The Business Of Marriage: The Non-Divorce Attorneyâ??s Impact on A Divorce

Description

Once upon a time, there was a beautiful woman who did very well for herself. She started her own software company and reaped the financial benefits when the company was bought out. She retired young and put over a million dollars down on a new home and carried a relatively small mortgage. Soon after these life successes, this woman meets a man. She falls in love, and they marry. The man (Husband) is happy to move into the womanâ??s lovely, nearly paid off, home. Shortly after the marriage, Husband quits his job and makes no contribution to the mortgage or any other household expenses. The woman, (Wife) grows increasingly annoyed with Husbandâ??s bloodsucking ways and decides the best way to resolve this bump in the road is to add Husbandâ??s name to the mortgage, as this will surely incite some sense of obligation to the finances.

Husband agrees to be added to the mortÂgage, so Wife begins the refinance process. The lender tells Wife that if Husband is to be added to the mortgage, then he must also be added to the deed. Husband is happy to oblige. The real estate attorney (a.k.a. the non-divorce attorney) prepares a deed of gift, reciting â??for love and affectionâ?• as the consideration, and further states the conveyÂance is exempt from recordation taxes. The parties sign the deed of gift and refinance the mortgage into both partiesâ?? names. Now that Husband is on the mortgage, he starts paying, right? Unfortunately, no. He still makes no contribution to the mortgage or other household expenses and continues to drink cocktails by the pool. Wife has had it and wants a divorce. Husband refuses to move out of *his* home unless Wife pays him at least $500,000.00. Marriage is a partnership after all.

In Virginia, when two people get a divorce, they may ask the court to divide their properÂty. This is called Equitable Distribution. The authority of the trial court to implement the equitable distribution of property is purely statutory.1 The equitable distribution statute is Virginia Code Â§ 20-107.3, which governs the property interests of each party in a divorce. Equitable distribution means the court will divide partiesâ?? property based on what is fair and equitable, which is not necessarily 50-50. When adopted, the legislative subcommittee specifically rejected any presumption in favor of an *equal* distribution of marital property.2 It was enacted to give each spouse a fair portion of the property accumulated during the marÂriage without regard to title.3

After a party has properly requested that the court divide the property, the court must follow a three-step process.4 First, the trial court must classify the property as separate, marital, or hybrid (part separate and part marital property).5 Second, the trial court must assign a value to every item or portion deemed marital property, and the value must be based upon evidence presented by the parties.6 Third, the judge must equitably disÂtribute the partiesâ?? property by applying the factors set forth in Virginia Code Â§ 20-107.3 (E) and (G). Applying these factors is how the Court determines what is fair. Only marital property or part marital property is subject to equitable distribution.7

The most relevant step in our scenario is the classification of property. Since Wife bought her home before the marriage, it was initially her â??separate property.â?• Separate property is all property, real and personal, acquired by either party before the marriage. Separate property is also all property acquired during the marriage by bequest, devise, deÂscent, survivorship, or gift from a source other

than the other party; and finally, separate property is all property acquired during the marriage in exchange for or from the proÂceeds of sale of separate property.8

Had Wife not retitled the house into joint names by a deed of gift, she may have fared well in the equitable distribution of the house in a divorce. Unfortunately for Wife, Virginia Code Â§ 20-107.3(A)(3)(f) states: â??When sepÂarate property is retitled into the joint names of the parties, the retitled property shall be deemed transmuted to marital property. HowÂever, to the extent the property is retraceable by a preponderance of the evidence and *was not a gift*, the retitled property shall retain its original classificationâ?• (emphasis added).

But did Wife really intend to *gift* her home to Husband? To establish a gift, the donee must prove by clear and convincing evidence: (1) the intention on the part of the donor to make the gift; (2) delivery or transfer of the gift; and (3) acceptance of the gift by the donee.9 The equitable distribution statute specifically states that no presumption of gift shall arise when existing property is conveyed or retitled into joint ownership.10

One might argue that Wife did not have the requisite donative intent to give her house to the marriage, and that her only intent was to make her husband start paying his fair share. The problem with this argument, however, is that it will never be heard by the judge because the non-divorce attorney was unaware of the implications a deed of gift has in a divorce.

