

# What Every Financial & Insurance Professional Should Know About Divorce

An Overview of Divorce, Property Division, Spousal Support, Tax Changes, Post-Divorce Elections and Divisions and Financial Misconduct

**CAVITCH**  
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# Termination of Marriage

- ▶ Two most common methods to terminate a marriage:
  - ▶ Divorce: Litigation-based method that provides certain protections of marital assets through the use of restraining orders and court process.
  - ▶ Dissolution: Agreement-based method that provides the parties an avenue to present an agreeable termination of marriage to the court.
- ▶ Less common methods include annulment and legal separation.

# Residency Requirements

- ▶ Ohio = at least 6 months
- ▶ County = at least 90 days
- ▶ The parties may agree to an alternate venue/county where neither resides in dissolution.

# Equitable Division of Marital and Separate Property

- ▶ Marital property is that which is acquired “during the marriage”
  - ▶ “During the marriage” means either
    - ▶ Date of marriage → date of final hearing; or
    - ▶ Date of marriage → a de facto termination of marriage date that the court (or parties by agreement) considers equitable in defining marital property.

# Equitable Division of Marital and Separate Property

- ▶ Marital property includes:
  - ▶ Property currently owned by either/both or that was acquired by either/both during the marriage;
  - ▶ Interest that either/both currently has in property or that was acquired by either/both during the marriage;
  - ▶ Income and appreciation on separate property, due to the labor, monetary, or in-kind contribution of either/both during the marriage;
  - ▶ Retirement accounts; and
  - ▶ Property acquired by either/both during the marriage which is not separate property of either spouse.

# Most Common Types of Marital Assets in Divorce:

- ▶ Marital residence/real estate;
- ▶ Financial assets such as checking and accounts, stocks and bonds, mutual funds, CDs, POD accounts, money market accounts, and cash, including those jointly with another person or with minor children;
- ▶ Money owed to one or both spouses/promissory notes;
- ▶ Retirement assets, including deferred compensation, participant accounts, pensions, profit sharing, 401(k)s, 403(b)s, IRA's;
- ▶ Businesses and/or stock ownership;
- ▶ Tax refunds; and
- ▶ Credit card assets (airline miles, points, etc.);
- ▶ Furniture, appliances and household goods;
- ▶ Bitcoins, electronic currency, gaming profiles
- ▶ Publicly held stocks, bonds, securities, mutual funds, patents, copyrights, trademarks, franchises;
- ▶ Automobiles, trucks, motor homes, RV's, boats, ATV's, motorcycles;
- ▶ Timeshares;
- ▶ Collections (stamps, guns, coin, etc.), antiques, artwork;
- ▶ Household goods and furnishings;
- ▶ Insurance policies with cash value;
- ▶ Safe Deposit boxes;
- ▶ Personal injury/workers compensation claims;
- ▶ Personal property and jewelry.

# Separate Property

- ▶ An inheritance to only one spouse during course of marriage;
- ▶ Property acquired by one spouse prior to date of marriage (premarital property);
- ▶ Passive income and appreciation of separate property during the marriage;
- ▶ Property acquired after decree of legal separation;
- ▶ Property excluded by valid prenuptial agreement;
- ▶ Personal injury compensation to one spouse (with exceptions); and
- ▶ Any gift proven by clear and convincing evidence to be gift to one spouse.

**BEWARE!** Commingling separate and marital property does not destroy separate property, except when separate property is not traceable.

# Separate Property

- ▶ An inheritance clearly left to both spouses, or where it is unclear that the bequest is to one spouse only, can be a marital asset.
- ▶ Easiest way to define premarital separate property is through the use of a prenuptial agreement, which can also define and limit the nature and extent of marital property too.
- ▶ Absent prenuptial agreement, maintaining premarital property in separate accounts that are not commingled during marriage is key to maintaining separate property characteristics.
- ▶ Tracing is the process by which commingled funds are separated so that the value of marital and separate property can be determined.



# Tracing Issues

- ▶ Some commingled accounts can be traced easily.
  - ▶ Example: Savings account had balance of \$50,000 at time of the marriage. There were marital contributions to the account of \$20,000 and no withdrawals. At the time of divorce, the account is \$70,000; \$50,000 separate and \$20,000 marital.
  - ▶ Example: Wife owned a condo at the time the parties were married. Soon after the marriage, she sells the condo and uses the \$25,000 net proceeds as a down payment on the marital residence. When the couple divorces, the \$100,000 equity in the home is not divided evenly. Wife will first receive her \$25,000 separate property and \$75,000 of remaining equity will be split evenly.

