

page 2  
Be sure to have 'the talk' with your kids before they leave home

page 3  
Wife can't be forced to sell off property to pay large distribution to husband

Transfer assets to trusts with extreme caution (if at all)

page 4  
'Do it yourself' divorce is full of risk

# Legal Matters®

Family Law  
winter 2020

## Divorce and bankruptcy: which should I file first?

**A**s we all know, life often doesn't go as planned. Nothing illustrates this more than divorce. Bankruptcy is similar. You made financial plans, but for whatever reason your debts got out of control and you realized you might need a court to protect you from creditors and grant you a fresh start. Money problems and marital problems often go hand-in-hand, so it's no surprise that divorcing spouses may also be considering filing for bankruptcy. Which should you file first? The best answer we can give is, "It depends."

**If you and your spouse are on fairly civil terms, you might consider filing jointly for bankruptcy before filing for divorce.**

If you file for Chapter 7 bankruptcy, your assets are combined into a "bankruptcy estate." Some assets are protected, or "exempt," which means they can't be sold off to satisfy creditors. Under federal law, assets such as pensions, 401(k) plans, IRAs, Social Security benefits, alimony payments and child support payments are exempt. Most states allow you to protect all or some of the equity in your home, and most allow you to protect the equity in your cars. You can also protect up to a certain amount in household goods. "Non-exempt" assets are liquidated. You get a fresh start, but a bankruptcy can affect your ability to obtain credit for a while going forward. Chapter 7 is a relatively quick process, generally taking just a few months, but you can file for

Chapter 7 only if your income is below a certain threshold.



©AndreyPopov

Chapter 7 only if your income is below a certain threshold.

Another option is Chapter 13. If you have a regular income, the bankruptcy court under Chapter 13 will create a plan to pay back creditors for up to five years. Meanwhile, creditors will have to stop collection and foreclosure. It is a longer process than Chapter 7.

If you're dealing with crushing debt and a failing marriage simultaneously, it makes sense in many cases to file for bankruptcy first. Once you've filed for bankruptcy, no matter what type, an "automatic stay" is put into place, stopping creditors from contacting you, freezing your assets and property and temporarily halting all legal proceedings against you. The automatic stay applies to divorce proceed-

*continued on page 2*



## Divorce and bankruptcy: which should I file first?

continued from page 1

ings, too, making it tough for a family court judge to divide up your property, and dragging out the divorce process even longer that it otherwise might be.

If you and your spouse are on fairly civil terms, you might consider filing jointly for bankruptcy before filing for divorce; in some states that would enable you to increase your exemptions. And

it might simplify a subsequent divorce proceeding. If you file for Chapter 7, the process is usually com-

plete within six months, allowing you to then move quickly to a divorce.

On the other hand, you might consider filing for divorce first if you and your spouse have a combined income too high to qualify for Chapter 7. Once divorced, you may be able to file for Chapter 7 protection individually instead of having to go through a Chapter 13 payment plan. Additionally, by going through a divorce first, you can resolve support issues prior to bankruptcy. Owing a significant amount in child support or alimony can affect how a bankruptcy will proceed.

Your best bet is to talk to a family lawyer who understands the interplay between bankruptcy and divorce.



©AndreyPopov

---

## Be sure to have 'the talk' with your kids before they leave home

When children turn 18 they are adults, regardless of how mature they actually are. As parents, you're no longer entitled to access their medical records or make legal decisions for them without their permission.

It's unlikely they will have the real-world experience at that age to handle all medical and financial decisions on their own. This can feel scary, especially if they are leaving home to go to college or to work. It might feel scary to them, too. To ensure you can

### A HIPAA release authorizes you to continue accessing an adult child's medical information.

still have the level of involvement necessary for you all to feel comfortable, it's worth sitting down with your now-adult child to discuss these types of issues. For example, you might discuss having your child execute a HIPAA release and a health care proxy.

A HIPAA release authorizes you to continue accessing an adult child's medical information to help them stay on top of their prescriptions and doctor's appointments and manage ongoing care for medical problems. Health care proxies enable you to make medical decisions for adults who cannot make them on their own.



©zimmytws

You might also consider approaching your child about executing a power of attorney, which empowers you to make financial decisions on his or her behalf if, for some reason, he or she is unable make such decisions.

This is not intended for you to control your child. Kids need the chance to "launch" and learn to manage complex parts of their lives and make important decisions for themselves. But in these early years, you both may feel more comfortable if you still have some limited involvement in these areas. It's a personal decision, but it's certainly worth discussing with your kids and maybe with a family law attorney.

