenditures.¹³⁷ Each of these doctrines allow the court to account

132. See *Allison*, 864 A.2d. at 196 (holding that dissipation should provide a remedy when attorney's fees are unreasonable, but failing to define what would make attorney's fees unreasonable).

133. See *In re Marriage of Partyka*, 511 N.E.2d 676, 680 (Ill. App. Ct. 1987) (holding that dissipation occurred where husband's explanations for his expenditures were vague); *Mika v. Mika*, 728 S.W.2d 280, 284 (Mo. Ct. App. 1987) (concluding that evidence of the husband's expenditure of \$3,500 on another woman after separation from his wife was sufficient to find that dissipation had occurred).

134. See *Booth*, 371 S.E.2d at 572-73 (ruling that the trial judge may have held that the attorney's fees constituted waste if the husband had made a sufficient attempt to prove that the fees were excessive or unreasonable, but noting the fact that the money was expended for attorney's fees did not in itself prove dissipation).

135. See Memorandum of Laura Rizkallah, *supra* note 8, at 9-11 (modifying plaintiff's dissipation claim by arguing that the husband's attorney's fees were unreasonable because the fees resulted from a faulty legal position and further explaining why the husband's legal position was incorrect). The plaintiff previously argued that the attorney's fees should constitute dissipation without regard to their reasonableness. *Id.*

136. See *TURNER*, *supra* note 15, at 467-70 (setting out the elements of fraud and constructive trust as remedies a court may employ in given situations to retain equity in the divorce).

137. See *Gaudio v. Gaudio*, 580 A.2d 1212, 1223 (Conn. App. Ct. 1990) (requiring that a spouse prove that there was fraudulent intent in order for the court to hold that a particular transaction was fraudulent); *Owings v. Currier*, 47 A.2d 743, 748-49 (Md. 1946) (holding that the court will only implement a constructive trust where a confidential relationship between parties exists and that Maryland will not assume

for attorney's fees expended on the divorce; however, dissipation affords the best method by which to bring the expended assets into the court's distribution because it permits more discretion that can be applied to many different fact patterns.¹³⁸

1. Constructive Trust

The first equitable remedy used to achieve a result similar to dissipation is the remedy of constructive trust. Implementation of a constructive trust over the assets a spouse spent on attorney's fees usually requires finding that a specific fiduciary duty or a confidential relationship exists between the spouses.¹³⁹ This can be difficult to prove because not all jurisdictions assume that the confidential relationship applies to marriage.¹⁴⁰ Thus, a spouse seeking a constructive trust must prove not only that the divorce attorney's fees unjustly enriched the other spouse, but also that a confidential relationship and duty existed between spouses with respect to the maintenance of the particular asset expended for the fees.¹⁴¹ Furthermore, the issue of control of the asset comes into question, as a constructive trust is not likely to come into use by the court if both spouses had access to, or a say in, the maintenance of the asset.¹⁴² Constructive trusts are primarily a useful tool in cases where one spouse had exclusive control of a particular marital asset.¹⁴³ However,

that such a relationship exists without evidence beyond that of the existence of a marriage).

138. See TURNER, *supra* note 15, at 468-70 (reasoning that fraud will not constitute a sufficient claim if the spouse cannot prove the fraudulent intent of the other spouse and third party and that a constructive trust will only apply in very limited factual situations).

139. See *Tedesco v. Tedesco*, 683 A.2d 1133, 1144 (Md. Ct. Spec. App. 1996) (holding that a spouse must establish that a confidential relationship exists in order to impose a constructive trust); *Patterson v. Patterson* 277 S.E.2d 709, 716 (W.Va. 1981) (holding that in order for the wife to prove that marital assets transferred to her daughter belong in a constructive trust, a plaintiff must prove that the husband accomplished the transfer through a breach of implicit fiduciary duty that the husband owed his wife).

140. See *Owings*, 47 A.2d at 748-49 (asserting that Maryland does not automatically assume that a confidential relationship exists in transactions between spouses).

141. See *Bell v. Bell*, 379 A.2d 419, 421-22 (Md. Ct. Spec. App. 1977) (holding that in order to find the existence of a confidential relationship, a court will consider factors such as age, mental condition, education, business experience, and the degree of dependence of one spouse on the other).

142. See *McClellan v. McClellan*, 451 A.2d 334, 339 (Md. Ct. Spec. App. 1982) (refusing to implement a constructive trust where the wife understood the property division in the separation agreement that she signed and where the evidence showed that she handled the family finances and participated in negotiations over the agreement's terms).