# Tracing Issues

- ▶ Some commingled accounts can be traced using valuations.
  - ▶ Example: A spouse had a 401(k) account at the time of marriage and continued to contribute during the marriage. A valuation can be completed to determine the premarital value and passive income (i.e., separate property) and the marital value and marital growth.
- ▶ Some commingled accounts cannot be separated.
  - ▶ Example: One spouse receives an inheritance during the marriage. The money is deposited into the parties joint checking account that they use for deposit of paychecks and payment of bills. The inheritance was received a year before the divorce was filed. It is likely going to be virtually impossible to trace the separate property in this account.

# Passive Income and Appreciation of Separate Property

- ▶ Passive growth/appreciation in separate property during the marriage that is not due to the input of either spouse's labor, money or in-kind contributions remains separate property.
- ▶ Appreciation of separate property due solely to market forces, such as location and inflation, is passive appreciation and remains separate property.
- ▶ Evidence is required as to what is active appreciation in real estate due to improvements, labor or efforts of the parties during the marriage and what is passive appreciation due to market forces alone.
- ▶ If there is a contribution to an account during the marriage, the growth is likely to be considered active, not passive.

# Myth: If it's in my name or I paid for it, then it's mine

- ▶ Absent prenuptial agreement, all income earned by either/both spouses during the marriage is marital income.
- ▶ Title of marital property is generally irrelevant; the determining factor is whether the asset was acquired during the marriage.
  - ▶ Example: Car is titled in Husband's name only. It was acquired during the marriage and has equity. This is a marital asset and Wife should receive a share of the equity.
- ▶ When spouses maintain separate bank accounts during the marriage and purchase an item of property in his/her sole name, that asset is still a marital asset.
  - ▶ Example: Wife has her own bank account where her paycheck is direct deposited. She purchases furniture for the marital residence using the money from her bank account. This is marital property that was purchased from marital funds and subject to equitable division.

# Myth: If the debt is in my spouse's name, I don't owe

- ▶ Title of marital debt is also generally irrelevant; the determining factor is whether the debt was incurred during the marriage.
  - ▶ Example: Mortgage is in Husband's name only. It was incurred during the marriage. This is a marital debt that must be divided.
- ▶ Another very common misperception is if a spouse incurs credit card debt for personal use, it is never a marital debt.
  - ▶ Example: Wife likes to purchase Coach purses and accessories. She has historically done so during the entire marriage. The money she spent on Coach purses, even if incurred on credit cards, is unlikely to be considered her separate debt. It must meet the egregious test of constituting financial misconduct before it would not be considered a marital debt.

# Beneficiary Changes During Divorce

- ▶ Beware of Mutual Restraining Orders or other court orders preventing parties from making any changes to insurance or other beneficiary designations during the pendency of a divorce.
- ▶ You should always ask about court orders when working with a client going through a divorce.
- ▶ If your client is unsure, an easy way to check this is to review the case docket online for the court where the case is pending (except Medina County which does not have an online docket), or contact the client's attorney.

# Restraining Order

IT IS ORDERED, PURSUANT TO LOCAL RULE 24 OF THE RULES OF THIS COURT, EFFECTIVE WITH THE FILING OF THIS COMPLAINT, THAT EACH SPOUSE IS ENJOINED FROM COMMITTING ANY OF THE FOLLOWING ACTS:

