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Legal Matters®

Own a business and getting divorced? Beware of common mistakes

Splitting up a couple's property in a divorce can be tricky and contentious. But when either or both spouses own a business, it can take things to another level, making the process of untangling debts and assets even more complicated.

There are also a lot of mistakes that business owners tend to make when going through a divorce, which can only make matters worse. Here's a primer on some of the most common ones to avoid:

- **Not having a prenuptial agreement**

Nobody goes into a marriage thinking it's going to fail. So the idea of entering into a prenuptial agreement is anathema to many people.

But that's the wrong way to think about it. A prenup is a smart way to give yourself security and predictability just in case things don't work out.

Most states will allow you to designate your business as "separate property" not subject to division in a divorce. In some instances, you may even be able to designate a future business that hasn't gotten off the ground as "separate property." You can even include instructions for how the business will be appraised.

And if you didn't enter a prenup, it's not necessarily too late. If your spouse is willing to consider it at this point, you can put the same provisions into a postnuptial agreement.

- **Improperly valuing the business**

Even before a divorce appears on the horizon, you should know what your business is worth. To do this, you need a proper business valuation conducted by a professional business appraiser.

It's important to note that appraisers can use a variety of formulas to value a business. They might focus on income, they might focus on fair market



value, or they might focus on assets. It's a good idea to check in with a family lawyer to discuss which approach is best, but you do want to make sure that however the business is valued, you're taking into account the business's future outlook and not just its current worth. This reduces the risk of you receiving too little in the settlement.

- **Poor financial recordkeeping**

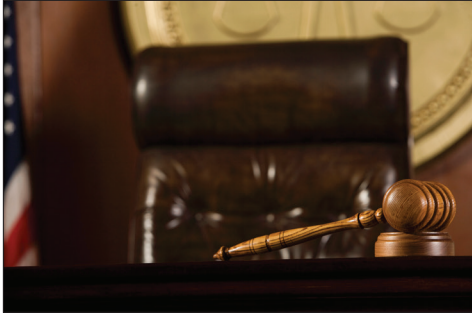
You simply can't have your business valued properly if you don't have accurate and up-to-date financial records. And a divorce judge will have a tough time entering orders that protect your business if your records aren't clear, no matter how big or small your business is.

- **Commingling business and personal funds**

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Courts can address important issues quickly with a ‘pendente lite’ hearing



The divorce process can take a long time — anywhere from several months to several years, depending on the complexity of the issues and the level of conflict.

However, certain issues may need to be addressed more quickly than that. That’s where a “pendente lite” hearing comes in.

What does that mean? Translated from Latin, it means “waiting for litigation.” But for your purposes, it’s a procedure in which you can file a motion with the court seeking a temporary order on divorce-related matters that need to be dealt with right away and can’t wait for the divorce to be finalized. You can file a pendente lite motion at any point during the process.

For example, it’s common to use pendente lite relief to obtain an order for temporary but legally enforceable child custody arrangements before the divorce is final.

Additionally, the pendente lite process can be used for temporary child support orders so that the spouse with less income isn’t waiting months or years before receiving a child support award in the final divorce judgment.

Meanwhile, if one spouse — say the lower-income spouse — has to move out and cover additional rent or a mortgage, that person might file a pendente lite motion seeking an order that the higher-income spouse help cover such expenses.

Courts also have a bit of flexibility with pendente lite motions. They can issue temporary orders that are in place for the entire duration of the divorce process or with a specific time limit, depending on the individual facts and circumstances of the case.

It should be noted that each state has its own divorce laws and procedural rules. That means how the pendente lite process works and what it covers may differ depending on location. Call an attorney to learn how it works where you live.

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How prenups have changed over time

Sixty-two percent of attorneys polled in a recent survey conducted by the American Academy of Matrimonial Lawyers reported that they have seen a significant increase in the number of clients seeking prenuptial agreements over the past several years.

Other reports indicate that the total number of prenups has increased fivefold over the past 20 years.

But today’s prenup is not necessarily the same as that of your parents’ generation. While many think of prenups as something that rich celebrities have to protect their millions against the possibility that their new spouse might be a gold-digger marrying for money and not for love, prenups these days — particularly among those of the “millennial” generation — serve an entirely different purpose.

For example, in today’s economy, a marrying spouse might be working for a start-up. While that person isn’t wealthy yet, he or she might have a stake in the business or stock options that could grow rapidly in the future. Such assets are hard to value in a divorce, so younger entrepreneurs may be including provisions in the prenup ensuring that these assets remain separate property or designating a specific

valuation method to determine how much they’re worth in the event of a divorce.