143. See *Tomaino v. Tomaino*, 68 A.D.2d 267, 268-69 (N.Y. App. Div. 1979) (finding that a constructive trust existed where the husband and wife purchased a marital home that was titled in the husband's name, and the wife relied on her husband's promise that the funds she put toward the home would be used for her

a spouse seeking the implementation of a constructive trust as an equitable remedy must be able to establish not only unjust enrichment, but also that the enrichment resulted from of a breach of a confidential relationship and duty.¹⁴⁴

In contrast, a spouse seeking judicial recognition of dissipation only needs to show that the other spouse benefited, akin to unjust enrichment, without having the additional burden of proving that there was a confidential relationship.¹⁴⁵ Both remedies provide the court with means to make an equitable outcome regarding the attorney's fees expenditure. Dissipation, however, requires less judicial effort by the court to reach an equitable outcome.¹⁴⁶

2. Preliminary Injunctions

Another equitable remedy that a spouse can seek to preserve marital assets is a preliminary injunction. Preliminary injunctions are available in most jurisdictions in order to prevent possible dissipation of marital assets.¹⁴⁷ A spouse can seek a preliminary injunction to stop the other spouse from using marital funds to pay for individual attorney's fees as an effective way to prevent dissipation before it occurs.¹⁴⁸ However, this solution is not particularly practical given the circumstances of the divorce.¹⁴⁹ Many courts are reluctant to grant injunctions that risk placing one spouse in a position that freezes all of the marital assets.¹⁵⁰ The spouse facing a preliminary

benefit as well as his).

144. See *Patterson*, 277 S.E.2d at 715 (noting that a court will only implement constructive trusts where the court has an equitable duty to impose one because one party will be unjustly enriched by breaching a fiduciary duty).

145. See *McCleary v. McCleary*, 822 A.2d 460, 463 (Md. Ct. Spec. App. 2002) (holding that a court will find dissipation wherever one spouse spends marital assets for individual benefit for a nonmarital purpose when the marriage breaks down, without mentioning the violation of any duty owed to the other spouse).

146. Compare *DeLarco v. DeLarco*, 728 N.E.2d 1278, 1284 (Ill. App. Ct. 2000) (providing an equitable remedy by including the amount that the husband spent as part of his share of the marital estate), with *Allgood v. Allgood*, 473 So.2d 416, 420 (Miss. 1985) (providing the equitable remedy by ordering the party in control of the asset to convey title of the asset to the other party after finding that a constructive trust existed).

147. See *TURNER*, *supra* note 15, at 60 (stating that some states such as West Virginia and Colorado have express statutory authority to give preliminary injunctions, while in other states it is usually available under the court's equitable powers).

148. See *Franzese v. Franzese*, 436 N.Y.S.2d 979, 981-82 (N.Y. Sup. Ct. 1981) (holding that a court will grant an injunction when the spouse seeking the injunction can show evidence that dissipation of assets is a real risk).

149. See *generally* *Little v. Superior Court of Arizona*, 884 P.2d 214, 217 (Ariz. Ct. App. 1994) (holding the husband in contempt for violating the preliminary injunction for selling his car to obtain money for living expenses and attorney's fees and discussing what was a reasonable expenditure under the preliminary injunction).

150. See *Kahn v. Kahn*, 559 N.Y.S.2d 103, 105 (N.Y. Sup. Ct. 1990) (recognizing

injunction faces the risk of not having access to assets to pay for attorney's fees without violating the injunction.¹⁵¹ Furthermore, courts give few guidelines as to what a spouse seeking an injunction must show to obtain a preliminary injunction, providing that spouse little certainty that he or she will actually be able to acquire one.¹⁵² In contrast, accounting for attorney's fees spent by one spouse through dissipation protects both spouses from possible harm by permitting a spouse to spend money on attorney's fees while simultaneously not depleting the other spouse's share of the estate; therefore, it provides a more effective remedy.¹⁵³

3. *Fraud*

Another judicial tool that a court could apply in certain divorce cases is a claim of fraudulent conveyance.¹⁵⁴ In the divorce context, a claim of fraud, like dissipation, will effectively remedy a particular conveyance that removes property that was available for equitable distribution.¹⁵⁵

However, fraud differs from dissipation in two ways. First, it requires the spouse claiming fraud to prove that the other spouse and the third party in the conveyance possessed fraudulent intent or inadequate consideration.¹⁵⁶ Second, unlike dissipation, where the court will account for the extant property in its distribution of remaining assets, fraud allows the court to void the entire transaction

that in certain situations, such as where a husband held many volatile assets, a preliminary injunction could cause more harm than good by freezing these assets).

151. See TURNER, *supra* note 15, at 60 (stating that preliminary injunctions can create a significant risk of damage to one spouse due to the fact that situations often arise that require the expenditure of marital assets).

