DISSIPATION OF COMMUNITY ASSETS

Steven H. Everts[1]

I. INTRODUCTION

A. Scope

1. Community or jointly-owned property
2. Not S&S property
3. Not all reimbursement claims

B. Terminology

1. Dissipation of assets (non-CP states)
2. Waste (CP states)

C. General Governing Statutes

1. A.R.S. § 25-318(A) (division of property)
2. A.R.S. § 25-315 (Preliminary Injunction)
3. A.R.S. § 25-214(B) (management of CP)

D. Competing Philosophies

1. Righting the wrongs of the marriage
2. Undoing choices the parties agreed to tolerate
3. Duty of care owed re jointly-owned property

II. TYPES OF TRANSACTIONS

A. Gifts
   1. To Third Parties
   2. To Paramour (*Neely, Mezey, Dee*)
B. Payment of Prior Family Law Obligations
C. Investments
D. Vices (gambling, alcoholism, drug use, criminal activity) (*Lindsay*)

---

[1]Recognition and gratitude is expressed to Larry A. Dunn, one of Mr. Everts' associate attorneys, for the legal research associated with this presentation.

E. Intentional or Reckless Management or Destruction of Property
   1. Disappearance of Liquid Assets (*Neely, Sample, Hrudka, Gutierrez, Dee, Maximov, Cozens, Mike*)
   2. Substantial Debts
   3. Selling CP for much less than FMV (*Little, Crissinger*)
   4. Consumption Decisions (*Martin, Simmons*)

F. Litigation

G. Cosmetic Surgery

H. Tax Filings/Refunds (*Lindsay*)

I. Sole and Separate Property (*Neely*)

J. Estate Planning (*Lonergan*)

K. Protracted Litigation (*Hrudka*)

III. FACTORS TO CONSIDER

A. Nature of Transaction

B. Size of Loss

C. Knowledge/Disclosure

D. Extent of participation or acceptance by spouse

E. Good Faith

F. Degree of Risk

G. Timing

IV. REMEDIES

A. Spouse that dissipates bears the loss

B. Disproportionate distribution of assets if possible

C. Otherwise, judgment against dissipating spouse

D. Formula
   1. Calculate amount of estate before dissipation
   2. ÷ 2
   3. Allocate ½ to non-dissipating spouse
   4. Allocate ½ less dissipation to dissipating spouse
   5. If not possible, enter judgment

E. Contempt
   1. Violation of Preliminary Injunction (*Lonergan*)
   2. Violation of Temporary Order
   3. Violation of Decree of Dissolution of Marriage

F. Spousal Maintenance (*Martin*)

V. RESOURCES

A. AZ Case Summary (attached)

B. J. Thomas Oldham, "Romance Without Finance Ain't Got No Chance": Development of the Doctrine of Dissipation in Equitable Distribution States, 21 Journal of the American Academy of Matrimonial Lawyers 501 (2008)

C. Management of the Community Estate During an Intact Marriage, 56 Law & Contemporary Problems 99 (1993)

SUMMARY OF ARIZONA CASES
Chronological Order

A. Reported Decisions

CITE	FACTS	HOLDING/DISCUSSION	NOTES
Neely v. Neely, 115 Ariz. 47, 563 P.2d 302 (App. 1977)	Trial CT ordered H to execute and deliver to W a Promissory Note in an amount which reflected W's interest in certain community assets dissipated by H. (CP funds to develop H's S&S crop, expenditures on girlfriend, concealed funds).	Affirmed. Apportionment of community property equitably is discretionary. Even distribution is not required. Factor to consider include age, financial condition, health, opportunities and previous standard of living. Also expenditures under A.R.S. § 25-318.	
Lindsay v. Lindsay, 115 Ariz. 322, 565 P.2d 199 (App. 1977)	During dissolution H secretly sold the community's interest in an airplane ($19,500 less $5,000-$6,000 due) and subsequently lost the proceeds in gambling. Also, without W's knowledge, H used $1,711 of a joint income tax refund to pay debts against the plane. Trial CT (Myers) did not require H to account for the funds or make an reimbursements payment to W.	Reversed. Trial CT ordered to modify the decree to include a provision awarding W $3,625 representing her share of the community's interest in the aircraft. While the Trial CT in a dissolution proceeding is not required to divide the community property exactly equally, and has wide discretion, it cannot without reason create a gross disparity, or make its award arbitrarily. Sound discretion has been held to mean that, in the absence of sound reasons appearing in the record which justify a contrary result, the apportionment of the community estate upon dissolution must be substantially equal.	