1. Obstructing or interfering with the other spouse's parenting time or communication with the minor child(ren), or concealing the whereabouts of the minor child(ren) from the other spouse, except where a Protection Order has been issued.
2. Disparaging, denigrating or otherwise speaking ill of the other spouse to or in the presence or hearing of the minor child(ren).
3. Selling, removing, transferring, encumbering, pledging, damaging, hiding, concealing, assigning or disposing of any and all property, real or personal, owned by both spouses, or either spouse, or a child, including household goods, vehicles, and the personal property of each, without the prior written consent of the other spouse or the Court.
4. Voluntarily changing the terms or beneficiary of, terminating coverage of, cashing in, borrowing against, encumbering, transferring, canceling or failing to renew any type of insurance, including health, automobile, life, disability, home or fire insurance that provides coverage for a spouse or child(ren) of the parties.
5. Voluntarily liquidating, encumbering, borrowing against, cashing in, changing the beneficiary, terms or conditions of any retirement or pension plan or program that provides any benefit to a spouse or child(ren) of the parties and/or of either or both spouses.
6. Withdrawing funds from joint or individual bank, savings and loan association, and/or credit union accounts, retirement or pension funds (including IRA, Keogh, deferred compensation, or 401(k) accounts), trust brokerage houses or other financial institution accounts, except if such accounts are business accounts; provided however, that no stock broker is restrained from buying, selling or otherwise dealing with any stock, bond or other investment for the account of either spouse or both spouses. THE MUTUAL RESTRAINING ORDER IS NOT INTENDED TO RESTRAIN MONIES RECEIVED IN THE FORM OF WAGES.
7. Removing from the marital residence tangible personal property, other than a spouse's own clothing and personal effects or tools, equipment, books and papers incidental to the conduct of his/her trade, business or profession.
8. Incurring debt on existing lines of credit or credit cards in the name of the other spouse or in the spouses' joint names, unless by prior agreement of the spouses or Order of Court.



IT IS SO ORDERED.

# Spousal Support (Alimony)

- ▶ No formulaic statutory guide to calculate spousal support, although some courts will provide a “starting point” formula.
- ▶ Statute to determine spousal support requires a case-by-case analysis based on various factors.
- ▶ There are general rules of thumb for support that vary from county to county and even Judge to Judge.
- ▶ Duration is generally 1:3, 1:4 or 1:5 (i.e., one year of support for every three, four or five years of support), although more courts are moving to 1:3 duration.
- ▶ Amount varies widely from income equalization (50/50) to many other scenarios.



# Spousal Support Basic Example

- ▶ Husband and Wife have been married for 12 years. Husband earns \$100,000 per year and Wife earns \$50,000.
- ▶ These amounts are based on gross incomes, not net incomes.
- ▶ The Court in which the parties are going to get divorced uses a 1:3 duration formula and does a 60/40 spousal support split.
- ▶ Husband would owe Wife \$20,000 annually for spousal support for 4 years.

# Spousal Support Tax Changes

- ▶ Divorce Agreements before 1/1/2019:
  - ▶ Spousal support is tax deductible to payor spouse
  - ▶ Spousal support is included as income to the recipient spouse
  - ▶ Any modifications are grandfathered in
- ▶ Divorce agreements after 12/31/2018:
  - ▶ Spousal support is not tax deductible to payor spouse
  - ▶ Spousal support is not included as income to recipient spouse
- ▶ IRS Regulations are not clear about whether divorce agreement needed to be signed or the final divorce hearing concluded before 1/1/19

# Spousal Support Tax Changes Implications?

- ▶ Spousal support is treated the same as child support (taxable to payor spouse and no tax impact to recipient spouse).
- ▶ Fewer after-tax dollars are available between the spouses
  - ▶ Payor spouse is taxed in a higher bracket and therefore will pay more money on the income than the recipient spouse would have paid if it were taxable to the recipient
  - ▶ Less money to the parties and more paid in taxes
  - ▶ BIG WIN for the government

# Additional Tax Changes

- ▶ When divorcing, parties will be moving from filing married, to filing single or head of household under the new limits.
- ▶ Parties will allocate the ability to claim children for dependency purposes which affects if they will claim single or head of household but the following must also be present:
  - ▶ Considered “unmarried“ on the last day of the year and spouse did not live in the home during last 6 months of the year;
  - ▶ Paid more than 50% of the cost of keeping up a home; and
  - ▶ Had a qualified person living in the home for more than half the year.

# Dependency Exemption Eliminated?

- ▶ The dependency exemption is effectively eliminated because it is technically reduced to zero.
- ▶ No more fighting over the dependency exemption?
  - ▶ NO! The ability to claim a child is necessary for a person to have a “qualifying person” living in the household for purposes of qualifying to file as head of household instead of single under the new tax laws and to claim certain child-related expenses on tax return.
- ▶ May not be able to use in the first year following divorce if the former spouse lived in the home after July 1<sup>st</sup>.
- ▶ Reduction of exemption to zero is not permanent under the new tax law.

