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Fraudulent Transfers and Concealment of Assets in Divorce

Receivership, Sequestration, and Other Extraordinary Remedies
in Enforcing Dissolution, Spousal and Child Support

WEDNESDAY, OCTOBER 31, 2018

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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WHAT IS FRAUD

Misrepresentation of a material fact, made willfully to deceive or recklessly without knowledge, and acted upon by the opposite party, or made innocently and mistakenly and acted on by the opposite party, constitutes legal fraud.

O.C.G.A. §23-2-52

5 ESSENTIAL ELEMENTS

- The Defendant made representations.
- At the time Defendant knew they were false.
- Made with the intention and purpose of deceiving the Plaintiff.
- The Plaintiff relied on the representations.
- The Plaintiff sustained the alleged loss and damage as the proximate result of their having been made.

Bacote v. Wyckoff, 251 Ga. 862, 310 S.E.2d 520 (Ga., 1984)

UNIFORM VOIDABLE TRANSACTIONS ACT (UVTA)

- Formerly (UFTA)
- The purpose is to prevent Defendants from divesting themselves of assets while claims are pending, or in anticipation of future claims.

THINK

- Did an avoidable transaction occur?
- Can the Transferee assert a good faith defense?
- What remedies are available to the Creditor?

FRAUD IN FACT & FRAUD IN LAW

To recklessly represent facts as true to deceive, when it is not known whether or not such facts are true, is fraud as a matter of law, while a knowingly false representation is fraud in fact.

Smiley v. S & J INVESTMENTS, INC., 580 S.E.2d 283, 260 Ga. App. 493 (Ga. App., 2003)

KNOW YOUR JURISDICTION

Should a fraud claim be part of a divorce?

- Some jurisdictions maintain that torts between married persons should not be litigated in a divorce pleading.

KNOW YOUR JURISDICTION

Some jurisdictions require an independent action be brought rather than a Motion to Modify or Set Aside.

- A claim of fraud is considered a tort and thus is not properly addressed in a petition to modify a divorce decree.
- Instead, an independent action for fraud must be filed.

KNOW YOUR JURISDICTION

Proper recourse is to file a Motion to Set Aside the Final Judgment.

OCGA § 9-11-60; Jordan v. Jordan, 11 FCDR 3706, 313 Ga.App. 189, 721 S.E.2d 119 (Ga. App., 2011)

STATUTE OF LIMITATIONS

A claim for relief with respect to a fraudulent transfer is extinguished unless action is brought:

- Generally within four (4) years of transfer/obligation
OR
- Within one (1) year if insolvency was known or there was reasonable cause to know after it was discovered or could reasonably have been discovered.

PLEAD WITH PARTICULARITY

- Allegations of fraud must be pled with particularity.
- A general allegation of fraud amounts to nothing.
- Issuable facts must be charged.

TRANSFEREES

- A transfer is not voidable against a person that took it in good faith for a reasonably equivalent value.
- Judgment may be entered against the person for whose benefit the transfer was made, the first transferee or a subsequent transferee - other than a good faith transferee.

COMMON DEFENSES & RELIEF

- A common defense is scienter (*knew at the time the representation was false.*)
- In the absence of an outright admission a court may consider a list of objective facts (“badges of fraud”) from which fraudulent intent may be inferred.

BADGES OF FRAUD

- Transfer to an insider.
- Debtor retained possession or control of the property transferred.
- The transfer was concealed.
- Debtor sued or threatened with suit before the transfer was made.
- Transfer was of substantially all the Debtor's assets.
- Debtor absconded.
- Debtor removed or concealed assets.

BADGES OF FRAUD (cont.)

- Value of consideration received by the Debtor was not reasonably equivalent to the value of the asset transferred.
- Debtor was insolvent or rendered insolvent shortly after the transfer.
- The transfer occurred shortly before or shortly after a substantial debt was incurred.
- Debtor transferred essential assets to Creditor who transferred assets to an insider.

CONFIDENTIAL RELATIONSHIP

"[i]n cases of a confidential relationship, silence when one should speak, or failure to disclose what ought to be disclosed, is as much a fraud in law as is an actual false representation."

Vincent v. Bunch, 240 Ga. App. 255, 257 (1) (522 SE2d 495) (1999).

SPOUSAL RELATIONSHIP

There is generally a confidential relationship between spouses.

O.C.G.A. §23-2-58; Gibson v. Gibson, 801 S.E.2d 40 (Ga., 2017)

PLAINTIFF'S DUTY

A [party] is not entitled to negligently refuse to acquire knowledge that was open and available. . . through inspection of the corporation's books and records.

Averill v. Akin, 219 Ga. App. 32, 33 (463 SE2d 730) (1995)

PLAINTIFF'S DUTY

One general partner of a company could not show that another partner, who was also his son and with whom he had a confidential relationship, engaged in any acts of fraud when the record showed that the father signed documents and tax returns, which revealed the information pertinent to his claims.