CITE	FACTS	HOLDING/DISCUSSION	NOTES
Lonergan v. Strom, 145 Ariz. 195, 700 P.2d 893 (App. 1985)	Between filing of annulment and entry of decree, H became terminally ill. He severed the joint tenancy with W in the marital residence by a straw-man transaction with Quit Claim Deeds back and forth between himself and his attorney's secretary. The annulment was dismissed, but shortly thereafter H died. W brought a quiet title action against the PR of H's estate to void the Deeds. The Trial CT (Roberts) found the transaction did not violate the Preliminary Injunction and granted summary judgment against W.	Affirmed. Although the straw-man transaction was a clear violation of the Preliminary Injunction, the Trial CT had power to deal with joint property pending a final Decree. The transaction here still left the property entirely in the hands of both parties and not beyond the reach of the CT. It is not the purpose of A.R.S. § 25-315(A) to freeze each parties' estate plan as of the date of filing the Petition.	

CITE	FACTS	HOLDING/DISCUSSION	NOTES
Sample v. Sample, 152 Ariz. 239, 731 P.2d 604 (App. 1986)	Between Decree and appeal, H sold community stock to his corporation which, in turn, sold it to 2 Panamanian corporations, in exchange for 2 installment promissory notes. H also received stock dividends and interest on some shares. Trial CT awarded W a ½ interest in the proceeds from the promissory notes, ½ of the dividends and interest received subsequent to entry of the Decree, and ordered H to guarantee the installment payments still due under the notes. Trial CT also refused to offset H's spousal maintenance payments against W's property division during appeal.	Affirmed. The Trial CT's Order was justified where H knew of W's community property claim even without a Preliminary Injunction in effect. H was required to refrain from putting the property at risk of dissipation or placing it beyond the reach of the CT. The fact W did not request a stay or post a supercedeas bond did not negate H's notice of W's claim in her appeal.	Case is well-known for valuation of assets on remand after appeal.

CITE	FACTS	HOLDING/DISCUSSION	NOTES
Martin v. Martin, 156 Ariz. 452, 752 P.2d 1038 (1988)	Trial CT (Hancock) awarded judgments from H to W of $46,688 representing W's share of the net community income during the 3 years of separation and $9,473 for H's excessive withdrawals from the community savings account. Court of Appeals reversed on grounds Trial CT lacked jurisdiction under A.R.S. § 25-318(A) to make such awards.	Supreme CT vacated the Court of Appeals decision and affirmed the Trial CT. Two prior decisions, *Neely* and *Lindsay*, approved the awarding of a sum of money for the dissipation of community assets. The language in A.R.S. § 25-318(A) allowing the Trial CT to make the division equitably "though not necessarily in kind" authorizes a monetary award instead of merely dividing property. This is supported by the fact that it is virtually impossible to effectively divide all types of community property. The same rationale should be applied to dissipation of marital property. The value of the dissipated property should be added to the value of the existing community, joint tenancy, and other property held in common. The total value of existing and dissipated property should be equitably divided between the spouses.	A dissolution action is a statutory action, not necessarily an equitable action. The CT noted that A.R.S. § 25-319(B)(11) also allows for consideration of similar factors with regard to an award of spousal maintenance.

CITE	FACTS	HOLDING/DISCUSSION	NOTES
Little v. Superior Court, 180 Ariz. 328, 884 P.2d 214 (App. 1994)	Between filing of Petition and entry of decree, H, after consultation with counsel, sold W's van and used proceeds to pay his attorney fees and purchase a less expensive vehicle for himself. Trial CT (Hauser) held H and his attorney in contempt for violation of the Preliminary Injunction and ordered them to pay W $9,350 as restitution which constituted W's share in the fair market value of the van.	Affirmed. The payment of attorney fees did not fall within the exemption of "necessities of life" under the Preliminary Injunction. Under A.R.S. § 25-315(G)(5) the Trial CT was authorized to enjoin the disposal of property by "any other civil or criminal remedies available."	This case led to the revision of the Preliminary Injunction permitting payment of attorney fees under A.R.S. § 25-315(A).

