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Family Law  
fall 2022

# Legal Matters®

## Minimizing impact of divorce on your credit score

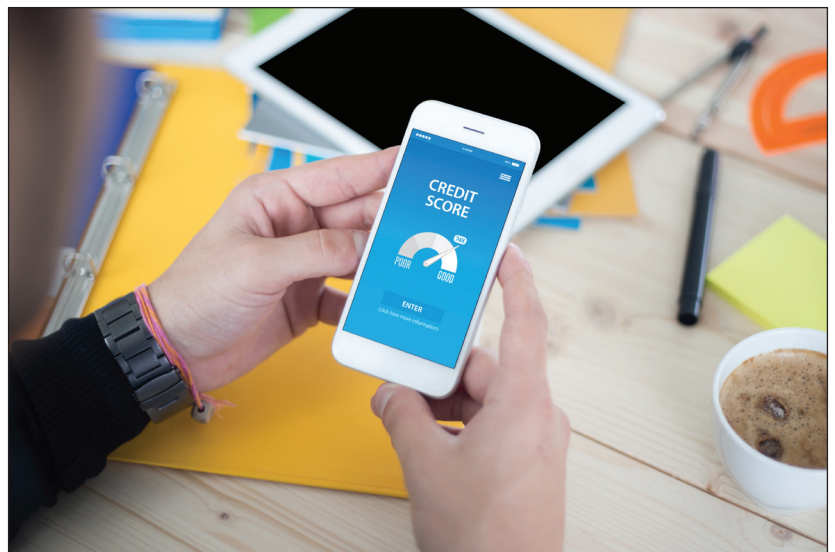
**W**hile getting divorced doesn't automatically lower your credit score, things that have happened as a result of your marriage and/or divorce certainly could have an impact.

For example, you might now be saddled with debt that you previously faced with your spouse, making it hard to stay current on your bills. Perhaps you authorized your spouse to use your credit card and he ran up charges that you're now on the hook for, or maybe you've been using credit for things that you used to pay for with cash because of the costs of moving out and finding a new place. Maybe you even got so caught up in the emotional trauma of your divorce that you started missing payments. Now you're facing mounting balances that are even harder to pay, which may be reflected in your score.

Clearly this is not a desirable situation, but there are things you can do to try and minimize the hit.

First, make sure you know what's in your credit report. That way you'll know which debts are affecting your score, which debts you and your soon-to-be ex are both responsible for and which cards you should consider cancelling. Simply agreeing that you'll pay Card A while your spouse covers Card B isn't good enough. As far as the bank is concerned, if it's a joint account, they can come after you if your spouse isn't making the payments.

Also, if you're separating, you might consider "freezing" your credit



in order to restrict potential new lenders' access to your credit report. This way an ex-spouse won't be able to open up new cards or lines of credit and run up debt in your name because the lender would be blocked from running a credit check. You can lift the freeze at any time, but it's probably a good idea to wait until the divorce is final.

Additionally, be sure to get together all your important financial documentation before seeking a divorce. Once you've announced your intentions, your spouse may be less cooperative in providing copies of everything you need, such as joint income tax returns for the years

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(704) 370-2828 • [www.CharlotteDivorceLawyerBlog.com](http://www.CharlotteDivorceLawyerBlog.com)

## Court rules lopsided prenup ‘unconscionable’



A prenuptial agreement is a contract between marrying spouses, signed before the marriage, that lays out the terms should the couple get divorced. In many instances, prenups can be a very useful way of creating predictability and reducing the acrimony of a divorce. But as a recent California case shows us, if the terms are truly unfair, it may

be unenforceable.

In that case, the husband, who ran a hedge fund, had a net worth of \$32 million and earned around \$4 million per year at the time of the divorce.

California is a “community property” state where all property acquired during a marriage by either spouse is considered to be owned by both spouses equally and if a couple divorces all property is divided equally. But under the prenup signed by this couple, the wife waived her community interest and agreed instead to a \$10,000 payment upon moving out of the house followed by \$6,000 per month in spousal support. She also waived any inheritance rights should the husband pass away during the marriage.