Godwin v. Mizpah Farms, LLLP, 330 Ga. App. 31, 41 (3) (b) (766 SE2d 497) (2014)

PLAINTIFF'S DUTY

No evidence of actual fraud when a beneficiary received, but did not read, regular statements that revealed the mismanagement she alleged in her complaint and noting that "[a] trust beneficiary cannot put it on the back burner, shove the statements in a drawer, sit on her rights, and then hope to bring a lawsuit clearly outside the statute of limitation period."

Allen v. Columbus Bank & Tr. Co., 244 Ga. App. 271, 277 (1) (534 SE2d 917) (2000).

WHO DECIDES WHAT IS MARITAL PROPERTY

It is a question of law for the court whether a particular category of property may legally constitute a marital or non-marital asset, but whether a particular item of property actually is a marital or non-marital asset may be a question of fact for the trier of fact.

Gibson v. Gibson, 801 S.E.2d 40 (Ga., 2017)

ASSETS TRANSFERRED TO TRUST

In *Gibson v. Gibson*,

- Husband placed property in trust during the marriage without Wife's knowledge and consent.
- Wife argued that trust assets were marital assets irrespective of any fraud on Husband's part.
- Wife also argued Husband's actions amounted to fraud as a matter of law.

Gibson v. Gibson (cont.)

Assets transferred to the Trust:

- Insurance policy;
- An interest in an LLC via and L.P.; and
- 1.3 million in accounts in Husband's name.

Gibson v. Gibson (cont.)

- Trial court found that Husband and Wife did not have a confidential relationship (*Georgia Supreme Court found this to be in error*).
- Trial court found that Husband did not form or fund Trusts at time he knew Wife contemplating divorce or with intent to defraud Wife and that Husband did not actively conceal the transfers from Wife.
- Husband was not a Beneficiary.
- Husband was not a Trustee.

Gibson v. Gibson (cont.)

- The law of contracts and titles is respected in divorce cases.
- Property that has been conveyed to a third party is not subject to equitable division, absent a showing of fraudulent transfer.
- If a spouse places property in a trust of which he is the sole beneficiary, that property may be subject to equitable division.

Gibson v. Gibson (cont.)

But

If a spouse is not the sole beneficiary of a trust, the corpus of the trust is not subject to the other spouse's claim of distribution.

As such:

The property is subject to equitable division only if the other spouse can show that the transfers were fraudulent.

Gibson v. Gibson (cont.)

The trial court considered the “badges of fraud” finding that: several of the factors weighed against concluding that Husband intended to defraud Wife.

Georgia's Uniform Fraudulent Transfers Act ("UFTA")

A transfer made or obligation incurred by a Debtor is fraudulent as to a Creditor, whether the Creditor's claim arose before or after the transfer was made or the obligation was incurred, if the Debtor made the transfer or incurred the obligation ... [w]ith actual intent to hinder, delay, or defraud any Creditor of the Debtor.

Georgia's Uniform Fraudulent Transfers Act ("UFTA")

Key terms broadly defined:

- A "Creditor" was defined as "a person who has a claim,"
- A "Debtor" meant a "person who is liable on a claim,"
- And a "claim" was "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."

Gibson v. Gibson (cont.)

- Wife Argued that both the insurance policy and the interest in the LLC were owned by an L.P. and the transfer documents did not indicate that Husband was executing them in any representative capacity.
- Husband's estate-planning attorney testified Husband owned the L.P. and had the autonomy to direct distributions.

Gibson v. Gibson (concluded)

NO FRAUD:

The transfer of insurance policy and LLC were fine.

However,

Transfer of 1.3 million in accounts was not completed because the name on the accounts had not been changed. Statute specifies brokerage accounts should bear the name of the trustee to be held in trust.

JURY QUESTION

Husband executed a Settlement Agreement requiring him to pay his wife \$125,000 as an equitable division of marital property, execute a Will designating certain beneficiaries, and not make any gift that would substantially reduce his estate, BUT just a week prior to execution of the Agreement he had given his future wife \$472,000.

See Miller v. Lomax, 266 Ga.App. 93, 96-98 (2) (b), 596 S.E.2d 232 (2004). Gibson v. Gibson, 801 S.E.2d 40 (Ga., 2017)

ESTABLISHING CHILD SUPPORT

A parent may sue the other for fraud and deceit based on alleged misrepresentations made during the action to establish child support.

SUPPORT ORDER & UNDER- REPORTED INCOME

- A Motion for Modification is not enough as it only governs prospective changes.
- A Motion to Set Aside needs to be brought.

CHILD SUPPORT AND GOVERNMENT AGENCIES

- Parent assigns to the Department of Human Resources their right to seek child support as a condition for receiving benefits.
- Parent later learns that the other parent's income was misrepresented.
- May one (1) parent sue the other for fraud and misrepresentation?

DOES THE PARENT RECEIVING BENEFITS HAVE STANDING?

- Were DHR and receiving parent in privity to the original action establishing child support?
- If not, did the receiving party have standing to bring suit for fraud and deceit?

IS THERE PRIVACY?

- Parent not a Plaintiff in DHR suit.
 - No control over the litigation,
 - Not expressly represented by DHR
- Parent and DHR do not have a complete identity of interest.

Butler v. Turner, 555 S.E.2d 427, 274 Ga. 566 (Ga., 2001)

IS THERE STANDING

DHR and the trial court acted and relied upon Payor Parent's apparently willful misrepresentation of his finances to the detriment of the system and to the child.

