

MARITAL MISCONDUCT OR ECONOMIC FAULT
IN CONTEMPLATION OF DIVORCE

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On June 2, 2012 forty-one years will have elapsed since a version of the Uniform Marriage and Divorce Act (“Uniform Law”) became law in Colorado.¹ A hallmark of this 1971 legislation was the anticipated elimination of the fault-based system of divorce as it existed in Colorado.² The stated objectives of the drafter’s of the “Uniform Law” were listed in the legislation’s “Prefatory Note”: (a) “Throughout the Act, an effort has been made to reduce the adversary trappings of marital litigation.....(b) The Act has totally eliminated the traditional concept that divorce is a remedy granted to an innocent spouse, based on the **marital fault** of the other spouse.....(c) The required jurisdictional finding that factually the marriage is **irretrievably broken** shifts the law’s attention from an unproductive assignment of blame to a **search for the realities** of the marital situation.” (d) The Acts elimination of fault notions extends to its treatment of maintenance and property division.³

In spite of the drafter’s objectives, “adversary trappings” while reduced in dissolution matters have not been completely eliminated. Domestic relations judges are still being asked by practitioners for orders holding a spouse accountable for marital misdeeds. This is the case even if the conduct does not rise to a level of what was previously denominated “marital fault.”⁴

The nature and egregiousness of the marital misdeeds and the relief sought can vary but may include:

(a) the eligibility, amount, and duration of a maintenance award primarily based on a spouse's "reasonable needs" and diminished financial resources" arising by reason of past and future medical/therapy expenses related to acts of domestic violence,⁵

(b) conduct of a parent that is contrary to the children's best interest in an allocation of parental rights/responsibilities case,⁶

(c) conduct suggesting that a spouse has been "**shirking**" employment so as to minimize his/her child support obligations,⁷

(d) conduct amounting to violations of the court's temporary orders, including the automatic temporary injunction provisions, resulting in contempt hearings which are often consolidated (for docketing efficiencies) with hearings on permanent orders,

(e) conduct constituting a dissipation of assets or depletion of property which would otherwise qualify (see *infra*) as acts of economic fault .⁸

This article will explore the impact Colorado's adoption of the "Uniform Law" has had on practitioner's attempts to assign blame to spouses in dissolution proceedings. The article shall also focus on a tension that currently exists in the law in Colorado between two conflicting principles. Whether the public policy in Colorado of promoting harmonious marriages, coupled with the statutory admonition "without regard to marital

misconduct” outweighs the equities of holding spouses accountable for financial misdeeds?

THE ATTRACTION OF FAULT

Irrespective of the state of the law, there are countless arguments that are advanced everyday as justification for practitioners raising fault or marital misconduct in dissolution proceedings. For instance, a strong proponent of the effective use of fault in both fault and no fault jurisdictions was Harvey L. Golden, a past chairman of the American Bar Association Family Law Section. Mr. Golden as a long time practitioner in the fault jurisdiction of South Carolina, in an ABA article and Vail lecture titled “ Effectively Using Fault At Trial”⁹ argued that “the whole purpose of fault in domestic relations is to make sure that one is held accountable for misconduct and not be allowed to escape the consequences. This accountability permeates all aspects of a divorce, from dissolution through support and property division.... The essential idea behind “fault” is the proposition that, even if a marriage is viewed as a partnership, it is inherently unfair to make an innocent partner suffer the consequences of a substantial wrongdoer... Simply put, the overriding question is whether it is fair for an innocent spouse, who has spent the entire marital life knitting together the fabric of the family, to suffer a diminution in lifestyle simply because the other spouse decided to get out of the marriage, either actively (by abandonment) or by creating a situation

too onerous for the innocent spouse to endure (such as by drug abuse, adultery or physical cruelty.)”¹⁰

An example of a Colorado trial court (pre UDMA) exacting accountability upon an at fault spouse, can be found in the 1963 Colorado Supreme Court decision of *Liggett v Liggett*.¹¹ In *Liggett*, the Supreme Court relying upon a contribution analysis (which it later criticized)¹² held that it was not an abuse of discretion for the trial court to find that wife was not entitled to any property as part of the property division. This holding was based upon the trial court’s finding that during the eight years of marriage wife had failed to be a partner in the marriage relationship, and had not contributed to the business or financial resources of the parties. Rather by reason of wife’s addiction and her eight hospitalizations for treatment, along with her dissipation of husband’s funds, she had constituted a drain upon the husband to his embarrassment and detriment.

