Quick Summary of Illinois Dissipation Case Law – Timing: When Does Dissipation Start and the Impact of the 2016 Rewrite

By: Gunnar J. Gitlin
The Gitlin Law Firm, P.C., Woodstock, Illinois

www.gitlinlawfirm.com

Executive Summary: In light of the 2013 and the 2016 amendments narrowing dissipation law, it is critical to understand how far back one can go in seeking dissipation as to when the marriage began undergoing an irretrievable breakdown. The 3 / 5 year cut-off rules provide that one cannot claim dissipation for a period of more than "3 years after the party claiming dissipation knew or should have known of the dissipation, but in no event prior to 5 years before the filing of the petition for dissolution of marriage." And the 2013 amendments specifically for the first time included the phrase "began undergoing" for the timing of the marriage's break-up. This date should not be the date that a breakdown is necessarily inevitable although there is case law that states this.

The 2013 and 2016 Amendments Regarding Dissipation

The more important of the two sets of amendments was the 2013 amendments with the 2016 amendments merely bringing clarity to loose language in the original 2013 set.

PA 97-941- Notice of Intent to Claim Dissipation

2013 Dissipation Amendments: The 2013 amendments changed 503 [the property section], subsection (d)(2). It read following the listing of dissipation as a relevant factor the following language (after "(2) the dissipation by each party of the marital or non-marital property...):

> provided that a party's claim of dissipation is subject to the following conditions:
>
> (i) a notice of intent to claim dissipation shall be given *no later than 60 days before trial or 30 days after discovery closes*, whichever is later;
>
> (ii) *the notice of intent* to claim dissipation shall contain, at a minimum, *a date or period of time during which the marriage* ***began undergoing*** *an irretrievable breakdown*, an *identification of the property dissipated*, and a *date or period of time during which the dissipation occurred*;

(iii) a certificate of service of the notice of intent to claim dissipation *shall be filed with the clerk of the court and be served* pursuant to applicable rules;

(iv) no dissipation shall be deemed to have occurred prior *to 3 years after the party claiming dissipation knew or should have known of the dissipation, but in no event prior to 5 years before the filing of the petition for dissolution of marriage.*
[underlining represents changes in PA 99-90].

The 2013 amendments as clarified effective January 1, 2016 were excellent but for the 3 / 5 year rules. I can imagine unusual cases where this simply would be unjust and somewhat of an arbitrary restriction on the court's power following the seminal two-decade-old *O'Neill* decision. See, e.g., *IRMO Gurda*, 304 Ill.App.3d 1019 (1st Dist. 1999) [reconciliation after the second divorce petition was a pretext for the husband's manipulation of marital funds and established 1990 as the date of irretrievable breakdown of the marriage; and *IRMO Zweig*, 343 Ill.App.3d 590 (5th Dist. 2003) [In determining the date as to five years before separation, the appellate court found that the parties had lived in the same house but not lived "as husband and wife." *Zweig* involved a wife who appeared to have committed perjury regarding her failed attempt to secure control of her husband's estate via proceedings to have him declared incompetent before the separation. These are both discussed below.

Also note that the January 1, 2016 amendments provide that one cannot dissipate non-marital property. 503(2) now provides as a statutory factor: "(2) the dissipation by each party of the marital or ~~non-marital~~ property..."

The Standard

IRMO O'Neill, 138 Ill.2d 487 (1990)

The Illinois Supreme Court in 1990 defined "dissipation" as used in the provision of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), as to "use of *marital property* for the sole benefit of one of the spouses for a purpose unrelated to the marriage at a time that the marriage **is undergoing** an irreconcilable breakdown." The case also stated, "The appellate court, until the decision in this case, continued to interpret the term 'dissipation' as pertaining only to the improper use of marital assets after a marriage has begun an irreconcilable breakdown." And note that the 2013 amendments specifically stated, "(ii) *the notice of intent* to claim dissipation shall contain, at a minimum, *a date or period of time during which the marriage* ***began undergoing*** *an irretrievable breakdown."*

A previous case somewhat similarly defined dissipation in terms of the time frame as being, "at a time when the marriage relationship is in serious jeopardy." See *Head v. Head*, below.