The injury did not end there. Receiving Parent was left to deal with the fraudulently-procured and erroneous support determination in the day-to-day economic reality of providing adequate support for her child and whatever sacrifice that entailed.

Butler v. Turner, 555 S.E.2d 427, 274 Ga. 566 (Ga., 2001)

THE CHILD IS NOT MINE

Following entry of a Final Judgment and Decree of Divorce and entry of Order requiring child support be paid, former Husband learns he is not the biological Father.

PUBLIC POLICY QUESTION

Should courts be permitted to entertain an action filed by the former spouse of a child's mother, seeking to recover damages caused by the mother's misrepresentations regarding the identity of her child's biological father.

Hodge v. Craig, 382 S.W.3d 325 (Tenn., 2012)

PUBLIC POLICY QUESTION

Some states allow a putative father to maintain an action for damages for intentional misrepresentation or fraud against a child's biological mother based on her misrepresentations regarding the identity of the child's biological father.

Hodge v. Craig, 382 S.W.3d 325 (Tenn., 2012)

PUBLIC POLICY QUESTION

Former Husband was entitled to pursue common-law intentional misrepresentation claim and to an award of damages including reimbursement of child support, medical expenses and insurance paid following the divorce.

Hodge v. Craig, 382 S.W.3d 325 (Tenn., 2012)

AS TO THIRD PARTIES

3rd Party Creditors may challenge property divisions.

3RD PARTY FACT PATTERN

- Husband had an extramarital relationship resulting in a child.
- Husband was ordered to pay child support.
- Less than a month after Husband was ordered to pay child support—Wife petitioned for dissolution of her 25-year marriage to Husband.

Mejia v. Reed, 118 Cal.Rptr.2d 415, 97 Cal.App.4th 277 (Cal. App., 2002)

3RD PARTY FACT PATTERN

(cont.)

- The following day, Husband and Wife executed a Marital Settlement Agreement.
- Husband conveyed his interest in all of the couple's various real properties to Wife.
- Wife conveyed her interest in Husband's medical practice to him.
- Husband solely responsible for his extramarital child support obligation. Spousal support was reserved.

3RD PARTY FACT PATTERN (cont.)

- Two (2) years later Husband abandoned his medical practice.
- Husband had no assets apart from a car and a pension plan.
- He had little income and lived with his mother.

Mejia v. Reed, 118 Cal.Rptr.2d 415, 97 Cal.App.4th 277 (Cal. App., 2002)

3RD PARTY FACT PATTERN (cont.)

- Child's Mother brought suit against Husband.
- Mother filed *lis pendens* which impacted real property awarded to current Wife.
- Wife sought to intervene in paternity to expunge.
- Mother sought to join Wife.

Mejia v. Reed, 118 Cal.Rptr.2d 415, 97 Cal.App.4th 277 (Cal. App., 2002)

3RD PARTY FACT PATTERN (cont.)

- Court looked to UFTA as adopted by California.
- Court looked to California Family Code.
- Great discussion about marital agreements and judgements being set aside.
- Held - property division incident to divorce subject to UFTA and summary judgment reversed.

SHAM DIVORCE

- Husband and Wife filed for divorce in 1986 and the court awarded Wife monthly child support.
- Parties did not actually separate until 2007.
- Their dissolution was a sham, structured to shield marital property from the Husband's bankruptcy.
- After the parties actually separated in 2007, Wife sought past-due child support payments dating back to 1986.

Fernandez v. Fernandez, 358 P.3d 562 (Alaska, 2015)

FRAUD ON THE COURT

Original dissolution obtained by fraud on the court and was set aside.

Fernandez v. Fernandez, 358 P.3d 562 (Alaska, 2015)

ANTINUPTIAL AGREEMENTS

Obtained Through Fraud Are Invalid

- Misrepresentation or Nondisclosure of Material Fact
 - Net Worth Statement
 - Other Materials

My client has discovered that his/her spouse unilaterally transferred or otherwise conveyed marital assets to a third party.

What do I do now?

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I. Timing Considerations

Has the discovery occurred *prior* to or *after* the filing of the Complaint for Divorce?

- * A. Steps to be taken if the discovery occurs *prior* to the filing
- * B. Steps to be taken if the discovery occurs *after* the filing

A. Steps to be taken if the discovery occurs *prior* to the filing of the Complaint for Divorce

- * 1. Confirm in writing that the transfer was made without your client's knowledge or consent.
- * 2. Demand that the transferred assets be retrieved or held in escrow.
- * 3. If the adverse spouse will not or cannot retrieve the transferred assets, can the issue be resolved by application of a credit at the time of final equitable distribution?
- * 4. Filing of Complaint for Divorce naming the individual(s) or entity presently in possession of the transferred assets as a third-party defendant

B. Steps to be taken if the discovery occurs *after* the filing of the Complaint for Divorce

- * 1. Demand that the transferred assets be retrieved or held in escrow.
- * 2. If the adverse spouse will not or cannot retrieve the transferred assets, can the issue be resolved by application of a credit at the time of final equitable distribution?
- * 3. File a motion to amend your complaint or counterclaim to join as a third-party defendant the individual or entity in possession of the transferred assets.

