Legal Matters®

Family Law
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What happens if an ex-spouse files bankruptcy?

It's fairly common for spouses who have recently been through divorce to encounter financial problems. Sometimes, a former spouse will file bankruptcy as a result.

This often makes the other spouse very nervous. What if the bankrupt spouse is supposed to pay alimony, or child support? Will that continue? What if the bankrupt spouse still owes money to the other spouse as a result of the divorce agreement? What if the bankrupt spouse had been ordered to pay off a joint debt?

If your ex-spouse has filed bankruptcy, or is thinking of doing so, it's wise to speak to your family law attorney right away. There are some general rules governing what will happen, but only an attorney can tell you exactly how they apply to your specific situation.

As a general rule, any debt a spouse has incurred as a result of a divorce cannot be avoided in bankruptcy. So for instance, if a spouse has been ordered to pay alimony or child support, they have to continue to do so even if they go bankrupt.

What if a spouse owes money to the other spouse as a result of a property settlement? Generally, the spouse can't avoid this debt either.

This was not always the case. Before 1994, spouses who went bankrupt could avoid, or "discharge," a property settlement. Congress then changed the law, but it still said that a spouse could avoid a property settlement if the benefit to the bankrupt spouse outweighed the harm to the other spouse. It was only in 2005 that Congress made a clear rule that property settlement debts couldn't be avoided.

Since 2005, the courts have been very strict about not letting spouses get out of their divorce obligations through bankruptcy. For instance, in one recent case, a wife loaned her husband $24,000 before the marriage to help his business, and another $20,000 during the marriage. When they divorced, a judge ordered the man to repay the $44,000. He then went bankrupt. He claimed that he should only have to repay $20,000, because the other loan hap-

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Spending time with a new partner can jeopardize alimony

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The problem is that whether someone is 'cohabiting' isn't always clear-cut. Sometimes it's obvious that an ex-spouse has moved into someone else's home and is being taken care of by them financially. But not always.

Divorce agreements often say that alimony payments will stop if the spouse receiving them begins "cohabiting" with someone else.

The logic of this is that sometimes a spouse will get divorced, start receiving alimony, and then move in with a lover who will support him or her. This isn't fair, since the ex-spouse is then paying to support someone who is already being supported by someone else.

But the problem is that "cohabitation" isn't always clear-cut. Sometimes it's obvious that an ex-spouse has moved into someone else's home and is being taken care of by them financially. But not always.

Take a recent case from Delaware where a retired couple's divorce agreement called for the husband, Joseph, to pay alimony to his ex-wife, Shannon. The agreement said that Joseph could stop paying alimony if Shannon started "cohabiting" as defined by state law. Under Delaware law, two people are cohabiting if they "regularly reside" together and hold themselves out as a couple.

At some point, Shannon became romantically involved with another retiree named Fletcher. Joseph hired a private investigator to tail Shannon and Fletcher to determine if they were living together.

The investigator discovered that they *did* spend an awful lot of time together – in fact, he saw Fletcher's car at Shannon's house on 25 out of 37 days. He also spotted Fletcher doing domestic chores for Shannon, including feeding her cat, taking out the trash, and doing yardwork. Also, he saw Fletcher using her garage code.

But while Fletcher spent two to four nights a week at Shannon's house, the couple had separate homes, and Fletcher didn't keep any clothes or other personal property at Shannon's. The couple also pursued different activities during the day.

Joseph went to court to have his alimony stopped on the grounds that Shannon was cohabiting with Fletcher. A judge denied the request, noting that Shannon and Fletcher had separate, independent houses.

But on appeal, the Delaware Supreme Court sided with Joseph. It said it didn't matter that Shannon and Fletcher owned separate homes and didn't do everything together during the day. The couple were nevertheless cohabiting because they lived together "with some degree of continuity," the court decided.

The meaning of "cohabitation" varies a lot from place to place and can apply differently from situation to situation. But if you have any questions about your own situation or that of a former spouse, we'd be happy to help you.

Spouse's trust distributions could be divided in divorce

Money distributions that a husband receives each year from a trust could be divvied up at divorce, the South Carolina Supreme Court recently decided.

During their marriage, the husband used some assets to create a "charitable remainder trust." This is a type of trust that pays annual income to the donor, with the trust assets going to charity when the donor passes away. (There are a number of tax advantages to this type of trust.)

In this case, each year the trust paid 7% of its assets to the husband. When the husband dies, the trust will pay 7% of its assets each year to the wife. When she dies, the assets will go to charity.