The wife, who had a history of mental health challenges, went through emotional trauma before the marriage (she terminated one pregnancy at the husband’s request before they were married but refused to terminate a second one) and claimed she only saw the agreement the day she signed it, allegedly against her attorney’s advice.

When the couple divorced, the wife challenged the prenup, arguing she didn’t enter into it voluntarily. The case made it to the California Court of Appeal, which ruled that at least as far as the spousal support provision went, the agreement was “unconscionable” (in other words, its terms were so oppressive and unfair that it shouldn’t be enforced). The court emphasized that the wife had only a high school education and was not employed during the marriage, the husband had a seven-figure income, and the amount she received was 10 percent of what she would have received without a prenup in place.

The law, of course, varies from state to state, so call a family law attorney where you live to learn more.

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## ‘Virtual’ trial without proper safeguards violates parent’s rights

Since the start of the pandemic, family and juvenile courts everywhere have scrambled to find ways to carry out their proceedings. In many cases, this has meant “virtual” hearings and trials over videoconferencing applications like Zoom. Despite some hiccups, this generally hasn’t prevented courts from performing their functions while protecting the rights of the parties. But as a case from Massa-

chusetts shows, technological problems can sometimes impact the fairness of a proceeding to the point where the result has to be thrown out.

The case was a proceeding in which the state sought to terminate a mother’s and father’s parental rights. The child had been in the custody of the department of children and families since 2014, when she was four. The goal at that time was to reunite her with her parents, but by 2016 the goal changed to adoption and the child was placed with a preadoptive family.

In September 2020, several months into the pandemic, a trial was held in juvenile court to determine whether it was in the child’s best interests for her

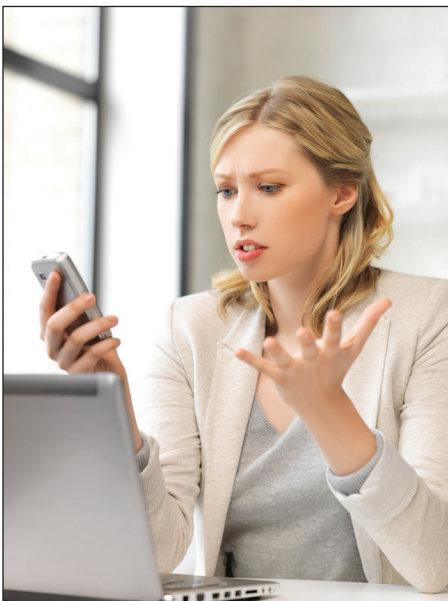
parents’ rights to be terminated, freeing her up for adoption.

The first day of trial, held over Zoom, was plagued with technical glitches, making it impossible for the mother to participate by phone or video and interrupting the testimony of the state’s witnesses. As a result the mother, who was not represented by an attorney, missed almost all the state’s evidence against her.

When the trial resumed two days later, the mother had to try and cross-examine witnesses whose testimony she had missed. The judge ended up ordering the termination of rights and denied the mother’s request for a new trial.

But the Massachusetts Supreme Judicial Court reversed the decision, ruling that the trial as conducted was unfair and in violation of the mother’s right to due process of law, and ordered a new trial.

The court made clear that a virtual trial is not, in and of itself, unfair and can be considered perfectly acceptable as long as all the parties’ rights are safeguarded. But the case does highlight the challenges of doing justice online.



## Sale proceeds from dental practice considered marital property

A recent case from South Carolina shows that when selling a business during a divorce, it's important to think about different aspects of the business figure into the sale price and how that might affect the division of the proceeds.

In that case, after the wife filed for divorce she reviewed and agreed to a contract for the sale of her husband's dental practice. According to the contract, \$424,140 of the \$569,000 purchase price represented "goodwill" while the other \$145,000 represented assets being sold.

The divorce went to trial over division of marital assets. At trial, the judge ruled that the \$145,000 in hard assets were marital property and should be split between the husband and the wife. But the judge ruled that the goodwill component was a nonmarital asset because it constituted "personal goodwill" the husband had earned through his professional status.