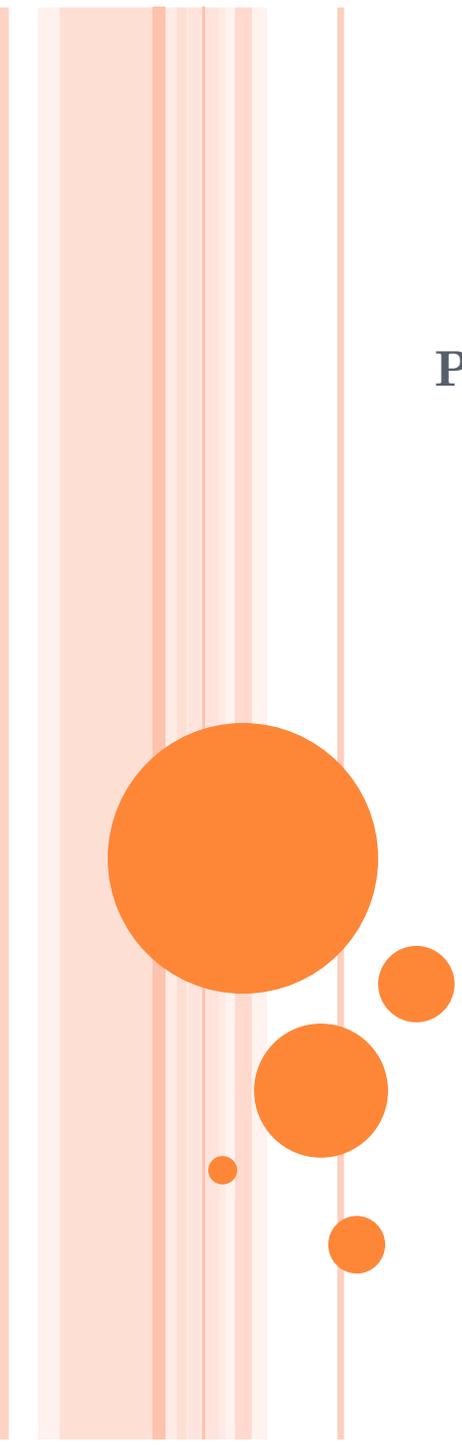
II. Potential steps after Third-Party Defendant has been joined:

- * A. File a motion to compel the third-party defendant to return the transferred assets or deposit same into escrow pending final judgement.
- * B. If the transferred asset is a business, piece of commercial real estate, or other form of income producing asset, file a motion for the appointment of a receiver.
 - * 1. Define the responsibilities of the receiver
- * C. File a motion requesting the appointment of a discovery master to supervise, facilitate, and/or enforce discovery obligations with regard to the transferred assets.

Example:

Your client discovers after he files his Counterclaim that his wife transferred \$1 million and ownership of a \$4 million apartment building to her mother.

The wife refuses to retrieve the assets from her mother.



**PREVENTING FRAUDULENT TRANSFER AND CONCEALMENT
OF ASSETS IN DIVORCE**

CASE LAW

SURVEY OF CASES AND RELEVANT STATUTES

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STATUTES ON INJUNCTIVE RELIEF

State	Statute	Explanation
Louisiana	La. Code Civ. Proc. Ann. § art.3944	Any party is able to obtain injunctive relief to those seeking retrieval for personal property.
Massachusetts	ALM R. Civ. P. Rule 65	Must have specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant.
West Virginia	W. Va. Code § 48-5-608	When allegations of abuse have been proved, the court is allowed to order an injunctive relief when needed to protect the abused party.
Florida	Fla. R. Civ. P. 1.610	A pleading seeking an injunction or temporary restraining order must still be filed before either can be entered
New York	3 New York Civil Practice: Matrimonial Actions § 45.01 (2018)	A preliminary injunction is not available under DRL § 234 in an action for vacatur of a divorce judgment.

STATUTES ON INJUNCTIVE RELIEF

State	Statute	Explanation
Arizona	Ariz. Rev. Stat. § 25-315	Prevents both parties are enjoined from transferring, encumbering, concealing, selling or otherwise disposing of any of the joint, common or community property of the parties.
Colorado	Colo. Rev. Stat. § 14-10-107	Restraining both parties from transferring, encumbering, concealing, or in any way disposing of, without the consent of the other party or an order of the court, any marital property. Also touches on children and insurance policies.
Minnesota	Minn. Stat. Ann. § 518.131	Restrain both parties from transferring, encumbering, concealing, or disposing of property. Related to parenting time and insurance as well.
Indiana	Ind. Code Ann. § 31-15-4-3	Allows for temporary restraining orders to restrain parties from transferring, encumbering, concealing, or in any way disposing of any property.