A divorce judge ordered the husband to split his 7% annual payment with the wife.

The husband objected, arguing that the trust was a separate entity that wasn't "owned" by either spouse, and therefore the judge had no authority to divide it.

The Supreme Court agreed that the trust itself wasn't marital property. But it said that the annual trust distributions were marital property, and therefore the judge could order them to be divided.

This was particularly true because the trust distributions were originally intended to provide support for the couple.

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pened before the couple got married.

But a federal appeals court in New Orleans said the man had to repay the entire amount. Even though the loan was made before the wedding, a divorce judge had ordered him to repay it as part of the divorce, and that made it a "divorce" debt.

Another issue is what happens if a divorce agreement requires one spouse to pay off a joint debt, such as a mortgage or a credit card. If that spouse goes bankrupt, can he or she avoid this obligation to a third party?

Typically, no. As long as the divorce papers require the spouse to assume the debt, the spouse can't get out of it with a trip to bankruptcy court.

For instance, a Missouri couple divorced recently and the husband was ordered to pay off $18,000 on a line of credit from U.S. Bank. Several months later, he filed for bankruptcy.

The Missouri Court of Appeals said the husband still had to pay off the debt to the bank. Even though the debt wasn't owed to his wife, it was owed for her benefit, and that made it a divorce-related debt.

Other courts have required bankrupt spouses to pay off debts owed to other third parties – including credit cards, mortgages, homeowner's association dues, income taxes, car loans, and medical bills.

But while the law favors ex-spouses, it's still important to speak to an attorney, because you may need to take steps to protect yourself in the legal proceedings, especially if the bankrupt spouse stops paying a debt.

It's also possible that even though an ex-spouse can't legally avoid a debt through bankruptcy, the ex-spouse might stop paying anyway because he or she is truly broke and simply *can't* pay it off. If the debt is owed to a third party, in some cases the third party might be able to come after you for repayment – especially if it's a debt for which you co-signed during the marriage. While the divorce might have "assigned" the debt to the other spouse, typically the bank or other third party won't have been part of the divorce and won't have waived its rights.

In such a case, you'll want to speak to an attorney about what legal options are available to help you.

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Prenup signed 24 years earlier couldn't be enforced

A California couple signed a prenuptial agreement back in 1985 saying that the wife wouldn't get any alimony payments if the couple divorced.

At that time, prenuptial agreements like this one weren't valid in California. In fact, the couple even acknowledged in the agreement that it probably wasn't legally enforceable.

But times change! In 2000, the California Supreme Court ruled that a waiver of alimony in a prenup could be enforced under certain circumstances. And in 2002, the state legislature passed a law saying that alimony waivers were okay as long as both members of the couple had their own lawyer.

The couple in this case divorced in 2009. So was the prenup now legally valid?

No, according to the California Court of Appeal. The court said that the prenup was subject to the law at the time it was signed. And even though the law had changed in the intervening years, the change in the law couldn't go backward in time and make a contract that wasn't originally valid into something that was binding on the couple.

Ex-wife is sued for damaging husband's credit rating

When a Utah couple divorced, the wife got to live in the couple's house. Although both spouses' names were on the mortgage, the wife was ordered to make the mortgage payments.

After some time went by, the wife developed a constant pattern of paying the mortgage late. As a consequence of her actions, the husband's credit score suffered.

Finally, the husband sued the wife, claiming she had violated the divorce agreement.

The wife replied that she had always made the payments, even though they were late, and that the husband couldn't complain unless she had actually defaulted on the loan and the lender had come after the husband for the money.

But the Utah Court of Appeals disagreed. It said the agreement meant that the wife not only had to pay the mortgage, but also had to do so on time, so as to protect the husband from any financial harm resulting from late payments.

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'Skyping' with child might not qualify as 'visitation'

Videoconferencing technology such as Skype, FaceTime, and Google Video has made remote face-to-face communication so cheap and simple that it's fast becoming part of everyday life. But does a video chat between a parent and a child count as "visitation"? A recent North Carolina court decision suggests that it might not.

The case involved a mother who suffered from mental illness and who lost custody of her son due to neglect. In order to maintain the bond between the mother and the child, the judge directed the county to set up visitation via video chats over Skype. The county would set up the connection at a local parenting center, where the mother would be able to communicate with her son under the supervision of a social worker.

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The mother argued that she was still entitled under North Carolina law to "appropriate" visitation, and that the Skype chats didn't qualify.

And the North Carolina Court of Appeals agreed with her. It said that Skype could be used to *supplement* child visitation, but it couldn't be used as a complete substitute.