

*Landmines in Litigation:
How Death, Divorce, & Other Events Affect
Pending Litigation*

Divorce

ROBERT WRIGHT



Wolff Hislop Crockett

Overview

- I. Who is the client? Community Business? One Spouse?
- II. Impacts of Spousal and Attorney-Client Privileges
- III. Separate Property v. Community Property
- IV. Effect of Unfinalized/Pending Divorce
- V. Divorce Decree Effects on Pending and Future Litigation



I. Who is the Client?

- Knowing who your client is matters
- Ethical considerations



I. Who is the Client? – RPC's

Ethical Considerations

- RPC 1.2(a) – Client dictates objectives of representation
 - Client decides whether to settle

Practice Tip!

- WSBA Advisory Opinions
- Ethics hotline: 206-727-8284



I. Who is the Client? –Joint Representation

- “agreed-upon” divorce
- Can I represent both spouses?
- RPC 1.7(b)(3)
- Advisory Opinion 201901



I. Who is the Client? – Case Study

Case: Plaintiff v. Construction Company, LLC

Client: Construction Company, LLC

Members: Husband and Wife

Problem: During litigation, Husband and Wife file for divorce.



I. Who is the Client? – Case Study

Answer: Client is Construction Company, LLC

RPC 1.13

- Rule 1.13(a): “A lawyer employed by or retained by an organization represents the organization acting through its duly authorized constituents.”
- Duties are to the entity



I. Who is the Client? – Case Study

If my duty is to the entity...what if joint owners disagree?

- RPC 1.13(b) – lawyer must proceed in best interest of corporation even if an officer or employee within the corporation acts or refuses to act in best interest
- Practice Tip!



II. Representation and Privileges

- Attorney-Client Privilege
- Spousal Privilege
- Waiver of Privilege



II. Attorney-Client and Spousal Privileges

Attorney-client privilege

- Applies to all communications/advice between attorney and client
- Must be made in confidence
- Must be in context of attorney-client relationship

What does that mean?



II. Attorney-Client and Spousal Privileges

Attorney Beware

- Presence of third-parties waives privilege unless:
 - Necessary for communication; or
 - Retained attorney on matter of common interest
- If waived = discoverable



II. Attorney-Client and Spousal Privileges

Spousal Privilege

- RCW 5.60.060(1)

Two distinct privileges

- (1) marital testimonial privilege
- (2) confidential communications privilege



II. Attorney-Client and Spousal Privileges

Marital testimonial privilege

- Prevents one spouse from having to testify against the other in court
- Why?
- Prevents spouses from choosing between contempt of court, perjury, or jeopardizing the marriage



II. Attorney-Client and Spousal Privileges

Confidential Communications privilege

- Protects all confidential communications between spouses made during marriage
- Privilege belongs to the *communicating* spouse



II. Attorney-Client and Spousal Privileges

How can divorce create a privilege landmine?

- Testimonial privilege ends upon divorce
- Confidential communications privilege survives divorce AND death



III. Community/Separate Property Considerations

What is community property?

- All assets acquired during marriage unless separate property
- All assets spouses agree are community
- All assets converted to community property through commingling



III. Community/Separate Property Considerations

What is separate property?

- All assets spouse owned before marriage
- Gifts and inheritances (even during marriage)
- Damages for personal injuries*
- Assets spouses agree are separate
- Earnings/property obtained post-separation
- Proceeds from and enhancements to separate property



III. Community/Separate Property Considerations

Why does this matter in civil litigation?

- Knowledge is power → Plan ahead with your clients
- Commingling kills
- Collection of judgments



IV. Effect of Unfinalized/Pending Divorce

Main Considerations

- Ownership of assets
- Allocation of Debts



IV. Effect of Unfinalized/Pending Divorce

Ownership/Allocation of Assets and Debts

- Biggest takeaway – it isn't certain until the divorce is over
- Communicate with your clients
- Plan appropriately



IV. Effect of Unfinalized/Pending Divorce

Ownership/Allocation of Assets and Debts

- Hypo – Successful company owned by H and W
- You represent company, awarded \$500k in damages
- H & W divorce, business is not allocated or mentioned
- Is there a right to reimbursement?

- Avoid the headache!



V. Divorce Decree Effects on Pending and Future Litigation

The biggest impact divorce has on litigation?

- Allocation of liabilities
- Collection of judgments



V. Divorce Decree Effects on Pending and Future Ligation

Hypothetical

- *Plaintiff v. Construction Company, LLC*
 - Breach of K, CPA violations, liability in excess of \$100k
 - business is community
 - obtain \$100k judgment against LLC and members
 - before case concluded, H & W divorce
 - husband awarded business and any associated debt



V. Divorce Decree Effects on Pending and Future Ligation

The Problem?

- Nobody pays the judgment
- Can you go after the wife even though the divorce has been finalized and allocated the debt to husband?



V. Divorce Decree Effects on Pending and Future Ligation

Dizard & Getty v. Damson, 63 Wn.2d 526, 387 P.2d 964 (1964)

- Community Construction Business
- Subcontractor obtained judgment against business/former marital community
- Husband did not pay full judgment – creditor pursued wife
- Holding?
 - *deficiency of judgment can be satisfied from community property, including property awarded and distributed to wife*



V. Divorce Decree Effects on Pending and Future Litigation

Limits on collection

- Can ONLY pursue the community's net equity
- Cannot pursue separate property unless liability in separate capacity is established



V. Divorce Decree Effects on Pending and Future Litigation

Takeaway?

- Divorce does not preclude collection
- However, if you want to collect:
- (1) allege veil piercing (assuming there is a basis); (2) include the former marital community as a party



V. Divorce Decree Effects on Pending and Future Litigation

Family Law Practice Tip

12. Debt Collection (hold harmless)

[] Does not apply.

[] If one spouse fails to pay a debt as ordered above and the creditor tries to collect the debt from the other spouse, the spouse who was ordered to pay the debt must hold the other spouse harmless from any collection action about the debt. This includes reimbursing the other spouse for any of the debt that spouse paid and for attorney fees or costs related to defending against the collection action.



Thanks for listening!

- Any Questions?
- Go ZAGS!