# Wife can't be forced to sell off property to pay large distribution to husband

A family court judge could not require a wife to liquidate her own separate property in order to pay a large distributive award to her husband, the North Carolina Supreme Court recently decided.

The couple, Andrea and William Crowell, married in 1998 and divorced in 2015. Before they married, William started several small businesses that he claimed as his own separate property. Andrea claimed she had an interest in them as marital property. The court found that they lived well beyond their means, and that to fund the lifestyle William sold his separate property and borrowed from his businesses, putting the couple in debt.

Andrea, on filing for divorce, sought equitable distribution of their marital property (in other words, fair division of their assets and debts) and alimony. The judge denied alimony and determined that the marital property had to be split equally, requiring that Andrea pay William an \$800,000 "distributive" award. Since Andrea didn't have the means to pay the award in full, the court ordered that she sell some of her own real estate to cover it.

But the supreme court reversed on appeal.

The court found that while the state law provision



©VIPDesignUSA

on distributive awards didn't specifically say a spouse *couldn't* be forced to sell his or her own separate property to pay such an award, it didn't specifically say he or she *could*. The court said the rest of the state's equitable distribution law allowed for the distribution of marital property only, so the lower court's order didn't follow the law.

Divorce and property division law is different in every state. Check with a lawyer where you live to find out more.

## We welcome your referrals.

We value all of our clients.

While we are a busy firm, we welcome your referrals. We promise to provide first-class service to anyone that you refer to our firm. If you have already referred clients to our firm, thank you!

## Transfer assets to trusts with extreme caution (if at all)

If there's one thing family courts hate, it's a spouse who plays dirty by trying to hide assets in the hopes of avoiding having to split them as part of the marital estate.

Doing so can bring stiff consequences, such as having to cede a bigger share of marital property, or getting hit with a judgment of contempt, or even criminal fraud charges (for securing property under false pretenses) or perjury charges (you signed your divorce papers under penalty of perjury).

A common way people try to shield assets from division is by placing them in trust (a financial instrument in which a "trustee" manages assets and distributes the income generated to the "beneficiary"). If you're doing this to cheat your soon-to-be ex, you risk the consequences noted above.

Of course, there are legitimate estate-planning reasons for putting property in trust.

Talk to a lawyer to do things right in the technical,

legal and moral sense, or you risk creating red flags that judges will pick up on.

For example, if you transfer what should be considered marital property to a third party (such as a relative or friend) by creating a trust on their behalf, make sure you receive adequate "consideration" in return. In other words, the person had better be paying you something of value for the property. If they're not, this will create justifiable suspicion, and a court might void the transfer.

There are other circumstances that may signal to a judge an intent to defraud, and each state has its own nuances of law. And there may be better estate-planning vehicles available under the circumstances.

If you're in the process of divorcing, but you also have legitimate reasons to put property in trust, talk to an attorney as soon as possible to weigh the different options.



The Historic John Price Carr House  
200 North McDowell Street  
Charlotte, North Carolina 28204  
(704) 370-2828  
[www.CharlotteDivorceLawyerBlog.com](http://www.CharlotteDivorceLawyerBlog.com)

## ‘Do it yourself’ divorce is full of risk

“Do-it-yourself” divorce apps and programs for preparing and processing forms have become more popular.



©ruigsantos

While DIY divorce may turn out fine in some cases, it’s full of risk.

If your divorce is simple (because it doesn’t involve kids, neither side is seeking alimony or support and you basically agree on how to split property) DIY divorce apps and tools *may* be OK. It’s still probably not a great idea, since the products cannot predict problems.

For example, if you and your spouse agree on who gets the marital home, the app is not necessarily going to counsel you on how to refinance the mortgage so that it’s in the right person’s name. Nor will it determine who handles unpaid property taxes, or ensure the title is transferred properly.

If not handled properly at the time of divorce, matters such as these can cause serious issues down the line. If the title transfer wasn’t properly accounted for and years later your ex does not make the monthly mortgage payments, you could be on the hook if your name is still on the title (and on the loan).

DIY divorce services can’t counsel you on handling retirement assets and debt, or on tax implications. DIY apps and programs will not see potential red flags on the forms you submit.

If your divorce is contested, meaning you expect to be battling over custody and property, you *absolutely* should not leave the process to technology tools. Only your own attorney can help you formulate a realistic approach and represent your interests, either in negotiations or in court. A DIY divorce may look cheaper on the surface, but in the end you get what you pay for.