Interestingly, *Toole* quoted the *O'Neill* standard as, "The doctrine of dissipation applies to

allegedly improper expenditures of marital funds for purposes unrelated to the marriage, at a time after the marriage has irretrievably or irreconcilably **broken down**."

✔*Hazel*, quoted below, addressed the time period and stated that various incidents showing the continual breakdown of the marriage, "cannot be said to display a marriage inevitably headed for breakdown. Thus, they cannot be said to signal the start of the process "undergoing irreconcilable breakdown."

But the key recent case is *IRMO **Holthaus***, 387 Ill. App. 3d 367 (Second Dist., 2008). This is discussed more fully below but I address one quote preliminarily:

> It appears that the trial court calculated dissipation, not from when the parties' marriage began undergoing an irreconcilable breakdown, but rather from when the parties' marriage had completed the process of breaking down.

Case Law on Date of Irretrievable Breakdown

✔O'Neill – Seminal Illinois Case
IRMO O'Neill, 138 Ill. 2d 4877 (1990)

The Supreme Court held that asset dissipation must have occurred at the time when the marriage had irrevocably broken down:

> We therefore hold that the term "dissipation," as used in section 503(d)(1) of the Illinois Marriage and Dissolution of Marriage Act, refers to the "use of marital property for the sole benefit of one of the spouses for a purpose unrelated to the *499 marriage at a time that the marriage is undergoing an irreconcilable breakdown." (*In re Marriage of Petrovich* (1987), 154 Ill.App.3d 881, 886).

***Zweig* – Where Parties Lived in Same House But Not as Husband and Wife Trial Court Properly Allowed Dissipation Claim Going Back 5 Years Before Separation – Given Strong Dissipation Facts**
IRMO Zweig, 343 Ill.App.3d 590 (5th Dist. 2003)

Dissipation of assets by wife may occur five years before wife filed for divorce and parties physically separated. Relying upon the *Petrovich* decision, the appellate court noted that, "An irreconcilable breakdown of a marriage does not necessarily require a separation or a filing for divorce by one spouse." In determining the date as to five years before separation, the appellate court found that the parties had lived in the same house but not lived "as husband and wife." This case involved a wife who appeared to have committed perjury regarding her failed attempt to secure control of her husband's estate via proceedings to have him declared incompetent before the separation.

Quotes re Timing: "the dominating feature was the husband's control over the investments and

his total lack of fiduciary reporting to his wife regardless of whether the news would have been good or bad."

✔*IRMO Carter*, 317 Ill.App.3d 546 (4th Dist. 2000)

Trial court erred by incorrectly setting date of breakdown of marriage as of July 1999. At the latest, the breakdown occurred in October 1998 upon the parties' second separation and the wife filing her second divorce petition, but the appellate court determined the irreconcilable breakdown occurred in 1992 when the parties first separated and the wife first filed for divorce. Even though the husband returned to the marital residence in December 1992 and the first divorce petition was dismissed, after December 1992 the parties' finances were not combined, they did not share meals, or responsibility for raising the child, and the husband continued to incur debts that were mostly unknown to the wife. The wife filed for divorce again in October 1998 upon learning her husband accumulated over $45,000 in debts, most of which she did not recognize as related to household expenses. The husband's credit card and other unsecured debts increased by about $25,000 between December 1992 and July 1999.

✔*IRMO Gurda*, 304 Ill.App.3d 1019 (1st Dist., 6th Div. 1999)

The husband testified that the marriage underwent an irretrievable breakdown "[a]bout 17 years before the 1997 trial." The trial court then found that the reconciliation after the second divorce petition was a pretext for the husband's manipulation of marital funds and established 1990 as the date of irretrievable breakdown of the marriage. On appeal, the husband claimed that his testimony was sarcastic only, and that the date chosen by the trial court was arbitrary. The appellate court found that the husband's testimony was consistent with the wife's prior filings for divorce, and that, given the marital discord as early as 1980, the trial court acted "well within its discretion" in choosing the date of irretrievable breakdown.