CITE	FACTS	HOLDING/DISCUSSION	NOTES
Hrudka v. Hrudka, 186 Ariz. 84, 919 P.2d 179 (App. 1995)	W transferred, concealed and sold substantial assets in violation of Preliminary Injunction, sought to evade completion of depositions or gave evasive and dishonest answers regarding the location of assets, encouraged non-parties to avoid service of process or provide evasive answers regarding the location of assets at deposition, continually changed counsel, and, after arranging for the return of certain assets after being incarcerated for contempt, some furnishings and art pieces were returned damaged. Trial CT (Hutt) found W had committed waste or dissipation of marital assets where: (1) W had final possession of several items of jewelry, antique furnishings, and artworks which were missing and had a total approximate value of $600,000; (2) W had conducted her case in such a manner as to protract the litigation and increase H's attorney's fees; and (3) W refused to cooperate in resolving creditor claims which led to substantial	Affirmed. When there is waste or dissipation of marital assets by one spouse, the trial court may, when apportioning the community property, award money or property sufficient to compensate the other spouse for that waste (citing *Martin* and A.R.S. § 25-318(A)).	

CITE	FACTS	HOLDING/DISCUSSION	NOTES
	interest being charged against the community. Trial CT gave a greater share of community assets to H and ordered W to sign a creditor workout agreement.		
Gutierrez v. Gutierrez, 193 Ariz. 343, 972 P.2d 676 (App. 1998)	H withdrew approximately $62,000 from community retirement account w/o W's knowledge and was unable to explain with specificity how he had spent the funds. W testified she only authorized $13,000 for a new roof on the parties' cabin. H claimed he spent the funds on community expenditures (truck, loans to a sister, furniture, vacations), but admitted he paid his sister anywhere from $10,000 to $16,000 as a sole and separate obligation for drinking and gambling. Trial CT found H committed waste and awarded W $20,000 as an equalization payment.	Affirmed. Presumption that expenditures made during the marriage were for community obligations is primarily intended for the benefit of creditors and should not apply where one spouse made a prima facie showing of abnormal or excessive expenditures. The spouse alleging abnormal or excessive expenditures by the other spouse has the burden of making a prima facie showing of waste. It is then the burden of the spending spouse to go forward with evidence to rebut the showing of waste because all of the evidence relative to the expenditures is generally within the knowledge or possession and control of the spending spouse.	The panel at CLE by the SEA in 2009 generally agreed this case did not create an "accounting standard."

CITE	FACTS	HOLDING/DISCUSSION	NOTES
Mezey v. Fioramonti, 204 Ariz. 599, 65 P.3d 980 (App. 2003)	H had extra-marital relationship for 13 of 33 years during which he gave substantial property to his girlfriend (e.g. jewelry, portable spa, bed, appliances, home entertainment center w/stereo and TV, and $120,300 in cash). W filed civil case against girlfriend on theory of conversion, fraudulent conveyance and intentional and negligent infliction of emotional distress. W requested constructive trust against property in girlfriend's possession. Trial CT (Katz) granted summary judgment on conversion and fraudulent conveyance and imposed constructive trust on property in girlfriend's possession and control. Trial CT also awarded damages of $120,300 plus prejudgment interest.	Affirmed. CT spent considerable time on appealability of partial judgment. Conversion defined as an act of dominion wrongfully asserted over another's personal property in denial of or inconsistent with that person's rights in the property. Neither good faith, care nor knowledge are defenses. H's statutory rights to act with respect to marital property remain subject to his fiduciary duty to W's interest in the property. A transfer is fraudulent when made with actual interest to hinder, delay or defraud any creditor of the debtor. Intent can be inferred. Good faith and fair value are defenses, but the girlfriend failed to present competent and admissible evidence. A constructive trust is a remedial device that may be imposed in practically any case where there is a wrongful acquisition or detention of property to which another is entitled.	The girlfriend failed to timely raise the 3-year statute of limitations defense to the conversion claim and higher statute of limitations defense to the fraudulent conveyance claim. Also, the opinion never stated whether H and W got divorced or whether W made any claims against H in any other proceeding, probably because the CT noted H ultimately "absconded."