INJUNCTIVE RELIEF

- preliminary injunctive relief is increasingly used to address the issues of dissipation by the Courts
- injunctions operate as a preventive mechanism prohibiting parties from falsifying records, nondisclosure of asset information, property destruction and concealment.
- Injunctions prevent dissipation before the damage has been done
- Due to the intrusive nature of injunctions, - they interfere with the parties everyday life, they are limited

You Must :

1. Show likelihood of dissipation
2. Not be overly broad
3. Not prevent parties from carrying out the necessities of life, e.g. utilities
mortgages, businesses

IN RE MARRIAGE OF FORBES, 150410-U (2016 ILL. APP. UNPUB.)

- The party seeking a preliminary injunction "must plead facts that clearly establish a right to injunctive relief."
- is not enough to set forth allegations of mere opinion, conclusion, or belief.
- A full and adequate hearing must be conducted prior to granting a preliminary injunction.
- trial court's order specifically stated it only heard *partial* testimony and attorney argument
- The granting of a preliminary injunction, with respect to the above factors, was therefore an abuse of the courts discretion

PACKAGING INDUSTRY GROUP, INC. V. CHENEY, 380 MASS. 609 (1980)

- to grant a preliminary injunction, the judge evaluates the moving party's claim of injury and chance of success on the merits.
- If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, ... the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party.
- What matters is the **risk** of such harm in light of the party's chance of success on the merits. Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue.

IN RE SCHMITT, 747 N.E.2D 524 (2001 ILL. APP.)

- Illinois courts have issued preliminary injunctions against a spouse or a non-spouse joined as a party to the case to prohibit the parties from dissipating property owned by a corporation when the marital estate owns an interest in the corporation.
- In *In re Marriage of Schmidt*, the Illinois trial court entered an injunction prohibiting the officers, management, and employees from "withdrawing, spending, disposing of, encumbering, transferring, pledging" any of the parties' assets except for usual business transactions
- court upheld the injunction enjoining the corporation's assets because the injunction followed the specific language of the statute and prohibited the parties from alienating assets except in the usual course of business.

JENIKE V. JENIKE, 857 A.2D 798 (2004 VT.)

- wife filed an action against appellant husband, seeking a divorce and ancillary relief.
- The Windsor Family Court (Vermont) entered judgment divorcing the parties, divided their property, and ordered the husband to pay spousal maintenance.
- Also issued an injunction on husbands business. The husband appealed.
- Held: injunction overly restrictive because injunction did not permit husband to transact business
- An injunction must not prevent parties from carrying out the necessities of their everyday life

LEONARD V. LEONARD, 678 So.2d 497 (Fla. 5th DCA 1996)

- Florida case where it was held, court did not abuse its discretion in finding that there was danger of dissipation of marital funds or in entering injunction to preserve status quo
- For an injunction to be granted you must show likelihood of dissipation
- This was satisfied as in years preceding separation, wife had revoked trust that had controlled moneys for preceding six years, and emptied parties' joint safe deposit box of all documents relating to lottery winnings and trust documents, denied husband access to those documents, and denied that husband had claim to future proceeds)

ARNOLD V. SPEARS, 36 S.W.3D 346 (2001 ARK.)

- Petitioners filed applications for writs of certiorari and prohibition to contest their forced intervention in a divorce lawsuit which implicated a landlord-tenant dispute between respondent husband and petitioner husband being considered in a different county's court.
- Held: A chancellor in a divorce action distributes all marital property equally, unless the chancellor finds that division to be inequitable;
- by necessity, they have to first determine what comprises marital property in order to distribute it
- Therefore an injunction against landlord to account for and prohibiting the sale of marital property as valid injunction).

FROELICH-SWITZER V. SWITZER, N.Y.S.2D 123, 124 (1980)

- this New York case was decided in the interests of justice, to prevent minimization of both parties' assets,
- pending a matrimonial action the court granted a temporary restraining order, followed by a preliminary injunction, prohibiting the transfer of marital property, to preserve the other spouse's rights to equitable distribution of that property under the Equitable Distribution Law
- neither party was permitted to alienate or otherwise dispose of or encumber any assets or interest in any assets, except in the normal course of business or personal affairs.
- However, either party could apply to the court for leave to dispose of or otherwise deal with the assets in an appropriate manner for valid reasons.

FRANZESE V. FRANZESE, 436 N.Y.S.2D 979 (SUP. CT. WESTCHESTER COUNTY 1981)

- Several decisions have denied motions for injunctive relief, where the motion was not substantiated by evidence that the other spouse was selling, transferring or otherwise disposing of the assets, and the movant-spouse had not shown how she would be prejudiced by such dealing.
- In *Franzese*, the basis for the wife's motion was that the husband had stopped paying certain bills for the parties' home and allegedly switched her diamond ring for an imitation. The husband denied that he intended to transfer assets and that he had switched the ring.