IRMO Blunda, 299 Ill.App.3d 855 (2d Dist. 1998)

Expenditures of marital property prior to date of irretrievable breakdown of the marriage cannot constitute dissipation. Noting that the trial court failed to set a date for such breakdown, the appellate court found the breakdown occurred at the earliest in late 1991 and at the latest in late 1992. Based on these dates, the appellate court reversed the trial court's finding of dissipation for an event that occurred well before late 1991. In this case, the appellate court used the phrase of when the marriage "suffered an irreconcilable breakdown." As to the timing, when the trial court failed to set a specific date, the appellate court then reviewed the earliest possible date that could be reasonably drawn by the testimony.

IRMO Andrew, 258 Ill.App.3d 924 (1st Dist., 5th Div. 1993)

Where Wife was aware of the Husband using marital assets to pay for adult children's college expenses, the evidence at trial failed to establish when the marriage had suffered an irretrievable breakdown, and the trial court stated that the issue of dissipation was not raised at trial, it was proper not to make a finding of dissipation. Compare to *Lee*.

IRMO Lee, 246 Ill.App.3d 628, 186 Ill.Dec. 257, Gitlin on Divorce Reports, No. 93-69.

In *Lee*, the husband transferred $266,719 to an educational trust fund for the parties' children within three months of separation. The appellate court in *Lee* approved of the finding of dissipation because: 1) The wife was not aware of the contributions and therefore could not object; and 2) the husband had a pattern of contributing to these funds, but much more modestly than in the year the parties separated.

✔*IRMO Smolle*, 218 Ill.App.3d 340 (1st Dist., 1st Div. 1991)

Irreconcilable differences that caused an irretrievable breakdown of the marriage can be unilaterally caused "[w]here evidence shows one spouse clearly desires to no longer continue to be married."

IRMO Harding, 189 Ill.App.3d 663 (1st Dist., 6th Div. 1989)

The appellate court reversed the trial court's finding regarding dissipation, that there was an irretrievable breakdown when the wife stopped cooking for the husband.

✔*IRMO Norris*, 252 Ill.App.3d 230 (1st Dist., 4th Div. 1992)

Husband did not dissipate marital assets (despite "squandering millions on drugs, alcohol, women and poor business decisions") because the parties' marriage was not undergoing irreconcilable differences at the time of the alleged dissipation. The trial court based its determination that "irreconcilable differences" had not arisen between the parties before 1983 because the wife had testified that "in 1982 she moved to Mexico to live with respondent [husband]. . . . [that her husband] had visited her in 1983, 1984 and 1985. . . . [and that d]uring this time, . . . the parties talked about 'ending up together'. Further, in 1984, respondent [husband] paid $35,000 to purchase the Arizona ranch and agreed to have the property placed in joint tenancy." An aspect of this case to note is the loose language and the focus upon irreconcilable differences as opposed to the focus upon an "irretrievable breakdown."

IRMO Smith, 114 Ill.App.3d 47 (1st Dist.1983)

Dissipation of marital assets may be found where a spouse uses marital property for his or her own benefit and for a purpose unrelated to the marriage at a time when marriage relationship is in serious jeopardy; it is not necessary to show that the dissipation occurred at the time of the parties' separation or after dissolution proceedings had been instituted, for such a requirement would be overly restrictive.

✔*IRMO Getautas,* 189 Ill.App.3d 148 (2nd Dist. 1989)

The trial court found the date of the breakdown to be the date that Petitioner filed for dissolution. The appellate court stated that "the testimony revealed that the marriage was a troubled one precipitated in great part by the differing attitudes of the parties with respect to the expenditures of marital funds. While there had been periods of separation "throughout the marriage, the parties had always reconciled."