B. Memorandum Decisions

CITE	FACTS	HOLDING/DISCUSSION	NOTES
Dee v. Dee, 2008 WL 4108053, Memorandum Decision (App. 3/6/08)	W claimed 4 items of waste by H re: (1) excessive ATM withdrawals; (2) limousine charges; (3) gentleman's club charges; and (4) hotel charges. H argued the ATM withdrawals were vague and speculative, the limousine charges were legitimate business expenses and not related to an extra-marital affair, the strip club charges were legitimate business or community expenses, and the hotel charges were for a business convention and to alleviate the pain of finding out W wanted a divorce, not girlfriend related (even though 2 females went on the flight). Arbitrator (Wolf) found waste in favor of W against H in each area.	Affirmed. CT cited *Gutierrez* for burden of making a *prima facie* showing of waste by W and H's burden to rebut the evidence. Arbitrator was entitled to determine credibility of witnesses. The remedy appeared to be offsets against various financial accounts by prior agreement of the parties.	The level of proof required by W to make a *prima facie* showing of waste was minimal and mostly oral.
Crissinger v. Crissinger, 2008 WL 5264647, Memorandum Decision (App. 12/18/08)	W alleged waste in that H conveyed 2 community vehicles worth $80,000 to his friend for no consideration. H alleged the vehicles were his sole and separate proprety and they were conveyed to the friend in satisfaction of a $15,000 community debt. Trial CT (Donahoe) rejected W's claim. W did not provide transcript of proceedings to CT of Appeals.	Affirmed. Cites *Gutierrez* re *prima facie* showing and shifting of burden to rebut the showing. Confirms Trial CT findings on vehicles in absence of transcript.	Must provide a transcript of proceedings to challenge sufficiency of evidence to support Trial CT's findings of fact and conclusions of law.

CITE	FACTS	HOLDING/DISCUSSION	NOTES
Maximov v. Maximov, 2009 WL 792299, Memorandum Decision (App. 3/26/09)	H withdrew $160,000 from a joint bank account shortly after the Petition was filed. H alleged he redeposited the funds and that they were borrowed. The Court-appointed expert supported H's position. Some of W's exhibits allegedly to the contrary were not admitted into evidence. H also obtained $151,874 from the refi on W's sole and separate residence a year before the divorce. H alleged he used and paid back $100,000 and W used the rest. Again, W's exhibit was not admitted into evidence. The Trial CT (L. Miles) found no waste regarding the withdrawal from the joint bank account and did not comment on the refi of W's sole and separate residence.	Affirmed. The CT simply stated there was substantial evidence to support the Trial CT's decision after reviewing the evidence in the light most favorable to upholding its decision. The CT noted that the Trial CT may not have addressed the refi on W's residence because it was her sole and separate property, not subject to the jurisdiction of the CT.	W should have actually offered her exhibits, or made an offer of proof.

CITE	FACTS	HOLDING/DISCUSSION	NOTES
Simmons v. Dudley, 2009 WL 936886, Memorandum Decision (App. 4/7/09)	(1) H owned a S&S jewelry business which increased in value during the marriage as a result of community effort. During the marriage the business was sold for $340,000 and the proceeds were reinvested into a new business in the form of a loan. The value attributed to the community was $312,057. The Trial CT (Flores) awarded W ½ or $159,029. (2) The parties jointly owned a chevrolet Tahoe. After the Petition was filed, H canceled the insurance policy. W purchased her own policy. The Tahoe was stolen and W received $10,687.33 in insurance proceeds which she used for living expenses. Trial CT found the Tahoe to be a community asset used for living expenses and awarded H nothing. (3) W purchased an extended warranty on a community BMW on a credit card after filing for $1,941. Six months later she traded in the BMW for a Honda and received $3,450 including $1,480 cash which she used for living expenses. Trial CT did not split the debt or award H a share of the trade-in proceeds.	(1) Reversed. The Trial CT could only divide community property in existence at the time of the dissolution. The decision was remanded to determine what, if any, interest the community may have in the loan that could be traced to the sale proceeds. (2) Affirmed. A mere change in the form of the property does not change its character. The insurance proceeds were used for W's living expenses and there was no violation of the Preliminary Injunction. (3) Affirmed. The Trial CT could only divide assets in existence. W used the proceeds for living expenses and there was no evidence of waste.	Disturbing analysis. Wasn't the whole point that the community interest was no longer in existence and a judgment could be entered? Also, arguably, the insurance policy was a sole and separate asset of W purchased after filing when H canceled the original policy also after filing. Is an insurance policy merely a change in the form of the property? Just because a spouse uses the proceeds for living

