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A Divorce Checklist – Death and Bankruptcy Considerations

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By Thomas W. Repczynski

A substantial portion of estate and trust litigation and post-divorce enforcement litigation ("contempt proceedings") is rooted in failures or shortcomings in negotiations or drafting during the divorce process itself. Here is a recommended "best practices" checklist of questions developed based on my nearly three decades of bankruptcy, creditors' rights, collection and enforcement, and estate and trust litigation. This "best practices" checklist for family law (aka matrimonial law) attorneys, divorce lawyers, those contemplating divorce, and those, perhaps, already in the throes of post-divorce contempt proceedings tracks with my recently published List of "Top 5 Divorce-related Financial Protection Failures". It incorporates lessons learned "the hard way" from potentially avoidable situations occasioned or worsened when the questions compiled here had not been considered or, if asked, ineffectively taken into account by the drafting attorneys involved in the first instance.

This checklist is a practical, check-the-box application of the "Top 5 List" broken down into specific questions to be asked and answered by all involved in the divorce process. The checklist can and should be relied upon and applied (in whole or in part, depending on the circumstances) during multiple phases of a divorce proceeding. The checklist should help guide drafting considerations during negotiations of a Property Settlement Agreement when trying to avoid or limit costly equitable distribution litigation to determine how much each spouse is equitably to receive; otherwise to be measured by what portion of which assets the judge determines most appropriate after costly hearings. The checklist similarly serves to guide drafting considerations of the final divorce decree itself. Furthermore, although the checklist is intended to reduce costs and delays associated with post-divorce litigation used to hold a non-compliant spouse accountable when not adhering to one or more financial terms of the divorce, it can be equally effective during these contempt proceedings at aiding decision-making and providing both cost-saving guidance and time-saving benefits for the user. If routinely followed and effectively applied, the checklist should serve to help avoid unintended negative financial consequences while reducing future litigation and related legal fees, costs, and delays.

THE CHECKLIST

Insurance

1. Notice to Provider - Has the insurance company (and/or benefits provider) been notified and / or asked about relevant policies and procedures for irrevocably assigning policy proceeds (and precluding unilateral re-designation of beneficiaries by the insured)?
2. Beneficiary Re-designation - Have policy beneficiaries been irrevocably re-designated to identify ex-spouse (and/or child, children, or trust) expressly by name?
3. Account Access – Has perpetual real-time account access to policy information (including, most importantly, payment status and continuing coverage) been irrevocably established?
4. Employment Coverage - If relying upon employer-provided insurance coverage, have conditions or contingencies been

established for the continuance of coverage upon termination, or if work-related coverage benefits ceases to be provided for any reason?

5. Premium Payments - What specific protections (e.g., Irrevocable Life Insurance Trust (ILIT) or escrow) have been established to assure continuity of premium payments if the debtor-spouse refuses or is unable to pay for any reason?

Real Estate

1. Clean Title - Have you verified that there are no mechanics liens, judgment liens, or other title impediments?
2. Premature Death - Have you analyzed and provided sufficiently for the possibility and potential impact of the premature death of either spouse?
3. HELOC - Have you protected against additional credit extensions in addition to making appropriate arrangements for payoff or paydown?
4. "Robbing Peter" - If an asset is to be liquidated and paid over in whole or in part, have you established consequences, contingencies, and otherwise protected against proceeds of the asset(s) being improperly disposed of, including in satisfaction of a separate financial obligation?
5. Retitling/Disposition – Have you documented that "time is of the essence" and maximized protection of "reciprocal rights" against bankruptcy and/or failed pre-condition(s) to relinquishing, re-titling, or otherwise disposing of assets, especially real property assets?

Retirement Accounts/Benefits

1. Notice to Providers - Have all benefits managers/providers of relevant retirement accounts and benefits been given sufficient notice of all changes?
2. Beneficiary Re-Designations - As with insurance coverages, have all beneficiaries been appropriately and irrevocably re-designated?
3. Claim Deadlines – If in a jurisdiction with time limits on claims against a decedent's estate (e.g., MD – 6 months), have adequate disclosures been made to assure timely action after death?
4. Spousal Payout Elections – If applicable, have appropriate elections been irrevocably made to assure manner and means of payout after death (e.g., continuing spousal payments v. payments terminating at death)?
5. Borrowing Restrictions – Have any outstanding loans against any retirement assets been factored in for valuation purposes and future borrowing against such assets been appropriately and irrevocably restricted?

Bankruptcy

1. Jurisdiction - Do you know what, if any, continuing jurisdiction the "divorce court" has if a bankruptcy is filed?
2. Different Chapters - What difference, if any, would the filing of a Chapter 7, 11, 13, or "Subchapter V" bankruptcy have on your situation?
3. "DSO's" - Have you negotiated financial obligations regarding future PSA payments concerning whether they are subject to characterization under bankruptcy law as "domestic support obligations?"
4. "The Automatic Stay" - Are you prepared to seek relief from the automatic stay and or pursue enforcement in bankruptcy court if a filing is forthcoming?
5. Corporate Assets - If division and/or control of corporate assets by or between one or both of the spouses is/are to be factored, has a potential bankruptcy filing been accounted for with relevant valuation and enforcement considerations?

Collectability Limitations

1. Contempt Jurisdiction - Have you sufficiently familiarized yourself with binding local precedent regarding the scope of continuing contempt jurisdiction of the "divorce court" in the event of a bankruptcy filing?

2. Bankruptcy Clawback/Discharge - Have you evaluated whether, and/or the likelihood of, future financial obligations might be subject to clawback or discharge in bankruptcy (and/or how the outcome/impact might differ depending on which bankruptcy chapter or sub-chapter is pursued)?

3. Third-Party Requirements - For known assets held or controlled by third parties, has/have any specifically needed language been incorporated into the PSA, divorce decree, or contempt order to avoid later having to seek additional judicial relief as a pre-condition to third-party cooperation?

4. Escrows/POA's - Presuming future ex-spouse noncompliance, what, if any, limited power of attorney language and/or separate writings might be included, created, and/or escrowed to avoid, potentially altogether, future ex-spouse involvement?

5. "Double-Duty" PSA - As a potential failsafe, have you incorporated language of present intent and otherwise satisfied necessary elements for the PSA itself to serve if/as needed as a deed, written assignment, or other ownership conveyance? (See [TWR's "PSA as Deed"] and [TWR's "PSA as Equitable Assignment"])