# Child Tax Credit Improved

- ▶ The child tax credit is improved under the new tax law to \$2,000 per child under 17 at the end of the tax year, of which \$1,400 is refundable if the taxpayer owes no tax, and which is phased out at certain income levels.
- ▶ Parents can still agree to assign the right to claim a child as a dependent and the child tax credit to the other parent via IRS Form 8332.
- ▶ If the requirements are met, parents can claim a college student as dependent and receive \$500 credit

# Final Documents

- ▶ Dissolutions are agreement-based divorces and most litigated divorces settle without trial, during trial, after trial but before court order, during objections or during appeal.
- ▶ When meeting with an estate planning or insurance client who has been recently divorced or has not had any planning done since divorce, you should look for two main documents: (1) Judgment Entry and (2) Separation Agreement. These two documents together will delineate the property division for the marriage.
- ▶ The Judgment Entry and/or Separation Agreement may call for certain division of assets to take place post-decree.

# Post-Decree Divisions

It is important to review divorce documents to determine the status of the post-decree division of assets and liabilities.

- ▶ Marital Residence - Quit Claim Deed needed? Refinance completed?
- ▶ Car - was title transferred?
- ▶ Financial accounts - were they divided and closed or title transferred as required?
- ▶ IRA transfers completed?
- ▶ Were all retirement accounts divided?
  - ▶ A QDRO is a court order necessary to divide an ERISA qualified retirement plan (like a 401(k)), which allows an ex-spouse to take a distribution from retirement funds without penalty (but still subject to income taxes).
  - ▶ An IRA is covered under the Internal Revenue Code and only requires a “divorce or separation instrument” to divide it. The necessary document to divide an IRA varies from company to company, some accepting a decree, separation agreement, IRA Transfer Order, IRA Assignment or Letters of Instruction. Other companies will require a QDRO, even though not required by law.
  - ▶ If a spouse has an interest in a state retirement plan that is being divided (OPERS, STRS, SERS, OPF, OSHPRS), instead of a QDRO, you will need a Division of Property Order (DOPO). Military retirement benefits are governed by Uniformed Services Former Spouses Protection Act and requires a military qualified court order, in addition to a host of other requirements.



# Retirement Account Divisions

- ▶ QDRO/DOPO/MQCO/IRA Transfer Order Legal Process:
  - ▶ Order is prepared by attorney or company (such as QDRO Consultants);
  - ▶ Parties and/or attorneys approve and sign Order;
  - ▶ Executed Order is submitted to the Judge for review and approval;
  - ▶ A certified copy of the signed & filed Order is submitted to the Plan Administrator for approval (this can also be done earlier for “pre-approval”); and
  - ▶ Upon approval, the retirement account can be divided.
- ▶ Fidelity has its own process and significant fees for division and penalty for not using its forms and procedure.
- ▶ Distribution is not subject to 10% tax penalty for early withdrawal. Income taxes will still be assessed to the Alternate Payee Spouse for any distributions.

# Risks with State Plans

- ▶ When Participant Spouse receives state plan retirement benefits (OPERS, STRS, SERS, OPF, OSHPRS), there is no pre-retirement protection for the Recipient Spouse between the time of the divorce and the time that the Participant Spouse retires so some other protection must be put in place.
- ▶ Typically there is a requirement of post-retirement survivorship election be required so that the Recipient Spouse receives his/her benefits even if the Participant Spouse dies.
- ▶ Life insurance is often used to bridge the gap between the date of divorce and retirement of the Participant Spouse.

# Beneficiary Designations

- ▶ By operation of Ohio law, beneficiary or surviving spouse designations will be automatically nullified or terminated.
- ▶ Divorce automatically revokes provision conferring a beneficial interest, powers of appointment or nomination and there is no automatic revival of designation upon remarriage for:
  - ▶ Revocable trust
  - ▶ Power of Attorney
- ▶ Divorce automatically terminates spouse beneficiary designation and there is automatic revival of beneficiary designation upon remarriage for:
  - ▶ Life insurance policies
  - ▶ Annuities
  - ▶ POD accounts
  - ▶ IRA retirement plans
  - ▶ Employer death benefits
  - ▶ Other contractual death benefits
  - ▶ Survivorship rights of spouses.