CITE	FACTS	HOLDING/DISCUSSION	NOTES
			expenses and is not in violation of the Preliminary Injunction, does that mean they do not have to account for them in the dissolution of assets? The Court also cited *Toth* to justify the unequal distribution without "arithmetic precision," but not *Hatch* and other cases to the contrary.

CITE	FACTS	HOLDING/DISCUSSION	NOTES
Cozens v. Cozens, 2009 WL 2244501, Memorandum Decision (App. 7/28/09)	W, a realtor, attempted to arrange a sale of the community residence and furnishings to a corporate buyer for $6.1 million. W and the corporations' owner intended that W would remain living in the residence after the sale. H was not made aware of the plan, but had advised W's broker he would reject an offer if the buyer were the same buyer from a previous offer that had fallen through. The corporation's owner was the buyer in both deals, but H was told a different buyer was involved. The sale never closed, but H testified that had he known the same buyer was involved he would never have entered into the contract. H filed a separate civil action against W, her broker, the corporation, and the corporation's owners for fraud. He dismissed W, settled with the broker for $100,000 and obtained a default judgment against the corporation's owner for $879,666.18. W claimed she should share in the proceeds of over $900,000 in that there was no waste given that the home eventually sold for more than it would have under the sales agreement.	Affirmed/Reversed. A.R.S. § 25-318(C) is intended to compensate an innocent spouse for the other spouse's misuse of common property. The Trial CT correctly adjusted one transaction, not all of the parties' community assets. Although fault may not be considered in equitably dividing community property, fault may be considered under A.R.S. § 25-318(C). The Court noted the difference between matrimonial misconduct, which may not be considered, and financial misconduct, which may. The CT of Appeals affirmed the order requiring W to equally share in the payment of the post-service sales taxes on the grounds the business continued to remain a community asset through the dissolution, but reversed as to the pre-service income taxes because they were already paid with community funds.	

CITE	FACTS	HOLDING/DISCUSSION	NOTES
	H claimed that the proceeds should be awarded to him with no share to W for her financial misconduct. Trial CT (Mangum) found W misused the marital residence and awarded all of the proceeds of the civil action to H on the grounds to do otherwise would reward W for financial misconduct. W also claimed she should not be liable for post-service sales taxes of the community business without joining in their incurrence and that she should not be ordered to reimburse H for pre-service income taxes of $65,000 paid by H with community funds. Trial CT found W equally liable for the post-service sales taxes and also ordered her to reimburse H for payment of the pre-service income taxes.		

CITE	FACTS	HOLDING/DISCUSSION	NOTES
Mike v. Spadafore, 2009 WL 2342752, Memorandum Decision (App. 7/30/09)	On date of service in 2005 the parties owned 6 investment accounts and other accounts with a combined value of over $269,000. H controlled the family finances and W had no knowledge of the accounts before the dissolution proceedings were filed. H drew them down and cashed them out without first providing notice to W or obtaining her consent. H admitted he made the withdrawals, but alleged they were used to pay for community expenses. The Trial CT (L. Miles) allocated the value of the 6 investment and other accounts to H at the values that existed before H's withdrawals.	Affirmed, citing A.R.S. §§ 25-381(A) and (C), *Gutierrez* and *Hrudka*. In family court property included both the existing and dissipated value of the accounts in the share of property awarded to H, thus compensating W for her share of the withdrawn funds and ensuring an equitable division of the community property that existed at the time the marital community ended.	H argued the family court abused its discretion by dividing assets no longer in existence without a specific finding of waste. However, H made no request for findings of fact and conclusions of law.