

Top 5 Divorce-Related Financial Protection Failures

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1. **Inadequate Insurance Assurances**
2. **Uncorrectable Real Estate Refinancing/Retitling Shortcomings**
3. **Unclaimed Retirement Benefits**
4. **Unconsidered Bankruptcy Impacts**
5. **Unconsidered Collectability Limitations**

Death and Insolvency Considerations as Divorce-related “Best Practices”

Divorce lawyers routinely fail to protect clients against an ex-spouse's failure and/or outright refusal to comply with the terms of the documents governing the termination of the marriage relationship between their client and their client's soon-to-be ex-spouse. As an estates and trusts litigator, with nearly thirty (30) years of relevant creditors' rights and bankruptcy experience, I have seen innumerable cases involving avoidable—if not always easily foreseeable!—situations occasioned at least partly by shortcomings in the language of the documents generated and relied upon in a client's divorce proceedings.

In short, many, if not most, of the more costly post-divorce, death-related and non-compliance enforcement/collection matters can be substantially mitigated, if not completely avoided, by additional considerations at the drafting stage. With a backward-looking inquiry addressing “how could this ‘new’ costly litigation have been avoided?” assuring that these death and collection-related matters make the “best practices” checklist in any divorce-related legal planning only makes sense.

Top Five Divorce-related Financial Protection Failures

The top five divorce-related financial protection failures are as follows:

Inadequate Insurance Assurances – Failure to assure irrevocable designation of proper policy beneficiaries and unlimited access to policy-related information are primary among divorce “to do” list items not done. Similarly, divorce lawyers do their clients a disservice by failing to take sufficient steps to assure that insurance coverage remains in place, typically by neglecting to include a plan or structure assuring the payment of, and means to make, policy premium payments. A written assignment of policy proceeds is a necessary consideration, as is job-loss protection against either potentially willful or involuntary loss of employment where the insurance coverage relied upon is a benefit provided by a spouse's employer and, therefore, only an option so long as the employment continues. Providing for a client anticipating death benefits to have perpetual, real-time access to policy information is an easy way to afford a client the means to protect themselves against the future indifference and/or neglect of a willfully non-compliant ex-spouse who fails to keep up premium payments. In circumstances justifying the

added expense, the imposition of and well-considered funding of an irrevocable life insurance trust, or “ILIT,” may provide the highest level of protection short of pre-paying policy premiums for the entire life of the policy (which is itself, a non-option in more than 99% of cases).

Uncorrectable Real Estate Refinancing/Retitling Shortcomings – Failure to provide properly or sufficiently for failed refinancing/retitleing of marital assets converts a hypothetical remedial benefit into a potentially cost-prohibitive non-option. Many divorces include commitments to sever ties between spouses both as to title and financing commitments related to the marital residence or other jointly held real property. It is not enough to provide for a simple “what if” scenario involving the failure to refinance, retitle, or otherwise dispose of a real property asset by one spouse for the benefit of the other, or, for that matter, to include some form of reciprocal rights of the other spouse in the event the first fails to achieve the contemplated refinancing, retitleing, etc. Best practices in this regard ought to consider unanticipated, untimely death-related scenarios. For instance, what if the hypothetical “what if” scenario arises because of suicide? What if the titular owner of the real property dies unexpectedly before carrying out the contemplated transfer of title? Thorough planning in this regard would necessarily consider the existence and potential interaction of an existing will or trust, or of the intestacy hypothetically arising due to the lack thereof.

Unclaimed Retirement Benefits – Much like the unfortunate situations involving life insurance policies with unchanged beneficiary designations, failure to provide for proper notice and/or re-designation of retirement plan beneficiaries can mean the difference between a divorce client’s future perpetual financial security and potential ruin. First and foremost, it is not enough to include a provision in a divorce-related agreement that one simply agrees that a particular someone shall receive the proceeds of one’s work-related pension, 401k, or other ERISA-qualified retirement account. In fact, it is not enough to include such a commitment generally in one’s will, trust, or other testamentary document. One must communicate one’s change in beneficiary designations directly to and with the account broker/provider (or, in many cases, through official means managed by one’s employer acting as the provider’s agent). Such a change is most typically accomplished by submitting a signed beneficiary designation change form or via an electronic equivalent. Again, it is not enough to request such a form, or even to complete such a form without “delivery” of such a form to the provider or its agent. Here, best practices should include confirmation requirements and not merely a commitment to timely effect the change. Query whether pre-compliance, untimely death considerations ought not also be taken into consideration in this instance as a best practice, as well. The better question is why one wouldn’t at least include this on the checklist of considerations when deciding whether to expend any additional resources in protecting against such a risk.

Unconsidered Bankruptcy Impacts – Failure to contemplate “what if” scenarios of possible bankruptcy filings by either or both divorcing parties or a related business entity (e.g. individually to try to delay or avoid support obligations or of a business the value, cashflow, and/or operational continuity of which as a critical marital asset served to leverage negotiated concessions). There is no “one size fits all” bankruptcy provision to plug into divorce-related property settlement agreements, just as every divorce gives rise to a necessarily factually unique set of circumstances. What is most important is that when negotiating asset transfers and contemplating spouse #1 v. #2, one factors the potential impact of bankruptcy scenarios into asset values and negotiates accordingly. Client risk tolerances and, possibly, actual threats or perceived intentions regarding post-divorce bankruptcy filings comprise the most important considerations. One does not necessarily need to incorporate potential bankruptcy language in every divorce agreement but failing to make or seek a bankruptcy risk/impact evaluation only invites subsequent client dissatisfaction, potential Bar complaints, and perhaps even potential malpractice considerations.

Unconsidered Limitations on Collectability – Failure to consider requirements of financial institutions and other third-party asset holders likely comes at a future cost and with potentially significant unwarranted delays. It should be no surprise that divorcees do not always live up to their financial commitments in divorce-related agreements and/or divorce decrees. Contempt proceedings and related remedies are not unto themselves the only mechanism to be employed when it comes to securing payment and satisfaction of divorce-related financial obligations. In fact, contempt proceedings themselves generally give rise to additional financial obligations, the collection of which is not a foregone conclusion and rarely, if ever, immediate. Contempt awards are frequently not satisfied immediately. Consequently, the financial relief a successful contempt proceeding is intended to provide often comes, if at all, only after imposing additional financial burdens on the “creditor spouse.” When a “debtor spouse” refuses to make divorce-obligated payments, a creditor-spouse can employ the contempt process to quantify and formally liquidate the amount(s) owed in an enforceable court order (sometimes coming only after the

threat of or actual jail time). Having secured entry of a liquidated contempt order amount, one still needs to enforce the order to satisfy the newly liquidated debt. Such enforcement actions (such as garnishments, attachments, asset seizures, turnover actions, etc.) again mean additional legal fees and costs, but here's where some pre-planning can potentially reduce or avoid even more fees, costs, and delays. Applying some "creditor's rights" know-how during the contempt process, including considering known third-party asset holder's risks and requirements, can be a substantial difference maker. It might very well avoid altogether the need for a secondary enforcement proceeding.