152. See Kahn, 559 N.Y.S.2d at 104-06 (discussing the split in authority in New York over what circumstances warrant the imposition of an injunction and whether it was an automatic right or was necessary to prove that a spouse had the ability to or was attempting to dispose of assets).

153. See *In re Marriage of Walls*, 925 P.2d 483, 486 (Mont. 1996) (illustrating that the wife was able to pay \$5000 retainer to her attorney while at the same time protecting the husband's interest in the \$5000 of the marital estate through dissipation and subsequently including that amount in wife's share of the estate).

154. See TURNER, *supra* note 15, at 468 (stating that courts have held that fraudulent conveyance falls within their equitable powers in the divorce context when implementing equitable distribution of property).

155. See *Gaudio v. Gaudio*, 580 A.2d 1212, 1224 (Conn. App. Ct. 1990) (defining fraud in the divorce context as whether or not the conveyance resulted in marital property being improperly excluded from equitable distribution claims and holding that fraud had occurred where the husband transferred stock to a third party in order to prevent his wife from reaching the asset).

156. See *id.* at 1223-24 (finding that fraud occurred where a husband and third party were involved in a stock transfer with the intent of placing the assets out of the reach of the wife and where the third party was not a bona fide purchaser of the stock).

and restore the actual assets to the marital estate.¹⁵⁷ While the second difference results in more complete relief than dissipation affords, the fact that it requires proof of fraudulent intent makes it inapplicable to most situations in which one spouse spends marital assets on attorney's fees.¹⁵⁸ In contrast to fraud, if former marital assets end up in the hands of a good faith purchaser, dissipation allows the property to be considered as part of the estate in a situation where a fraud claim would not apply.¹⁵⁹

There will be some situations in which a fraud claim can be made when one spouse liquidated particular assets and used the proceeds for attorney's fees.¹⁶⁰ However, in a majority of circumstances fraud likely will not be a proper claim to bring.¹⁶¹ Therefore, while fraud does provide for complete remedy to the situation, its limited application results in it being an inefficient judicial tool to account for attorney's fees transactions.¹⁶²

D. Policy Implications

Courts should consider unilateral transactions for attorney's fees dissipation for the purposes of equitable distribution.¹⁶³ Dissipation, as Illinois and other courts have found, is the most effective tool through which to account for the transaction, while still maintaining the equity of the divorce without punishing either the expending

157. See *id.* at 1212 (holding that a party alleging fraud is entitled to the equitable remedy of having the transaction set aside, and in this case, setting aside the fraudulent stock conveyance until the wife's judgment was satisfied).

158. See *DeLarco v. DeLarco*, 728 N.E.2d 1278, 1284 (Ill. App. Ct. 2000) (considering the payments the parties made from marital funds to attorney's to be advances from the marital estate, not fraudulent conveyances).

159. See *generally* *Sharp v. Sharp*, 473 A.2d 572, 499 (Md. Ct. Spec. App. 1984) (holding that the Maryland Marital Property Act was designed so that dissipated property could be considered in the context of the property distribution where it was in the hands of a good faith third party and could no longer be recovered back into the estate).

160. See Memorandum of Laura Rizkallah, *supra* note 8, at 3 (claiming that the defendant husband committed fraud when he sold the house for less than market value without his wife's knowledge and spent part of the proceeds to pay his attorney).

161. See *TURNER*, *supra* note 15, at 469 (stating that the difficulty with fraudulent conveyance is that in many instances it is impossible to prove deliberate fraudulent intent of the other spouse and third party).

162. See *id.* at 469-70 (discussing that the disadvantages of the fraud remedy, including rescission of the transaction, are outweighed by the disadvantages posed by the difficulty of proving fraudulent intent and the inapplicability of fraudulent conveyance to cases where a spouse concealed or wasted assets).

163. See *Kothari v. Kothari*, 605 A.2d 750, 752 (N.J. Super Ct. App. Div. 1992) (holding that although the legislature did not give a definition for dissipation of marital property, the concept was "plastic" and designed to fit the facts and needs of individual cases).

spouse or the non-expending spouse.¹⁶⁴ Jurisdictions such as Maryland and Virginia should re-evaluate their line of reasoning on the attorney's fees question because it results in a detrimental effect on one spouse.¹⁶⁵ Attorney's fees constitute a very large expenditure, and because the transaction is made to protect one spouse's interest against that of the other spouse, the court needs a judicial tool through which it can take account of the transaction when dividing assets.¹⁶⁶

Equitable distribution was created with the welfare of both spouses in mind, with special attention given to reducing sex discrimination in domestic and family law.¹⁶⁷ More often than not, the wife who had held the role of homemaker in the marriage was left in dire financial straits.¹⁶⁸ In developing the doctrine of equitable distribution, courts attempted to level the playing field and reduce the economic impact that divorce often had on wives.¹⁶⁹ It is true that with the complex nature of equitable distribution comes a much more contestable confrontation between the parties in the division of the estate, and spouses need to be able to have access to some form of legal counsel.¹⁷⁰ However, the need for an attorney came hand in hand with the depletion of marital assets to meet that need and can

164. See *In re Weiler*, 629 N.E.2d 1216, 1222-23 (Ill. App. 1994) (holding that both spouses dissipated assets by expending marital funds on attorney's fees and remanding to the trial court to reconsider the property distribution to account for both of the expenditures of both spouses in the equitable award).