RECEIVERSHIP

- Control over assets that are the subject of litigation is via the appointment of a receiver, who is an officer or agent of the appointing court, and acts for and under the supervision of the court.
- Receivership law in a divorce context in most jurisdictions does not have a lot of case law because most divorce statutes expressly provide a similar remedy : “status quo” **injunctions**
- Florida is not an exception.
- *Ugarte v. Ugarte*, 553 So. 2d 250 (Fla. DCA 3rd 1989) Is a case on using the ancillary remedy of receivership in conjunction with a suit for divorce
- In this case, court upheld receiver’s appointment where husband himself had requested it, and shown appointment was necessary to protect the spouse and children)

STATUTES ON RECEIVERSHIP

State	Statute	Explanation
US Code	28 U.S. Code § 3103	Receivership can be granted if reasonable cause to believe there is substantial danger to property or assets in question.
Ohio	Ohio Rev. Code Ann. § 2735	Receivers may collect and protect assets, and property. They may also bring and defend actions on the receivers own name as the receiver.
Missouri	Mo. Rev. Stat. § 515.510	The Receiver is appointed in regards to dissolving of an entity or property of value.

STATUTES ON RECEIVERSHIP

State	Statute	Explanation
Indiana	Ind. Code Ann. § 32-30-5-1	Allows a receiver be appointed when it is shown that the property, fund or rent, and profits in controversy are in danger of being lost, removed, or materially injured.
New York	N.Y. C.P.L.R. Law § 5228	Court may appoint a receiver who may be authorized to administer, collect, improve, lease, repair or sell any real or personal property.
Michigan	Mich. Comp. Laws Serv. § 600.2926	Circuit court judges in the exercise of their equitable powers, may appoint receivers in all cases pending where appointment is allowed by law.
Ohio	Ohio Rev. Code Ann. § 2735.01	Receivers may be appointed between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of a party whose right to or interest in the property or fund, or the proceeds of the property or fund, is probable, and when it is shown that the property or fund is in danger of being lost, removed, or materially injured

IN RE MARRIAGE OF GORE, 527 N.E.2D 191 (IN 1988)

- Appellant husband sought review of the order of the Morgan Superior Court (Indiana), which imposed a receivership over his personal assets and his corporation pending the dissolution of his marriage.
- The court held that the trial court abused its discretion in imposing the receivership over the corporation because there was no evidence that the husband would squander its assets, and that irreparable injury would have occurred had a receiver not been appointed.
- The court held that the trial court properly appointed a receiver over the husband's personal assets, finding that the husband had demonstrated a pattern of not complying with court orders, and could not be relied upon to comply with future orders
- the court held that by making an appearance to defend the contempt citation, the husband satisfied the "appearance" requirement of Ind. Code § 34-1-12-9. The court held that a trial court had the power to appoint a receiver in a divorce proceeding, and that the husband was properly taxed with the costs of the receivership.

MAYHUE V. MAYHUE, 485 A.2D 494 (1984 PA. SUPER.)

- The trial court issued an injunction and appointed a trustee in receivership in appellee wife's divorce action to prevent appellant husband from defeating property rights in a joint business.
- Receivers powers extended over an intervenor business operated by appellant to settle the parties' delinquent tax liability.
- Appellant and intervenor challenged the orders and the court affirmed holding that the trial court properly preserved the status quo under the Pennsylvania Divorce Code, 23 P.S. § 102(a)(6) and 23 P.S. § 401(c) until the equitable distribution of marital property was completed.
- Appellant had appropriated marital property and been held in contempt several times for refusing to comply with court orders and his conduct demonstrated his clear purpose to dispose of or hide property in which his wife had a marital interest.
- The court held that the Receivers function was necessary to preserve marital property pending the divorce action.

NELSON V. NELSON, 473 N.Y.S.2D 40 (1984 N.Y. APP. DIV.)

- Defendant husband appealed against an order which granted plaintiff wife's motion for the appointment of a temporary receiver to manage the financial aspects of the parties' jointly owned restaurant.
- The wife alleged that the husband failed to account for profits despite an order entered in the parties' pending divorce action granting the parties the right to jointly manage the restaurant.
- The court affirmed and held that the trial court did not abuse its discretion in appointing a temporary receiver.
- Noted that the appointment of a temporary receiver was an extreme remedy, but the wife had managed to show prima facie that her assets were in danger of dissipation,
- therefore satisfied the requirements of N.Y. C.P.L.R. 6401(a) and was entitled to such relief for the conservation of the property and the preservation of the parties' respective interests.

SEQUESTRATION

- Sequestration is an equitable remedy used to preserve property during litigation or to enforce obedience to judgments, as authorized by statute.
- It involves the act of removing, separating, or seizing anything from the possession of its owner under process of law for the benefit of creditors or the state.
- This has different names in different States, such as a writ for claim and delivery, or writ of possession, or writ of equitable attachment
- Sequestration proceedings are *in rem*, not *in personam*.
- If the property is producing income or requires management, the court may appoint a sequestrator to take possession.
- **A sequestrator is much like a receiver.** Trawick, Fla. Prac. & Proc. § 37:4 (2017-2018 ed.)

STATUTES ON SEQUESTRATION

State	Statute	Explanation
Texas	Tex. Civ. Prac. & Rem. Code § 62.001	Writ of Sequestration is available where a reasonable conclusion may be drawn that the defendant may conceal, dispose of, destroy or remove of any property.
Minnesota	518A.71 SECURITY; SEQUESTRATION; CONTEMPT	the court may sequester the obligor's personal estate and the rents and profits of real estate of the obligor, and appoint a receiver of them if the obligor fails to maintain his/her supports or maintenance.
Louisiana	La. Code Civ. Proc. Ann. § art.3571	When one claims the ownership or right to possession of property, or a mortgage, security interest, lien, or privilege thereon, he may have the property seized under a writ of sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action.