Meanwhile, many younger people getting married these days are bringing significant debt into the marriage, including credit card debt, car loans and, most significantly, student debt. Accordingly, prenups are being used to insulate one spouse from the other spouse’s debt should the marriage not work out.

Finally, long-term economic fallout from the Great Recession has caused many millennials to delay marriage. By the time they tie the knot, they could be coming into their marriages further along in their careers than previous generations and, in some instances, with more assets to protect. They also may be more likely to consider a prenup if they grew up with divorced parents of their own, as is more likely the case with millennials than with prior generations.

As you can see, prenups are not just for celebrities and millionaires. If you’re getting married, you may have interests to protect that you’re not even aware of. A family law attorney can help you identify them.

Ex-wife gets spouse's retirement account after his death

A recent Rhode Island case should send a clear message to those getting divorced that they need to go through all their insurance policies, retirement accounts, and estate planning documents to see who they have listed as their beneficiary.

If they see that their soon-to-be ex-spouse or new ex-spouse is still listed and they don't want that person to receive the benefits should they pass away, they need to make that change right away.

In the case in question, Transportation Security Administration employee Michael Tarasevich enrolled in the Thrift Savings Plan (TSP) offered to federal workers. He named his then-spouse Pamela as his beneficiary.

The marriage eventually ended in divorce. During divorce proceedings, Pamela gave up any claim to Tarasevich's retirement account.

But the story didn't end there. Tarasevich never completed the necessary paperwork to change the plan's beneficiary designation to reflect his divorce.

More than a decade later, he died unexpectedly.

His estate requested that it receive the funds from his retirement account, but the government denied the request because Pamela was still listed as sole named beneficiary. The estate challenged the denial

in U.S. District Court, but a federal judge agreed with the government and threw out the lawsuit.

Specifically, the judge found that the Federal Employee Retirement System Act determines how a TSP participant's retirement account benefits are distributed. He also noted that the first person in line under the law is the named beneficiary. And a state divorce decree does not change the outcome.

At the same time, it's true that in many states divorce will automatically cancel an ex-spouse's beneficiary status whether the other spouse does the paperwork or not. But even if you're in one of those states, you may have retirement plans that are governed by federal law. And according to the Tarasevich case, when state divorce law conflicts with federal law, the federal law prevails.

Contact a divorce lawyer near you to discuss this issue further.



Own a business and getting divorced? Beware of common mistakes

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One of the most important steps you can take as a business owner is keeping your personal and business funds and expenses separate. This means if you have a credit card or a separate bank account for your business, you should not use it for personal expenses and vice versa.

By mixing up your finances, you're making it a lot harder to value your business properly and get a fair and reasonable property settlement. If you're in the habit of commingling your finances, now is a good time to divide your personal life from your professional life and even gather, organize and review your records with a family law attorney.

• **Hiding personal expenses in your business**

If you're like a lot of business owners, you might be tempted to write off certain personal expenses as business expenses for tax purposes. You may even use your business to cover all your personal expenses.



If you do this, however, you run the risk of a divorce judge attributing additional "deemed income" to you, which could result in higher child support or alimony payments.

This is just the tip of the iceberg. If you want to learn about other mistakes you could be making, call a local family law attorney today.



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LegalMatters | spring 2023

Social Security benefits often forgotten in divorce

If you're going through a divorce, you are likely focused on what's going to happen to the marital home, cars, credit card bills, joint bank accounts, home furnishings, and perhaps vacation home. But

it's common for people to overlook another important potential asset: their spouse's Social Security benefits.

If you have been married to your spouse for at least 10 years, you are entitled to claim a spousal benefit based on your ex's Social Security contributions. The amount of the benefit can be up to about \$20,000 a year

based on Social Security Administration formulas, which is not insignificant.

You can't claim this on top of the benefits from your own career, and it wouldn't make sense to claim it if your own benefits are higher. But if you halted

your career to stay home and take care of the children during the marriage, thereby missing out on the accrual of higher benefits along the way, it may be a good idea to claim the spousal benefit.

Additionally, when you claim your share, your spouse's benefit isn't impacted. In fact, he or she likely won't even know you made the claim.

The government does put restrictions on the spousal benefit. You can't claim it until you reach age 62, and you get a more generous benefit by waiting until the full retirement age of 67. You also need to have been divorced for two years to claim it, and you can't be remarried when you do so.

So if you are contemplating divorce but haven't reached your 10th anniversary, you might delay filing until that date arrives. You also should think twice about remarrying if you don't want to lose the benefits.

There may be other factors that impact your decision, too. A family lawyer can review with you all the considerations.