Moreover in *Liggett*, husband as the innocent spouse was not made to suffer a diminution in life style by reason of a maintenance award. Rather the Supreme Court upheld the trial court’s award to chronically ill wife of \$200 a month maintenance to meet her reasonable future needs out of a one time \$7500 fund. This was based on the trial court’s finding that wife at age 50 could rehabilitate herself and thereafter engage in “gainful pursuits”.¹³ While there was no mention of the size of the marital estate or the parties’ net worth in the decision, at the time of the divorce, husband as the innocent spouse, was a banker, rancher and in the insurance business.

WITHOUT REGARD TO MARITAL MISCONDUCT

The adoption in Colorado of its version of the “ Uniform Law” presumably eliminated the notion that marital fault or misconduct had any future role to play in a court’s treatment of property division and awards of maintenance.¹⁴ This thought was reinforced not only by the stated intent of the drafters in the prefatory notes to the “Uniform Act”, but also by the addition of “**without regard to marital misconduct**” language found in Colorado’s UDMA property division and maintenance statutes.¹⁵

Nevertheless the notion was short lived. While the Colorado legislature had failed to define the phrase “without regard to marital misconduct” in the new UDMA statute, there existed for practitioners resources to decipher the legislative intent. For example, the drafting committee’s comments to Section 307 (Disposition of Property) in the 1970 version of the original “Uniform Act” provided “the court is directed not to consider marital misconduct, such as adultery or other **non-financial misdeeds**, committed during the marriage, in making its division.”¹⁶ From this comment a negative inference arose, that a trial court under Colorado’s Uniform Dissolution of Marriage Act could properly consider “**financial misdeeds**” as a factor in making its property division.

Further support for the “financial misdeeds” interpretation came from post adoption amendments to the “Uniform Act.” In a 1973 amendment to Alternative A to Section 307 (Disposition of Property) of the “Uniform Act”

the drafters provided that “ the court shall also consider the contribution or **dissipation of each party** in the acquisition, preservation, depreciation, or appreciation in value of the respective estates... .” ¹⁷

Ultimately, culpability of spouses for “financial misdeeds” or economic fault arising during the marriage and unrelated to any social or moral misconduct quickly found expression in Court of Appeal’s cases. ¹⁸ Nevertheless, issues emerged concerning the propriety of economic fault claims, when the adverse financial consequences to a party or to the marital estate were caused by a spouse’s moral or social misconduct.

The Colorado Supreme Court, after granting certiorari attempted to address these issues in the consolidated case, *In re Marriage of Hunt/Raimer*.¹⁹ The Supreme Court found that the Raimer trial court awarded wife an unequal share (40%) of the marital property portion of Husband’s military pension. As justification for the unequal division, the trial court relied upon a finding that wife had only given “luke warm support to Husband’s military career.”²⁰

The Supreme Court also found that the trial court had engaged in “rough justice” by erroneously interjecting marital fault into its property division analysis.²¹ The Court held “a trial court’s determination of the parties’ contributions to the acquisition of marital property **cannot assess marital fault in any way.** (citing **14-10-113**).”²²

Prior to reaching this conclusion, the Supreme Court considered the possibility that the trial court’s finding of “wife’s lack of support of husband’s

military career” was neither marital fault nor misconduct but in actuality was the more benign concept of “economic fault”.²³ The Supreme Court by implication disregarded the broad definition of “economic fault” (which included the economic consequences of moral and social fault) as contained in Turner’s treatise **Equitable Distribution of Property** and stated that “economic fault” is a **limited concept** that comes into play only in **extreme cases** such as the spouse’s **dissipation of assets in the contemplation of divorce**. (citing Marriage of Ebel 874 P.2d 406(Colo. App.1993) (Husband’s unilateral withdrawal of jointly owned golf course assets in advance of a property division hearing)²⁴ The Court held that the Marriage of Raimer facts did not support a conclusion of “economic fault” since wife’s behavior was not the equivalent of a dissipation of marital assets (in contemplation of divorce).²⁵

