Divorce and Dementia – Why You Need an Attorney Knowledgeable in Both Areas

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You may watch the Real Housewives of Beverly Hills and think that your life bears very little resemblance to the lives of the housewives, but one recent story line (the divorce of housewife Erika Jayne and her husband, Tom Girardi) touches on issues that many divorcing spouses face and highlights the focus of my practice, namely the intersection of divorce and guardianship. Tom Girardi has reportedly been diagnosed with Alzheimer's Disease and dementia, which his representatives have claimed has contributed to the financial issues that his law firm has experienced.

I will leave it to the creditors and Girardi's representatives to sort out the details of his financial issues and liability. What the story demonstrates, however, is the way that dementia can cause a financial implosion of a marriage. I have counseled numerous clients about how to approach their spouse's cognitive decline and accompanying financial mess.

The first thing I generally tell clients is not to avoid doing something just because the spouse gets upset. A marriage is like a boat, and if one spouse is drilling holes in the boat, you both will sink. Do not let yourself go down with the ship just because your spouse gets upset when you question his or her financial actions or capacity. You cannot control your spouse's reaction. You can take action, however, to try to stop the financial damage.

Once we get over the client's reluctance to cause upset, we talk about four main issues:

(1) what debts are there, and who is liable for them?
(2) how can we stop the bleeding in terms of financial misuse, waste, or even exploitation?
(3) what care needs and costs will the spouse have and how will those be paid? and
(4) what are the client's expenses and how will those be paid?

The client may have to file for divorce to protect the client's emotional and financial well-being. If that is the path that the client chooses, the first question is whether the other spouse needs a guardian to represent him or her in the divorce. The client and spouse often have mirror estate plans established many years earlier where they name the other party as their attorney-in-fact through a power of attorney. The client, however, cannot act on behalf of the spouse in a divorce using the power of attorney because it's a conflict of interest. If the spouse no longer has the capacity to sign a new power of attorney, a guardian will have to be appointed for the spouse. If you serve a complaint for divorce upon someone who does not have the capacity to understand a legal proceeding or advocate for themselves, that service may be ineffective, so any relief that you may obtain from the court may be overturned. Further, the court may see the client's efforts to proceed with a divorce without alerting the court as to a spouse's cognitive deficits as an attempt to take advantage of the spouse in the divorce process.

As the divorce proceeds, you can still try to reach a settlement on the financial terms of the divorce even if the spouse is under a guardianship. While the court does not generally look behind the terms of a separation agreement between spouses, if one of the spouses is subject to a guardianship, the court will need to be persuaded that the financial arrangement is in the spouse's best interest. The client will need to consult with an expert about the spouse's care needs and costs and determine the best way to fund that, particularly if there is a possibility that the spouse will need Medicaid to pay for the care. When applying for Medicaid, there is a five-year lookback period to examine any transfers of assets and determine whether they have been made for fair market value. This lookback period can cause negative consequences for a transfer that in a typical divorce would be advantageous.

Complex issues arise when divorce and dementia intersect. It is important to consult with an attorney experienced in both divorce and capacity issues to make sure that these issues are addressed proactively and advantageously. Attorneys whose practice includes both focuses can also provide the client with valuable connections to financial, Medicaid, and elder care professionals who can help the client with all of the issues the client is facing.

If you have questions about this or any other Family Law issue please contact Catherine H. "Kate" McQueen at (240) 507-1718 or kmcqueen@offitkurman.com.