STATUTES ON SEQUESTRATION

State	Statute	Explanation
Florida	Fla. Stat. Ann. § 68.03; Fla. Fam. Law R. Proc. 12.570	Statute applies only in the specific scenario where one defendant is outside Florida, but another in-state defendant holds property of the absentee defendant, or owes money to the absentee defendant. The Family Law Procedure allows the sequestration to apply directly to family law matters.
New York	N.Y. Dom. Rel. Law § 233	in an action for divorce, separation, annulment or declaration of nullity of a void marriage it appears to the court that the defendant is not within the state, or cannot be found therein, or is concealing himself or herself therein, so that process cannot be personally served upon the defendant, the court may at any time and from time to time make any order or orders without notice directing the sequestration of his or her property, both real and personal and whether tangible or intangible, within the state, and may appoint a receiver thereof, or by injunction or otherwise take the same into its possession and control.
South Carolina	S.C. Code Ann. § 20-3-650	At any stage of a proceeding under this article where it appears to the court that personal jurisdiction may not be obtained over an absent party or where a party refuses to comply with an order of the court, the court may, upon appropriate petition, order the sequestration of that party's real and personal property which is within this State. It may also authorize the sequester to take the property into possession and control.

SERGE V. SERGE, 276 So.2d 86 (FLA. 4TH DCA 1973),

- Use of Sequestration as a remedy in divorce has hazy parameters in Florida for family law matters it is prescribed by rule, rather than statute.
- In *Serge*, (which predates the rules) the appellate court indicated that a Florida divorce court has inherent equitable powers to sequester property of a former spouse for the purpose of effectuating the payment of sums that have been reduced to judgment
- However because it is somewhat unclear exactly how to apply or enforce Rule 1.570(c) in the real world. Only three reported cases including one dealing with a post-divorce scenario
- *Randall v. Randall*, 158 Fla. 502, 29 So.2d 238 (1947) involving an out-of-state former spouse scenario arising under Section 68.03

DI IORIO V. DI IORIO, 603 A.2D 127 (NJ 1991)

- a court of equity has the power to issue a **writ of sequestration** in order to preserve property and to enforce compliance with any judgment or order.
- In New Jersey, Rule 4:60-19 specifically authorizes sequestration to enforce orders or judgments,
- N.J.S.A. 2A:34-23 (Alimony and Maintenance) provides for the sequestration of a judgment-debtor's personal estate and the rent and profits of real estate.
- Held: it has been recognized that the matrimonial litigant has the right to file pending divorce an action to protect interests and property that may be subject to equitable distribution, whether such property be in the name of the plaintiff, defendant or the parties jointly

CLEARY DE PACANINS V. PACANINS, 650 So. 2D 1028 (1995
FLA. APP.)

- Petitioner wife challenged an order releasing to respondent husband funds which had been provisionally frozen by a prior order of sequestration.
- The court reversed and remanded the order, finding that a Venezuelan court had cited principles of comity and requested the aid of the trial court in an attempt to maintain the status quo of the parties pending resolution of a domestic relations suit.
- The court noted that, apparently, the Venezuelan court feared that without the cooperation of the trial court in entering and enforcing the injunction freezing respondent's funds, respondent could "spirit away" assets to avoid petitioner's ownership interests.
- Accordingly, the court found that the trial court abused its discretion by releasing the funds in question contrary to the request embodied in the Venezuelan court's Letters Rogatory.

PRE- DISCOVERY

- Discovery phase can be used to show concealment of any marital assets concealed by a company or trust
- Argument will be that the assets of the trust are matrimonial assets.
- In a New York case - *Babitt v. Vebeliunas (In re Vebeliunas)*, 332 F.3d 85 (2003) requirements to pierce the corporate veil were discussed as follows: -
- Plaintiff must prove that the owner exercised such control that the corporation became an instrumentality of the owner and that the owner used this control to commit a fraud, and the fraud results in an unjust loss or injury to the plaintiff.
- If the corporate veil is pierced, the corporation and those who have controlled the corporation are treated as one entity and ...

PRE- TRIAL - *IN KRIGER V. KRIGE*, 115 MISC. 2D 595, 454 N.Y.S.2D 500 (SUP. CT. NEW YORK COUNTY 1982).

- The court granted the **injunction**, stating:

“To suggest, as the defendant does, that even after the service of the [divorce] summons he is free to convert sound assets into questionable assets, destroying a spouse’s rights in the said assets all without interference from the courts is to deny the very existence of marital property. To sustain such a view would require the courts to ignore the plain language of the statute which creates rights in property and not merely in the value of the property.”

- the wife contended that husband had misused and converted her inheritance, the children’s trust accounts and the parties’ marital assets. She also claimed that her husband had intermingled their finances to defeat her right to equitable distribution.
- The court found that at least part of the wife’s concerns were supported by the record, where the husband acknowledged that he had entered into the agreement without examining the restaurant’s balance sheets or seeking other basic information as to the propriety of the investment or his obligations after purchase. He did not even know who drafted the contract of sale.
- The husband argued that provided he had the money to pay the wife a distributive share, it was no concern of hers how he invested her money

[3 New York Civil Practice: Matrimonial Actions § 45.01 \(2018\)](#)

POST JUDGMENT :*IN RE MARRIAGE OF HUTH*, 437
N.E.2D 1042 (1982 IND. APP.)

