

COMMUNITY DEBT AND BANKRUPTCY ISSUES

THIS INFORMATION IS A GENERAL OVERVIEW OF COMMUNITY DEBT ISSUES FOR BOTH DISSOLUTIONS AND BANKRUPTCIES. AN ATTORNEY IS STILL YOUR BEST SOURCE OF ADVICE FOR YOUR SPECIFIC CASE.



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“Community” Debts:

Community debts are those debts that both you and your spouse are liable for. Under Washington law, your name does not have to appear on a debt for you to be liable. In fact, you do not even have to be aware of the debt at the time it was incurred to be liable. All that is required is that the debt must have been for the general benefit of the marital community when it was incurred.

To be a community debt, there must be a marital “community” in existence. In other words, community debts are those debts which are incurred after marriage and before physical separation. You do not have to start a legal separation or divorce proceeding to be physically separated for community debt purposes. If you are physically separated without an intention to resume the marital relationship, you should not be liable for the debts of your spouse during that period.

“Separate” Debts:

Separate debts are those debts which only one spouse is liable for. These debts are incurred either prior to marriage or after physical separation. You are not legally responsible for the separate debts of your spouse, and vice-versa.

If you are a named party on an account, you may still be legally liable on a debt which is incurred either before or after marriage. To avoid further liability for other charges, you must contact the creditor (preferably in writing and keep a copy) and have your name removed from the account. This should end your liability for future charges, but probably not for past charges where your name was listed as a responsible party on an account. If a creditor refuses to close a joint charge or credit card account (because there is a balance), you may ask your spouse to transfer the balance he/she has agreed to pay to a credit card in his/her name alone or you may ask the creditor to freeze the account, so that your spouse cannot continue to charge.

A final category of “separate” debts are those debts which occurred during marriage but which were not on behalf of or for the benefit of the marital community. This category is very narrow and complex, and if you think there is such a debt involved in your situation, you should seek the advice of an attorney.

Dividing the Debts in a Divorce:

Under Washington law, the court which enters a decree in a dissolution (divorce) proceeding must fairly divide the debts between the parties. If the parties can agree on how the debts should be divided, they may ask the court to approve the agreed division. If the parties cannot agree, they may ask a court or other person (mediator, arbitrator, etc.) to divide the debts.

Regardless of whether the debt division is agreed or not, a court is required to follow some rules when dividing debts:

- 1) Separate debts should be the responsibility of the spouse who incurred the debt;
- 2) Community debts should be divided fairly and equitably between the parties;
- 3) The whole dissolution (debts, assets, etc.) must be fair and equitable to each party.

The court will generally approve an agreed division of the debts unless it is very unfair to one party. The first rule above is important because a spouse should not be asked to bear a much greater portion of community debt just because the other has large separate debts to pay. The third rule above is important because a court will generally look to asset division as a measure of how fair the debt division is.

The Effect of the Debt Division on Creditors:

This point cannot be stressed enough: *No matter who is ordered to pay a community debt in a dissolution or separation proceeding (even if agreed by the parties) both parties are still liable to the creditor for the community debt.* In other words, if your ex-spouse fails to pay the debts he or she was ordered to pay in the dissolution, the creditor can come after you and the creditor is not required to cease collection just because of the dissolution decree.

This may seem harsh, but actually makes sense if you think about it this way: Let's say you lend \$100 to your cousins Abe and Ben, who are starting a business. Each signs a written note, to you, to be liable for the full \$100. You lend it to them because although each cousin alone is less than totally reliable, each should be good for about \$50. After a couple of months, Ben decides to leave the business. Abe proposes that he keep all the assets of the business, and all of the debts (including the loan to you). Ben agrees. You then go to collect on your note from Ben, to which he replies: "I am no longer liable to pay you – Abe and I agreed he would take the debt." The actual collectability of your \$100 has just been cut in half by a contract which you had no part of! This example shows why it is not possible to modify the rights of a creditor by virtue of the dissolution decree. Like Ben, the divorcing parties cannot modify the rights of creditors by their agreement with each other.

This does not mean that the decree is worthless, however. If your ex-spouse fails to pay and you are forced to, you can sue for damages and contempt of the decree.