The wife appealed the decision, arguing that the goodwill should actually be considered a marital asset to be divided as well.

The South Carolina Court of Appeals agreed. As the court noted, at least in South Carolina there are two types of goodwill — "enterprise goodwill," which attaches to the business, independent of any particular individual, and "personal goodwill," which attaches to a particular person based on his or her reputation. The court also noted that enterprise goodwill is a marital

asset that gets split up in a divorce while personal goodwill belongs only to that individual and is not part of the marital estate.

Here, the court said, the practice was being sold and was not an ongoing concern. Because nothing in the sales contract required the husband to remain active in the dental practice, there was no evidence that any of the sales price was attributable to personal goodwill.

Other states may handle the issue differently, and it's possible that in another state, the husband could have retained part of the sales proceeds as personal property if the contract itself had allocated part of the sale as "personal goodwill." However, this case strongly suggests that for any of the proceeds to be considered personal goodwill, you would need to maintain some active role in the business after the sale.



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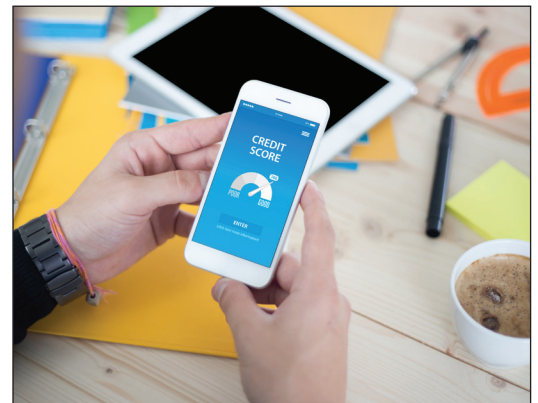
## Minimizing the impact of divorce on your credit score

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leading up to the divorce, credit card and bank statements and documents laying out your retirement accounts, investments and insurance policies. Knowing exactly what you have will make it easier for your attorney to help position you financially following the divorce.

Meanwhile, you should talk to a financial adviser to obtain realistic advice on how your divorce will impact your finance and credit. Your attorney may be able to help you find one. This person may be able to help you make difficult decisions, such as whether to cancel credit cards and reopen new ones in your own name and how to choose which ones to close and which ones to keep open.

Finally, consider cutting back on expenses in anticipation of the reduced income that you may experience as a result of the divorce. For example, rather than keeping the family home, it might make more sense to sell it, share the proceeds with your ex and move into a more affordable place. These are obviously difficult, emotionally laden decisions to make, but a good family law attorney can talk through them with you.







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## Battles over ‘crypto’ becoming an issue in divorce cases



There’s an awful lot of buzz in the news about “cryptocurrency,” which refers to any form of currency that exists either digitally or virtually and is secured by cryptography, enabling bearers to use it for secure online payments without third-party involvement. Cryptocurrency — of which the most well-known is Bitcoin — is not issued by any central authority such as the U.S. Department of Treasury. Instead, it is “mined” or purchased

from cryptocurrency exchanges, making it purportedly immune from government interference or manipulation. It’s not often used to purchase goods or services; instead it’s more typically used for trading and investment.

This sounds exotic, but as of late 2021, roughly a third of American adults under 30 had invested in or used crypto, with the numbers on the rise.

As crypto has become more commonplace it has caused issues in the divorce process.

That’s because crypto-based assets, which are traded on a decentralized network, can be highly lucrative investments but are difficult to track, making it tempting for a spouse to underreport how much they have or to try and hide it in “online wallets” that can be challenging to access without the “digital key.”

Crypto can also be difficult to value, given its volatility, and many different types are on the market, which makes it hard to determine how to divide it.

The takeaway is that if you and/or your spouse have cryptocurrency, it’s important to work with an attorney who is familiar with this new type of asset and in a position to negotiate a fair division and who can help you track down holdings if you believe your spouse is concealing them.