Moreover, the Supreme Court in Raimer found “given the UDMA’s prohibition against consideration of “marital fault”, it is especially important that “economic fault” be **strictly confined** so that it does not become a means to circumvent that prohibition.”²⁶ As an example of the difficulties associated with the concept of economic fault, the Supreme Court reconsidered its own holding in the pre UDMA case of Liggett v. Liggett.²⁷ The court stated that “the Liggett case illustrates the inherent problems in distinguishing between “marital fault” and “ economic fault.”²⁸ In the 1963 Liggett decision, the Supreme Court had rejected wife’s claim that the trial court had not awarded her any property because of its reliance on “marital

fault” related to her drug and alcohol problems.²⁹ Rather in Liggett, the Supreme Court found that the trial court’s decision was based not on fault but on economic circumstances such as a dissipation of assets and a failure to contribute to the acquisition of property.

Thirty-two years after the Liggett decision, the Supreme Court in Raimer reversed itself. The Court stated “ this court’s rationale (in Liggett) for upholding the award of all marital property to the husband is indistinguishable from a finding of marital fault.”³⁰

A relevant consideration today for practitioners contemplating an economic fault argument in a case, especially one arising out of a spouse’s social or moral misconduct, is the Supreme Court’s rejection in Raimer of the following finding it had made in the 1963 Liggett case:

“..... where as here, the court found that the wife failed during the entire period of the marriage relationship to perform her duties as a wife and a partner in the marriage relationship and did not contribute to the business or financial resources of the parties, **but by her addiction and conduct constituted a drain** upon the husband to his embarrassment and detriment, we cannot say as a matter of law that she is entitled to a division of property.”³¹

The Supreme Court in Raimer stated “ this finding **could not be upheld under the UDMA** and Liggett must be limited to pre UDMA cases.”³²

NEW WRINKLES

The Colorado Supreme Court in the 1995 Raimer decision set forth the framework for a trial court's consideration of economic fault in its property division and maintenance orders. The Colorado Court of Appeals has filled in some of the gaps left by the Raimer decision when it addressed the following three economic fault issues:

- (a) What impact if any a spouse's incarceration would have on a property division order?³³
- (b) What valuation date should be used in valuing assets that had been dissipated?³⁴
- (c) Can a spouse prior to the filing of a dissolution proceeding dissipate assets (separately or jointly owned) that had not as yet been vested in either spouse as marital property?³⁵

In the 1998 case of *In re Marriage of Casias*, the Court of Appeals first considered the propriety of a spouse asserting an economic fault claim at permanent orders arising from the other spouse's incarceration. The Court held that so long as the trial court did not consider the underlying marital fault of husband that resulted in his incarceration, husband's reduced financial needs as an inmate of the department of corrections could properly be considered as an "economic circumstance" as provided under CRS 14-10-113(1)(c)".³⁶

In addition, the Court of Appeals in addressing the fairness of the trial court's grossly unequal property division in favor of Wife suggested that upon remand, the trial court consider as authority, the **broad definition** of economic fault as contained in Turner's treatise "Equitable Distribution of Property."³⁷ Turner's broad definition as noted previously included not only dissipation of assets but also the economic consequences resulting from a spouse's moral or social misconduct.

In evaluating the strength of the Casias decision as precedent today, practitioners should note that the decision failed to mention or cite the Supreme Court's holding in Raimer. Moreover, the Court overlooked the Supreme Court's inferential rejection of the Turner treatise's broad definition of economic fault. Finally, eight years after its decision, the Court adopted the narrow definition of economic fault as defined by the Supreme Court in Raimer when it decided *In re the Marriage of Jorgenson*.³⁸

In *Jorgenson*, the trial court found that husband in contemplation of dissolution had concealed, transferred, and withdrew marital assets in violation of the automatic injunction. He had also failed to make lease payments on business property despite having the funds to do so and had sold off business assets when the parties had stipulated in court to list the business as a whole for sale.