# Beneficiary Designations

- ▶ If divorce decree calls for ex-spouse to remain as beneficiary or surviving spouse (for child or spousal support purposes, for example), that designation must be re-designated post-decree.
  - ▶ This is OFTEN overlooked!
- ▶ By statute, even though there is an automatic revocation, an agent, broker, custodian, insurer, life insurance company, plan administrator, bank, transfer agent, or trustee will not be held liable for damages if money is distributed based on the designation of beneficiary form where the distribution is otherwise proper and the distributor does not have any notice of the divorce.

# Beneficiary Designations

- ▶ Beneficiary designations for ERISA qualified retirement accounts are NOT automatically nullified or terminated upon divorce because ERISA qualified plans are governed by federal law, not state law.
  - ▶ Unless the plan states otherwise, the beneficiary designation form controls!
  - ▶ It is imperative that a spouse change their designation form post-decree to avoid an ex-spouse receiving ERISA retirement benefits upon death.
  - ▶ Even if the divorce decree states that the ex-spouse should receive no benefits, the federal rules of ERISA and beneficiary designation trump any state-issued court order.
  
- ▶ **SPOUSES MUST UPDATE BENEFICIARY FORMS!**

# General Requirements for Prenuptial Agreements

In addition to other specific requirements, generally to have a valid prenuptial agreement it must be:

- ▶ Entered into voluntarily
- ▶ Entered into freely without fraud, duress, coercion or overreaching
- ▶ Full disclosure of the nature, value and extent of the prospective spouse's property
- ▶ Does not promote or encourage divorce or profiteering by divorce
- ▶ Competency of parties
- ▶ Compliant with statute of frauds
- ▶ Both parties must have independent legal counsel.

# Myth: You Can Agree to Limitations on Spousal Support Without Potential for Court Evaluation

- ▶ NO!
- ▶ The Ohio Supreme Court held that a court must review a spousal support provision at the time of the divorce or separation to determine its fairness.
- ▶ Provisions relating to maintenance or sustenance in a prenuptial agreement may lose their validity by reason of changed circumstances which render the provisions unfair as to one or the other at the time of the divorce of the parties.
- ▶ Spousal support provisions can be found to have become voidable at the time of the divorce or dissolution.

# Myth: You Can Enter Into a Post-Marital Agreement in Ohio

- ▶ Post-marital agreements are not enforceable in Ohio, except separation agreements executed by separated parties or parties contemplating their immediate separation.
- ▶ What does this mean? Parties cannot do a Prenuptial Agreement after they are married and the parties cannot modify a Prenuptial Agreement after the marriage.



# Financial Misconduct

- ▶ Ohio is a no fault state, BUT a spouse can be penalized for financial misconduct by the Court.
- ▶ If a spouse has engaged in financial misconduct, including but not limited to, the dissipation, destruction, concealment, nondisclosure, or fraudulent disposition of assets, the Court may compensate the offended spouse with a distributive award or with a greater portion of marital assets.
- ▶ There must be a clear showing that the offending spouse profited or personally gained from the alleged misconduct or intentionally defeated the other spouse's distribution of assets.
- ▶ It is difficult to establish financial misconduct that rises to the level that the Court will order a larger distributive award to the affected spouse.

# Examples of Financial Misconduct

- ▶ Wife did not engage in financial misconduct by depositing 2 of Husband's paychecks into her account during the divorce when after Husband left Wife, he withdrew \$34,000 from their joint accounts to give to his girlfriend for her utilities, plastic surgeries and the purchase of a car as a prop for her modeling career.
- ▶ Husband made financial investments, gifts, purchased stocks for decades before divorce that Wife alleged was misconduct. Court disagreed finding each transaction was properly documented and Husband did not personally profit.
- ▶ Where both parties have "unclean hands" because both engaged in financial misconduct, the court refused to compensate either party for the misconduct of the other.
- ▶ Husband controlled the finances to the exclusion of Wife. His risk investments, including with Wife's inheritance, was not financial misconduct.
- ▶ Husband claimed Wife committed financial misconduct by withdrawing more than \$200,000 right before the divorce to purchase a car, make large charitable donations, gave large sums of money to their adult children, and paid down her credit cards. The court held there was no financial misconduct.
- ▶ Sloppy bill payment and bad management of personal finances during a marriage does not constitute financial misconduct.

Thank you for your  
time and attention!

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