Bankruptcy Issues:

Perhaps your ex-spouse was assigned several debts in the divorce, and you have just received notice that he or she is filing for bankruptcy. Are you now liable for all those debts? Perhaps you received several debts in a divorce and are considering filing for bankruptcy. Can you discharge these debts in the bankruptcy? Perhaps you and your spouse want to draft an agreed order dividing the debts, but you want to be sure to protect yourself if the other ever files bankruptcy. Perhaps the divorce has left you both financially depleted and you both know you will have to file a bankruptcy. Is it better to file now, before the divorce is over, or after?

It is almost always best to consult an attorney in these matters. A little pre-divorce planning in this area may save you a lot of headache in the long run. Some general principles to use if you decide to try it yourself are:

- 1) The general rule is that community debts taken in connection with a dissolution decree are not dischargeable in bankruptcy unless: a) the debtor absolutely cannot pay because all his or her money is needed for the basics of survival; or b) the benefit to the bankruptcy debtor outweighs the detrimental consequences on the ex-spouse.
- 2) Some debts that are normally dischargeable in bankruptcy can become non-dischargeable if they are included within a dissolution decree. For example, a single person may have a credit card debt which is discharged in bankruptcy, but a formerly married person who took the same type of debt may be obligated to repay it if it was included in a dissolution decree (subject to #1, above);
- 3) The time period that you have to object in a bankruptcy proceeding is very short (about 60 days after the first meeting of creditors). If you feel as though your ex-spouse is trying to get out of a debt he or she should be forced to pay, you must file an objection in the allotted time period or the discharge will be effective against the debt, whether you have a great case or not. *Do not wait too long or you may be stuck with all the debts, regardless of how unfair it may be!*
- 4) You can be physically separated and still file a joint bankruptcy petition. Joint petitions are generally cleaner and cheaper than two separate bankruptcies. If you can both agree that filing bankruptcy is the way to go, you don't have to still be married and under the same roof to file at the same time. Filing before the divorce is final may also be advantageous, but you should consult an attorney on that particular issue.
- 5) Filing for bankruptcy does not change the child support which has already been ordered by the court; it also does not generally change spousal maintenance obligations. Once a bankruptcy petition is filed, the court handling the divorce cannot change or modify child support or maintenance payments unless the Bankruptcy Court specifically permits modification proceedings.

Avoiding Common Mistakes:

Here are some common errors in this area which you can avoid by being a little proactive:

- 1) *Get Creditor Information as Quickly as Possible.* If you and your spouse have separated, you should make a rapid assessment of your creditors. Get information from your spouse, through discovery in the dissolution, or get a credit report. Find out all the creditors you really have—just guessing can hurt you.
- 2) *Notify Creditors Promptly and In Writing that You Will Not be Liable for Future Debt.* You don't want to get into costly and lengthy litigation about when you separated and what you are liable for. A simple certified letter to a creditor can save you a lot of time and expense in the long run.
- 3) *Don't Agree to Pay Your Spouse's Separate Debts or More Community Debt to Offset Their Separate Debts.* Remember that that is their obligation, and most courts will not really consider those separate debts when dividing community debts.
- 4) *Don't Defend Against a Collection Based on Your Dissolution Decree.* Many people fail to answer or respond to collection lawsuits because they think their divorce decree protects them from the collection. It doesn't. As noted above, you cannot alter the creditor's rights by virtue of your decree with your ex-spouse.
- 5) *Consider a Joint Bankruptcy Filing Before You Proceed with Divorce.* It may be difficult to even consider doing anything together during this time, but remember that a joint filing does not require you to live together. Many joint filings can be accomplished without any real contact between the parties, and may be the cleanest and most economical solution to debt problems.
- 6) *Don't Wait to File Objections to Discharge Upon Receiving Notice of a Bankruptcy.* If you are concerned that your spouse is trying to file bankruptcy against debts he or she took in the divorce, don't delay! Waiting too long can be the difference between eating groceries and eating the debts.
- 7) *Consult an Attorney or Consider Other Legal Services Agencies.* These generic principles are helpful, but every individual case has its own concerns which are best addressed by a lawyer.