- The trial court entered a decree dissolving the parties marriage.
- found, that the husband transferred the parties' home to his mother, without consideration, prior to the commencement of the divorce proceeding for the purpose of defeating a property division.
- The court awarded the wife half of the value of the home and imposed a lien on the real estate. As authorized under Ind. Code § 31-1-11.5-15 (Supp. 1981) to guarantee the division of property. This section affords the court the broad discretion in requiring security for the division of marital property
- Property transferred by a spouse to defeat the other spouse's claim to alimony or the collection of alimony is fraudulent and may be set aside

LYTAL V. LYTAL, 818 So. 2D 111, 2001 (LA.APP. 1 CIR. 2001);

- Louisiana case, Parties married in 1960 and divorced in, 1997.
- At issue was a community-owned corporate entity Lytal Offshore, Inc., which was created during the marriage
- the vessel was sold in 1999 for a net price of \$ 440,000. These proceeds formed the basis of the instant dispute
- wife learned of the sale of the vessel, and requested that husband to consent to some type of protective measures with regard to the proceeds. He refused. She filed an injunction (post divorce)
- held the corporation was the husband's alter ego when he was removing funds from a corporation under his control and upheld an injunction directed specifically against the corporation)

BAGGETT V. BAGGETT, 870 So. 2D 735 (2003 ALA. CIV. APP.)

- Found a husband engaged in actual fraud by transferring his assets to his son in an effort to defraud his former wife
- In Alabama, transfer of property made to defeat a spouses marital rights is voidable.
- Further, a provision in a divorce agreement obligating the spouse to maintain a life insurance policy for the benefit of his dependent former spouse, once incorporated into a divorce judgment, is not modifiable unless the obligation terminates upon the dependent former spouse's remarriage or death
- Alabama Fraudulent Transfer Act, Ala. Code § 8-9A-1 et seq.- An actual fraudulent transfer is one made by a debtor who transfers assets with actual intent to hinder, delay, or defraud any creditor of the debtor. Ala. Code § 8-9A-4(a).

BOONE V. BOONE, 438 S.W.3D 494 (MO WD 2014)

- Dividing assets discovered post-decree as a general if frowned upon by the courts.
- Normally, it is an unflinchingly rigid rule, that prevents the court from considering any equitable distribution issue once a property division order has become final
- minority of states (including Missouri) hold that a judgment is not actually final unless ***all*** marital assets have been divided. The Missouri Court of Appeals recently held in *Boone*:

"If undistributed property is discovered before the time for appeal has run, the appellate court, when presented with an appeal raising the issue of undistributed property, must dismiss the appeal because the trial court has not exhausted its jurisdiction and has not rendered a final judgment from which an appeal can be taken."

IN RE MARRIAGE OF ROSSI, 90 CAL. APP. 4TH 34 (2001 CAL. APP.)

- 11 days before wife filed for divorce she had won \$1.3 million in the California Lottery. She told no one in her divorce case,
- More than two years after the divorce, a misdirected piece of mail sent to her ex husband brought the matter to light.
- A Los Angeles family court judge ruled that she had violated state asset disclosure laws and awarded all her lottery winnings to her ex-husband.
- The strong language of Cal. Fam. Code § 1101(h) serves an important purpose: full disclosure of marital assets is absolutely essential to the trial court in determining the proper dissolution of property and resolving support issues.
- § 1101(h) provides that, where a spouse conceals assets under circumstances satisfying the criteria for punitive damages under Cal. Civ. Code § 3294, a penalty representing 100 percent of the concealed asset is warranted. The statute is unambiguous and no exception is provided.

WIAND V. WIAND, 522 N.W.2D 132 (1994 MICH. APP.)

- Michigan initially Court stated that property settlement provisions of a divorce judgment, unlike alimony or child support provisions, are final and, as a general rule, cannot be modified.
- Contended such provision is inconsistent with MCR 2.612, which addresses the various ways in which one may seek relief from a court's judgment.
- However the appellate court ruled that, it is proper to include a provision in a judgment of divorce stating that the judgment does not cover concealed assets. Such assets may be the subject of future proceedings
- The circuit court improperly denied the former wife's motion to set aside or modify, the divorce judgment with respect to her allegations of undisclosed assets, as the alleged undisclosed assets had not been previously addressed.

SANDS V. SANDS, 482 N.W.2D 203 (MI 1992), AFF'D 497 N.W.2D 493 (MI 1993)

- Husband, deliberately hid assets during the primary trial period.
- When assets were found after the trial, the court reconsidered the property division at a new partial trial.
- The Michigan appellate court awarded Wife *all* of the found assets.
- Also highlighted in his case that a person who seeks the aid of equity must come in with clean hands.
- The "clean hands" doctrine rests on the proposition that the court will not be the abettor of inequity