✔*IRMO Hazel,* 219 Ill.App.3d 920 (5th Dis 1991)

"Undergoing" Requires Showing that Some Threshold Has been Crossed: This cases focuses on the terminology of the use of the use of the progressive "undergoing" rather than the past tense. The appellate court rejected the wife's argument that the use of the term "undergoing" suggested that an irreconcilable breakdown may be viewed as a prolonged gradual process extending from the initial signs of trouble in a marriage until the actual breakdown itself. The court noted that "while petitioner lists incidents and conflicts which in retrospect may appear to mark the beginning of a gradual process culminating in marital breakdown, they cannot be said to display a marriage inevitably headed for breakdown.... To adopt the meaning proposed by the petitioner would require courts to examine every argument or conflict in the marriage from the moment vows are exchanged to the date of dissolution to determine if such an event was in fact the moment at which the marriage **began undergoing** irreconcilable breakdown." More specifically, the appellate court held that where the wife did not file a petition for dissolution until June 1988, the parties did not separate prior to that date, and the parties continued to engage in a sexual relationship until that date, the trial court did not abuse its discretion in finding that the marriage did not begin to undergo an irreconcilable breakdown until 1988. Thus, according to *Hazel* held there must be "some demonstration that a threshold has been crossed."

***McBride* – Trial Court Affirmed in Finding No Dissipation**

IRMO McBride, 2013 IL App (1st) 112255 (May 14, 2013)

Regarding dissipation, the appellate court affirmed the trial court's rejection of a finding of dissipation. The appellate court reviewed the factual background regarding dissipation as:

> It detailed each party's machinations during 2008-11 in preparation for dissolution. The court concluded that each party had paid roughly equal amounts on attorney fees out of marital funds during this time and petitioner's use of marital funds to pay real estate taxes was cured by the court's order for reimbursement of taxes paid. The court found petitioner's testimony that her brothers had repaid the loans she made in 2006 credible and rejected respondent's claim of dissipation. The court also rejected petitioner's dissipation claim against respondent regarding his expense account and per diem payments from his employer.

In his appeal the husband argued that the trial court erred in determining that his wife's loans to family members were not dissipation of marital property. I liked the discussion of the findings necessary for dissipation:

> Accordingly, for dissipation, a court must find "(1) the property at issue was marital property; (2) the spouse accused of dissipation used the property for his or her sole benefit for a purpose unrelated to the marriage; and (3) the spouse did so while the marriage was undergoing an irreconcilable breakdown." *In re Marriage of Daebel*, 404 Ill. App. 3d 473, 490 (2010).

The first prong seems obvious – because dissipation must be of *marital property* but occasionally this prong can be overlooked. And note that it was only until 2016 that the law was clarified to eliminate the potential argument for dissipation of non-marital property.

Regarding the loans, the appellate court stated, "There is only testimony that the loans were made and that they were repaid, the court found that testimony credible and the funds were not dissipated. The court observed petitioner's testimony and reviewed the record and found the evidence clear that there was no dissipation."

Regarding the timing element, the appellate court commented:

> Further support is found in the record before this court concerning the third factor under *Daebel*, that the dissipation occurred while the marriage *was undergoing* an irreconcilable breakdown. Because courts cannot be charged with parsing the record to determine what action or argument started the exact date the breakdown begins, the point a marriage is undergoing an irreconcilable breakdown **is the date a breakdown is inevitable**. *In re Marriage of Romano*, 2012 IL App (2d) 091339. In this case, the loans were made around the same time the parties mutually agreed to advance a loan to an acquaintance. The parties were still residing together at this time. This was roughly two years prior to the parties' separation, over 2 ½ years prior to petitioner's informing respondent she wanted a divorce, and three years prior to the filing of the petition for dissolution. This also predated any of the parties' withdrawals or opening of new bank accounts. The record does not support a finding that the breakdown was inevitable in 2006 and the trial court did not abuse its discretion in rejecting respondent's dissipation claim.

The language from this case is quite problematic but is important where it states, "the point a marriage is undergoing an irreconcilable breakdown **is the date a breakdown is inevitable**." I believe that interjecting the seeming requirement that the breakdown is inevitable is contrary ot the majority of cases that discuss the timing requirements.

What we can see was that older cases did not have the 3/5 year rules and accordingly sought out language regarding when the marriage began undergoing an irretrievable breakdown. Because of the emphasis in the 2013 amendments with the language "began undergoing" regarding a notice of intent, it is urged that this case may not reflect the current state of the law.