165. See *Allison v. Allison*, 864 A.2d 191, 196 (Md. Ct. Spec. App. 2004) (reducing the amount of a 401(k) plan eligible for equitable distribution by \$13,000 which was spent by the husband on his attorney's fees effectively lowering the amount of the assets his wife received from \$14,000 to \$7,000); *Anderson v. Anderson*, 514 S.E.2d 369, 380 (Va. Ct. App. 1999) (allowing husband to expend part of the \$15,000 he withdrew from marital funds on attorney's fees without attributing that amount solely to his share of the marital estate, effectively reducing the amount of the marital estate that the court could distribute).

166. See *Becker*, *supra* note 30, at 101 (stating that the primary purpose of equitable distribution is to serve as a fair system of property distribution, allowing a court to protect one spouse against the other spouse's transactions that adversely affect the non-expending spouse's interest in marital property).

167. See Henry H. Foster, *Commentary on Equitable Distribution*, 26 N.Y.L. SCH. L. REV. 1, 1-2 (1981) (stating that one major legislative purpose of New York's equitable distribution statute was to eliminate sex discrimination from family law).

168. See *Kelly*, *supra* note 111, at 160-62 (stating that while the old title system of divorce intended to treat spouses equally, it did not account for the fact that women often were not full participants in the paid labor market and were not in the same economic position as men).

169. See WEITZMAN, *supra* note 17, at 73 (stating that the New York bar pushed for passage of an equitable distribution statute by asserting that wives would benefit from judicial discretion under an equitable standard).

170. See generally *Castillo*, *supra* note 115 (examining the effect that the equitable distribution statute has on divorce costs and stating that attorney's fees have risen significantly due to the more complex nature of property distribution and the increase in contested factors in property distribution).

result in one spouse with no access to funds having to depend on other legal alternatives in order to protect his or her interests in the estate.¹⁷¹ By holding that attorney's fees, unless unreasonable, do not constitute dissipation, the court creates a situation where one spouse will inevitably end up footing the bill for half of the other spouse's attorney's fees and will receive a much lower amount in distribution than he or she in all fairness should receive.¹⁷² This can hardly be what the legislatures in equitable distribution states had in mind when they implemented equitable distribution statutes.¹⁷³ Courts should realign their holdings to conform with the idea that dissipation is not a tool strictly for faulting one spouse and punishing economic misconduct, but instead is a tool to deal with particular asset reducing transactions that the court specifically needs to account for in their distribution of assets to prevent inequitable results.¹⁷⁴

CONCLUSION

Attorney's fees are a large expenditure, and the impact of these transactions is potentially great in terms of what a spouse ultimately receives in the final distribution, especially in marriages with very limited marital assets.¹⁷⁵ Dissipation is a clear and easily implemented solution to account for attorney's fees transactions, and it allows the court to maintain equity in divorce. Dissipation should be utilized in this manner to prevent inequitable results from becoming commonplace in divorce.

171. See Plaintiff's Pre-Trial Memorandum, *supra* note 1, at 1 (showing that the wife had to seek the assistance of student attorneys at a law school clinic to represent her interests).

172. See *generally* Allison v. Allison, 864 A.2d 191, 196 (Md. Ct. Spec. App. 2004) (reducing wife's share of the 401(k) plan by about \$6500 or half of the amount of her husband's attorney's fees).

173. See Fields v. Fields, 643 S.W.2d 611, 617 (Mo. Ct. App. 1982) (holding that the legislature intended for a fair division of property through weighing statutory and other relevant factors).

174. See Becker, *supra* note 30, at 101 (arguing that the dissipation doctrine should extend maximum protection to a spouse's interest in marital property and should be applicable to any conduct that diminishes or adversely affects the marital funds eligible for equitable distribution).

175. See *generally* Memorandum of Laura Rizkallah, *supra* note 8 (illustrating that if the court adhered to the Allison decision, Ms. Rizkallah would not be eligible for a share of the \$19,000 that her husband spent on attorney's fees using the proceeds from the sale of their marital home).