

## **LOCATING AND PRESERVING MARITAL ASSETS: AN OVERVIEW**

**By  
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The search for hidden assets begins with the initial client interview after retention. Financial circumstances and intrigue within families differs and the lawyer must seek to explore the client's perception and knowledge of these circumstances so that he can begin the forensic process. Clients frequently know more than they think about the way they live their lives financially. They need the lawyers assistance in sensitizing them to the importance of what otherwise may appear innocent idiosyncrasies.

Forensic experts are of assistance not only in valuing assets, but in helping to uncover them and in strategizing ways to present the evidence that is discovered. The lawyer and forensic expert need to form a "presentation team" that plans the case and develops a theme from beginning to end. Lawyers without access to such experts are inviting a potential disaster for themselves and their clients. However, it is a far stretch from a duty of inquiry and a duty of investigation, to say that there is a duty to find. The following strategies will assist clients and attorneys in this inquiry.

### **TIMING**

Establishing a client's perception of the commencement date of serious marital difficulties, such as the date their spouse concluded that a divorce would occur or outright acts of financial isolation, reveals the time when there is motivation to change economic patterns. Subtle changes, such as those in the manner in which finances are being handled, records maintained, or when an atmosphere in the home changed can give the lawyer and the forensic expert the starting point for the investigation.

## **PENDENTE LITE APPLICATIONS**

When representing a dependent or disadvantaged spouse, proving the lifestyle issue at the pendente lite level to persuade the Court your version of reality is the truth is essential. In a case that involves a closely held or cash business, preliminary discovery will not fully indicate economic reality. The adverse spouse will have tax returns to support his or her position. However, at this early stage, expert's investigations will not have been completed, or even started, and if the trial court enters an award based upon the tax returns, although subject to review at final hearing, the marital lifestyle will not be maintained through the pendency of the litigation. In such a case, "a picture is worth a thousand words", or thousands of dollars. It is very difficult to assert convincingly that income on a tax return demonstrates that which is available when you can show pictures of elegant homes with a Mercedes and a BMW parked in the driveway. Vacations scenes of beaches at the Rivera and skiing in the French Alps is difficult to square with a \$50,000.00 income level.

It is also important, pendente lite, to prevent or account for dissipation of marital assets, not only pending the litigation, but even before it started. In Kothari v. Kothari, 255 N.J. Super. 500 (App. Div. 1992), the Appellate Division ruled that dissipation may even occur before a Complaint is filed. Although courts have discouraged an accounting of all expenditures ever made, if marital strife beset the relationship from the beginning, as in Kothari (four divorce proceedings in four jurisdictions during the first four years of marriage), it may be proper.

## **PRE-SUIT ACTIONS**

In a case where pre-action dissipation is suspected or likely, such as valuable coins or cash kept in a safe controlled by the adverse spouse, pre-suit action may be proper. Obviously, any notice of the awareness of such assets lends a substantial risk that they will simply disappear with

no way of proving that they ever existed. In such a case, an Order to Show Cause filed ex parte for a preliminary injunction and authorization to the Sheriff's Department to serve the Order on the defendant, and to remove or account for the valuable items may be appropriate. While difficult to persuade a Court that such a financial issue is emergent, carefully crafted moving papers indicating total control of finances or threats of dissipation may convince a judge that this unusual practice is necessary.

### **ASSET CHARACTERIZATION**

When completing a Case Information Statement, it is important to carefully list assets and their eligibility. If the attorney, the client or the expert is unsure of the eligibility of a certain asset, it should be duly noted in the appropriate place. Proper analysis with respect to the eligibility or ineligibility of assets is very important in terms of preserving the marital estate or protecting separate assets that do not belong in the marital estate. An improper characterization or analysis of the issue of eligibility may, in effect, result in the loss of an asset.

### **THIRD PARTY SUBPOENAS**

Third Party deposition subpoenas are a valuable tool especially when served upon the custodian of records of the adverse party's counsel to obtain copies of their ledgers demonstrating monies received for fees, monies owed, and copies of the instruments utilized to pay invoices. There is nothing privileged about such information. Thus, the adverse attorney has records that will identify the source of each payment received from the adverse spouse. If the adverse spouse is taking the "I can't afford support" position, proof that counsel fees are being paid without delay may rebut such a position. In addition, if the client is paying with an account not disclosed, through another business or with cash, that information is available through the adversary.