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PERSPECTIVE

Navigating finances in a dissolution of marriage

By James Giacchetti

During a dissolution of marriage, tempered financial management is essential to protecting your client from court imposed sanctions and penalties. Parties to a dissolution are required to preserve assets — both separate and community — until the court has determined each party's respective estate interests. This general prohibition can conflict with realities of life; at times, important expenses (which may not qualify as "necessaries") cannot, and should not, be postponed until after distribution of the estate. A review of the Family Code sections may inform your client's spending decisions and help them navigate challenging financial circumstances while reducing risks of unlawful conduct. Here are methods that can help you prevent dissipation or obtain liquidity (or both).

For a Client Seeking to Prevent Spending

Remind opposing counsel of spousal fiduciary duties. A court may divide community property prior to trial only in limited circumstances. Upon initiation of dissolution proceedings and prior to final judgment, Family Code Section 2040 restraining orders prohibit parties from transferring or disposing of property except in the usual course of business or for the necessities of life, without an order of the court or written consent of the other party. Spouses are fiduciaries concerning the management and control of assets. Failing to abide by Section 2040 could provide grounds for a breach of fiduciary duty claim. If you are concerned about overspending, try to reach an agreement on a budget.

Bring an ex parte request for temporary restraining orders. A party may move for orders enforcing the restraints of 2040. As provided in Family Code Section 2045, the court

may issue an order restraining any person from transferring or disposing of property. These restrictions may also be placed on third parties, companies and banks. To obtain such an order, you will need to show an immediate danger that assets may be lost.

Specify requests for orders concerning third parties. The court's power to restrain property transfers is not confined to spouses. Pursuant to Family Code Section 2045, the court may issue orders against third persons to enjoin levy upon community property by a judgment creditor. The court may also protect against dissipation of an alleged interest in a business entity. The Rules of Court authorize a direct injunction against a third person who is acting as a trustee, agent, custodian, or similar fiduciary with respect to property subject to disposition in the marital action.

Utilize the adverse claim procedure to freeze accounts. Under Financial Code Section 1450, accounts may be frozen to prevent dissipation of assets. Banks must freeze specified accounts when an adverse claimant delivers to the bank an affidavit, based on personal knowledge, stating that the person for whose account the property is held is a fiduciary; the adverse claimant has reason to believe the fiduciary will misappropriate the property; and recites the specific facts upon which the adverse claims are founded.

For a Client Seeking Liquidity

Show that avoiding liquidation impairs value. A court may order the liquidation of community assets to avoid unreasonable market or investment risks. Family Code Section 2108 provides that, at any time during the proceeding, the court has authority, on application of a party and for good cause, to order the liquidation of assets so as to avoid unreasonable market or investment risks. You will have the court's attention if you show



that an asset risks depreciation unless liquidated.

Conduct a mini-trial to determine the nature of an asset. A court may conduct a hearing limited to a decision about the community or separate character of an asset, and the existence of other community assets sufficient to offset any loss the objecting spouse might incur from liquidation and distribution. *Lee v. Superior Court*, 63 Cal. App. 3d 705 (1976). It may take a half-day hearing to determine the nature of an asset, and have it liquidated. This will limit the issues, save time and reduce confusion when trial is held.

Provide security to protect the objecting party. Similarly, the court in *Lee* explained that a trial court could, with appropriate safeguards, order one potential community asset sold and distributed when warranted. A trial court may order the sale of an asset without making factual determinations beyond the value of the asset, provided it requires security sufficient to protect the objecting spouse. A mini-trial can be altogether avoided if security protects the other spouse's potential interest in the property.

Instill confidence in the court. Section 2010 and 2550 provide courts broad authority to make any orders the court considers necessary to achieve an equal allocation of marital property. Pursuant to the California Rules of Court, any suitable process or mode of proceeding may be adopted by the court that is consistent with the spirit of the Family Code and these rules. A trial court has jurisdiction to inquire into and make orders

that are appropriate concerning settlement of property rights. *Glade v. Glade*, 38 Cal. App. 4th 1441 (1995). Use these sections, together with *Lee*, to remind the court of its broad discretion concerning financial matters.

Be Reasonable: Reach an Agreement

A court must enforce a valid, reasonable financial agreement. When it comes to marital finances, reduce anxieties, improve trust, and move the case towards settlement by stipulating to a budget or a distribution for specific purposes. If opposing counsel is obstinate, send a copy of Family Code Section 271 along with your proposal. A court may base attorney fees and costs on conduct that frustrates settlement and cooperation between parties. On a fees motion, show that the opposing party refused to act reasonably.

Dissolutions are painful. Measures should be taken to ensure financial surprises are avoided. Encourage your client to show grace and kindness by communicating effectively. The court will look favorably at good faith efforts to reduce the highly adversarial nature of most dissolutions.

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