The Court of Appeals in sustaining the economic fault finding of the trial court in *Jorgenson* quoted the Supreme Court's holding in Raimer when it stated " that concept (economic fault) comes into play in extreme cases

such as a spouse's dissipation of marital assets in contemplation of divorce and it must be strictly confined so as not to circumvent the prohibition against consideration of marital fault." ³⁹

Further limiting the scope of a dissipation of assets/economic fault argument is a new wrinkle recently raised by the Court of Appeals in the 2008 case of *In re the Marriage of Schmedeman*.⁴⁰ During the marriage, husband and wife built a cabin shell from utility poles which had been acquired solely by Husband during the marriage. Husband over wife's objection gave the cabin shell (including utility poles) to his parents who built a cabin. During the dissolution proceeding wife argued that the completed cabin should be characterized and valued as marital property and allocated to husband since she did not join in the gift to husband's parents. Alternatively, wife appears to have also argued that husband committed economic fault by dissipating assets through gifting away the cabin shell during marriage and wife should receive a credit in the property division for the value of the dissipated assets.

The Court of Appeals in *Schmedeman*, relying in part upon the Supreme Court decision, *In re Questions Submitted by the United States District Court*⁴¹ stated "under Colorado law, a spouse's right to the other spouses's property does not vest until death or divorce and until then the person may dispose of his or her property in any manner."

The Court also citing the case *In re Marriage of Lockwood* found that there was no evidence that husband had given away the cabin shell in contemplation of dissolution.⁴² Finally, as further support that there was no dissipation of “marital property” since marital property did not exist at the time of the gift , the Court quoted from the Commissioner’s note to the “Uniform Act” Section 307. The Court stated “the explanatory note accompanying (Section 307 of the Uniform Act) clearly establishes its limited function. It resolves that “marital property” is defined “only for the purpose of division on dissolution of marriage or legal separation. No attempt is made to regulate the respective interests of the spouses in property during the existence of the marriage..... Operation of the term “ marital property” is not triggered until the time of dissolution.”⁴³

IN CONTEMPLATION OF DIVORCE

An issue that has not as yet been completely resolved by the Colorado Court of Appeals is the scope and meaning of the phrase “ dissipation in contemplation of divorce.”⁴⁴ As a result it remains unclear as to what the requisite state of mind a spouse must possess and over what duration of time to sustain a finding of dissipation of assets in contemplation of divorce? Further uncertainty exists as to whether there are any defenses (legal or equitable) that can be raised in advance of permanent orders to limit discovery or proof for questionable non-marital purpose expenditures?

Illinois, a UMDA state, has addressed similar economic fault issues in the context of a property division statute that also provides for the division of marital property without regard to marital misconduct.”⁴⁵ The Illinois Supreme Court in the case *In re Marriage of O’Neill* held that the term “dissipation refers to the use of marital property for the sole benefit of one of the spouses for a purpose unrelated to the marriage, at the time the marriage is **undergoing** an irreconcilable breakdown.”⁴⁶

Illinois practitioners unsuccessfully argued that their Supreme Court’s use of the word “undergoing” (an irreconcilable breakdown) in its *O’Neill* holding meant that the trial courts could consider questionable expenditures over the entire period of time that the marriage was headed toward an “irreconcilable breakdown” rather than a fixed moment of time.⁴⁷ The Illinois Court of Appeals in *Marriage of Hazel* held “to adopt the meaning proposed 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.”⁴⁸

The Illinois Appellate Court in the case of *Marriage of Getautas* also gave a compelling explanation as to why trial courts in making property division orders should not consider as a relevant factor dissipation expenditures throughout the course of the parties’ marriage without any limitation. The court stated:

“With the advent of detailed discovery, the cost of dissolution proceedings has skyrocketed. Allowing lawyers, or possibly requiring them

under a threat of malpractice, to question all expenses and economic decisions of a 20-year marriage (as we have before us) in the hope of uncovering something that could be called dissipation adds an unnecessary and wasteful burden of time and expense especially when no initial triggering event or threshold has been crossed. The relatively few dissipation cases now seen by the court would mushroom given the ease by which a party could allege extravagant purchases of clothes, cars, furniture, golf clubs, et cetera in nearly every dissolution case. It should not be the trial court's role to account for the various financial inequities found in a "bad " marriage or bad business decisions, and the court should not be required to consider allegations of "extravagant purchases" prior to the irreconcilable breakdown of marriage." ⁴⁹

CONCLUSION

Forty-one years have passed since Colorado adopted its version of the Uniform Marriage and Divorce Act with the stated objective of eliminating adversary trappings of marital litigation. Despite the passage of time can it be fairly stated that the "law's attention has been redirected from an unproductive assignment of blame to a search for the realities of the marital situation"?