✔*IRMO* ***Holthaus***, 387 Ill. App. 3d 367 (Second Dist., 2008)
The wife argued on appeal that the trial court erroneously included as dissipation $86,000 that she withdrew before February 2005, which the trial court determined was the date of the irretrievable breakdown of the parties' marriage. The husband, on the other hand, contended that the trial court erred in calculating the dissipation only as of February 2005. The appellate court agreed with the husband. The appellate court first noted that the issue of whether dissipation has

occurred as a question of fact and accordingly the manifest weight standard apply on review. Besides the seminal Supreme Court *O'Neill*, decision, the wife cited *DeLarco* and *Toole* in support of the timing issue. This is one of the few cases to comment on a point the Gitlin Law Firm has previously made – *O'Neill's* emphasis on the term "is undergoing" when referring to the timing of the marital breakdown. The appellate court stated, "Accordingly, we disagree with Angeline's contention that dissipation occurs only after an irreconcilable breakdown has occurred, and we turn now to the trial court's specific finding." The key quote of the appellate court stated:

> It appears that the trial court calculated dissipation, not from when the parties' marriage **began undergoing** an irreconcilable breakdown, but rather from when the parties' marriage had completed the process of breaking down. This is apparent from the trial court's language in its letter order: "[T]he court fixes the date of irretrievable breakdown as February[] 2005, the date of physical separation." "So when was the breakdown?" "Under the circumstances February 2005 is the date that the marriage was irretrievably broken." This language demonstrates that the trial court was attempting to pinpoint the date on which the parties' marriage "was irretrievably broken" rather than attempting to determine when the marriage began to irreconcilably break down. As previously discussed, dissipation is to be calculated from the time the parties' marriage begins to undergo an irreconcilable breakdown, not from a date after which it is irreconcilably broken. *In re Marriage of Olson*, 223 Ill. App. 3d 636, 647 (1992).

Because dissipation cases are fact sensitive and are often cited, the facts mentioned by the appellate court other than the February 2005 argument are significant:

> Although the February 2005 argument between the parties does appear to have been the final straw in the process of the irreconcilable breakdown of the parties' marriage, the evidence presented at trial by both Angeline and Nicholas strongly indicates that the parties' marriage **was undergoing** an irreconcilable breakdown long before then. Between 1997 and 2001, the parties stopped having marital relations, sleeping in the same bedroom, living in the same part of the house, sharing meals, and communicating. They were living in an environment that Nicholas testified, and Angeline did not contest, was hostile. In October 2001, following a confrontation between the parties regarding $6,000 Angeline had withdrawn at a casino, Angeline told Nicholas she wanted a divorce. The following month, she went so far as to write him a letter detailing her "plan" for the future, which included a suggested division of responsibility between the parties for their financial obligations and which indicated that Angeline wanted to keep the marital home. In November 2004, Nicholas began to move personal belongings out of the marital home, and he finally moved out permanently in February 2005.

Thus, the appellate court stated:

> From this evidence, we conclude that the parties' marriage was undergoing an irreconcilable breakdown long before February 2005. See *In re Marriage of Carter*, 317 Ill. App. 3d 546, 552 (2000) (holding that the trial court's determination of when the parties' marriage was undergoing an irreconcilable breakdown was against the manifest weight of the evidence where, prior to the date determined by the trial court, the parties only occasionally slept together, mostly lived separate lives, kept finances at arm's length, and did not share meals or child-rearing responsibilities).

The appellate court did not fix an exact date for when the marriage was undergoing an irretrievable breakdown but remanded the case to the trial court to make this determination.

✔*IRMO Jerome-Martinez*, 255 Ill.App.3d 374 (5th Dist. 1994)

Date of Physical Separation Used: Found that the date of physical separation is the date upon which a marriage becomes irreconcilably broken for purposes of dissipation.

IRMO Rai, 189 Ill.App.3d 559 (1st Dist., 6th Div. 1989)

Testimony of Mental Health Care Providers as to Time Frame Marriage Began Breakdown: Testimony of mental health professionals together with parties' seeking claim for dissipation sufficient to show that the marriage began breaking down six years before petition for dissolution of marriage was filed.

✔ Reflects case cited within *Gitlin on Divorce: A Guide to Illinois Family Law* under the appropriate section regarding timing of dissipation.

The Gitlin Law Firm, P.C.
815-338-9401
815-338-9403
www.GitlinLawFirm.com
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