¹ The UMDA was signed into law on June 2, 1971 and became effective for dissolution proceeding filed after January 1, 1972. See H. B. 1299, 1971 Colo. Sess. Laws at 520. Colorado substantially adopted major provisions of the UMDA but departed from the official text in many instances. Also see Bayer and Bryant, "The Colorado Lawyer as Guinea Pig" 1 Colorado Lawyer 11 (Dec. 1971). Other jurisdictions that adopted versions of the 1970 Uniform Act were Arizona, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington. (See Vol.9A ULA Master Edition 1998)

²C.R.S. 46-1-1, 1963 as amended lists the pre UDMA marital fault grounds for divorce in Colorado as impotence at the time of marriage and/or thereafter if caused by immoral conduct , adultery, willful desertion without reasonable cause for a period of one year immediately preceding the filing of the action for divorce, repeated and extreme physical or mental cruelty, non support by husband who is otherwise in good health for a period of one year, habitual drunkenness or drug addiction for a period of one year preceding the filing of the action for divorce, felony conviction, adjudication of insanity or mental illness, but adjudication does not relieve husbands of duty of support of wife unless she has sufficient property or means to support herself, the parties living separate and apart for a period of at least three consecutive years prior to filing the action for divorce.

³ Vol. 9 ULA (Prefatory Note) pg 2-4. Uniform Marriage and Divorce Act, (Master Ed. 1998)

⁴ See note 2 supra

⁵ C.R.S. 14-10-114 (4)(a) provides that a relevant factor for the court to consider in determining the amount and duration of a maintenance award are the “ financial resources” of the party seeking maintenance. Also, see Marriage of Casias, 962 P.2d 999, (Colo. App. 1998) a trial court may not consider in making a property division any fault associated with a spouse’s criminal conviction but may consider as a factor under C.R.S. 14-10-113(1)(c) the “**economic circumstances**” of the incarcerated spouse at the time of decree including the reduced needs of an incarcerated spouse.

See Marriage of Hulse 727 P .2d 876 (Colo. App 1986) (“ evidence of wife’s medical expenses and decreased earning capacity is relevant to her “reasonable needs” although evidence that husband allegedly inflicted injuries which caused the medical expenses and decreased earning capacity is irrelevant.” Also see, In re Coomer 622 N.E. 2d 1315 (Ind. Ct. App.1993)(health problems of wife caused by physical abuse resulted in reduced earning capacity and probable future medical expenses, proper to award wife 60% of marital estate)

⁶ C.R.S. 14-10-124(b)(2) provides “ the court shall not consider conduct of a party that does not affect that party’s relationship to the child.”

⁷ People v. Martinez (a.k.a. In re JRT 70 P.3d 474 (Colo. 2003)

⁸ C.R.S. 14-10-113 and (1)(C), (1)(D), requires the court to consider “ all relevant factors” including but not limited to the “economic circumstances” of each spouse at the time the division of property is to become effective.” See Marriage of Paulsen

677 P.2d 1389 (Colo. App. 1984) recognizing **depletion of marital property** to be an appropriate factor for consideration under 14-10-113(1) even if not an enumerated factor. The factor “dissipation of assets” has been recognized as an equitable factor in Colorado since 1925. Wigton v. Wigton 242 P.56 (Colo. 1925)

⁹ Ultimate Trial Notebook 1 Vail 1991 American Bar Association Pages H-1 to H-4

¹⁰ Ibid at H-1

¹¹ Liggett v. Liggett 380 P.2d 672 (Colo. 1963) The Supreme later questioned in part its decision in Liggett in the case of Hunt/Raimer 909 P. 2d 525 at 542-3 (Colo. 1995)

¹² In re Marriage of Hunt/Raimer 909 P.2d 525 at 543. (Colo. 1995)

¹³ Ibid at 675

¹⁴ note 3

¹⁵ C.R.S. 14-10-113 (1) provides “and shall divide the marital property without regard to marital misconduct and in such proportions.....” C.R.S 14-10-114 (4) provides “.... shall be in such amounts and for such periods of time as the court deems just, without regard to marital misconduct”

¹⁶ Vol. V Number 2, 209“Uniform Marriage and Divorce Act” Family Law Quarterly June 1971 at 232-233 and Handbook of National Commissioners on Uniform State Laws 1970-71 edition

¹⁷ Vol. 9A ULA Master Edition 1998. The language in the 1973 amendment setting forth dissipation of assets as a factor to be considered in a property division was not adopted by Colorado as part of the UDMA. The concept of a spouse receiving credit in a property division order by reason of a dissipation of assets (oil stock speculation) found expression in the 1925 case of Wigton v Wigton 242 P. 56 (Colo. 1925).

¹⁸ Note 8, Marriage of Barnthouse 765 P.2d 610 (Colo. App 1988) (depletion of marital estate), Marriage of Ebel 874 P.2d 406 (Colo. App. 1993)(depletion in contemplation of a property division hearing), Marriage of Jaeger 883 P.2d 577 (Colo. App.1995)(depletion of marital estate)

¹⁹ Note 12

²⁰ Ibid at 529, 543

²¹ Ibid at 543

²² Ibid at 542

²³ Brett Turner’s treatise Equitable Distribution of Property Sec 809 at 600 (2d ed 1994) defines the term “economic fault” broadly as “conduct which has a negative

effect upon the parties financial condition. It includes not only conduct aimed directly at the parties finances, but also the economic consequences of social or moral fault.(citation omitted)

²⁴ Ibid at 542(pending a property division hearing, husband unilaterally withdrew assets from the parties jointly owned golf course.)

²⁵ Ibid at 543 (parenthesis ours.)

²⁶ Ibid

²⁷ Note 11

²⁸ Note 12 at 543

²⁹ Note 11; Wife's counsel had claimed in Liggett that since the divorce had been granted to both parties, each had been judicially determined to be guilty of marital fault, thereby rendering wife's conduct during married life immaterial.

³⁰ Note 12 at 543

³¹ Ibid (emphasis ours)

³² Ibid

³³ Marriage of Casias 962 P. 2d 999 (Colo. App. 1998)

³⁴ Marriage of Finer 920 P.2d 325 (Colo. App. 1996), Marriage of Lockwood 971 P.2d 264 at 266 (Colo. App.1998) (dissipated assets exception, assets should be valued as of the date of their last existence.)

³⁵ In re Marriage of Schmedeman 190 P.3d 788 (Colo. App. Div. 2 2008)

³⁶ Note 33 at 1002

³⁷ Note 23

³⁸ 143 P.3d 1169 (Colo. App. 2006)

³⁹ Ibid at 1173, Note 12

⁴⁰ 190 P.3d 788 (Colo. App. Div. 2 2008)

⁴¹ 517 P.2d 1331, 1334-1335 (Colo 1974)

⁴² Note 40 at 791, Marriage of Lockwood 971 P.2d 264 (Colo. App.1998)

⁴³ Note 40 at 791,

⁴⁴ Note 12 at 542 (The Supreme Court in Raimer cited the facts in the of case Marriage of Ebel (Note 18) as an example of dissipation in contemplation of divorce.)

⁴⁵ Ill. Rev. Stat.1987, ch.40 par.503(d)(I), In re Marriage of O'Neill 563 N.E. 2d494,498,(Ill. 1990)

(Ill. 1990), Marriage of Getautas 544 N.E. 2d 1284 (Ill. App.1989), Marriage of Hazel 579 N.E. 2d 1265 (Ill. App. 1991)

⁴⁶ In re Marriage of O'Neill 563 N.E. 2d at 497(Ill. 1990)

⁴⁷ Marriage of Hazel 579 N.E. 2d 1265 (Ill. App. 5 Dist. 1991)

⁴⁸ Ibid

⁴⁹ Marriage of Getautas 544 N.E. 2d 1284 (Ill.App.1989.

Note: The above manuscript is a draft version submitted to The Colorado Lawyer for publication consideration. It currently is under review, has not been scheduled for publication, and has not been edited by The Colorado Lawyer staff.