Any non-divorce attorney drafting deeds between husbands and wives should be aware of the Supreme Court of Virginia case of *Utsch v. Utsch*, 266 Va. 124, 581 S.E.2d 507 (2003). In *Utsch*, shortly after his marriage, the husband transferred title of the marital residence from his name solely, to himself and his wife as tenants by the entirety. The conveyance was made by deed of gift and recited â??love and affecÂtionâ?• as consideration for the transfer. Additionally, the deed of gift recited that the conveyance was exempt from recordation taxes. 11

In the divorce proceeding, the trial court held that the deed of gift was unambiguous, and therefore, circumstances surrounding the execution of the deed of gift were inadmissiÂble. On appeal, the appellate court reversed, and concluded that the deed of gift was not clear and unambiguous as to the husbandâ??s inÂtent to make a gift of the marital residence to the marital estate.12 The former Wife appealed, and the Supreme Court of Virginia found that the deed of gift was unambiguous on its face and that the parol evidence rule barred any other evidence of the grantorâ??s intent. The Court stated, â??The deed not only shows by clear and convincing evidence the intent to jointly title the marital residence, but it also shows the donative intent of Husband in makÂing the transfer.â?•13 Within the four corners of the instrument, it declared it was a deed of gift for â??love and affection,â?• and referenced the code permitting exception from recordation taxes for gifts; this showed that the husband clearly intended to make a gift of the marital residence to the marital estate.14

So, in this case, despite all the really good reasons why there was no intent to make a gift, the divorce lawyer must explain to the client that none of those reasons matter, and the judge will never hear those details; the judge would classify the property as marital, determine the equity based on the evidence, and distribute the million plus dollars of equiÂty fairly and equitably. It is plausible that the court could award Husband anywhere from 0 to 50 percent (or more!). The exposure for Wife is great.

What could Wifeâ??s counsel have done in this situation? One possiÂbility is counsel could have drafted a deed that did not say for love and affection, but stated it was for some other reason such as estate planning purposes,15 and signed under seal.16 The best solution from the divorce lawyerâ??s

perspective would have been for the real estate attorney to advise Wife of the legal consequences of a deed of gift, which should have given Wife pause. Then perhaps a marital agreement between the spouses would have solved the problem.

Similar landmines exist for non-divorce lawyers in the application of Virginiaâ??s Premarital Agreement Act17 to contracts or agreements between spouses. While its title seems to imply that the Premarital Agreement Act applies to agreements between couples who are not yet married, the last provision expands its reach to agreements entered into by married couples as well:

Married persons may enter into agreeÂments with each other for the purpose of settling the rights and obligations of either or both of them, to the same extent, with the same effect, and subject to the same conditions, as provided in [the Premarital Agreement Act] for agreements between prospective spouses, except that such marital agreements shall become effective immediateÂly upon their execution.18

Separation or property settlement agreeÂments made by couples in connection with a divorce or separation are likely familiar to most lawyers, but those are only â??a subset of the broader category of â??marital agreementsâ?? addressed by [the Premarital Agreement Act].â?•19 The Court of Appeals has explained that â??marital agreements are not limited to actions taken in contemplation of divorce.â?•20 Marital agreements are also nearly unlimÂited in scope as the Premarital Agreement Act provides they may modify, among other things, â??the rights and obligations of each of the parties in *any of the property of either or both of them whenever and wherever acquired or located*.â?•21

Given the breadth of applicability, it is easy to see how almost any contract between spousÂes could fall under this umbrella.

â??So what?â?• you may be asking. What are the consequences of a contract being a marital agreement? In a divorce, they are very signifiÂcant. In *Shenk v. Shenk*, the Court of Appeals decided a case where a married couple owned a business together. During the marriage, the business sought to refinance a construction loan, but the bank refused its application due to concerns over the husband being an owner of the business. To resolve the issue, the businessâ??s *corporate attorney* (who presumably would not have listed family law among his practice areas on his firmâ??s website) prepared an â??assignmentâ?• transferring the husbandâ??s ownership of the business to the wife. The couple executed the assignment and the business was approved for the refinance.

Prior to the signing of the assignment, the business was unquestionably marital properÂty. In any future divorce, the husband would have expected it to be included in the division of marital assets and to receive a monetary award for its value. Much to the husbandâ??s dismay, the wife took the position in their subsequent divorce that the assignment conÂverted the marital business into her separate property, excluding it from the marital estate to be divided in the divorce. The Circuit Court and Court of Appeals agreed with the Wife. Both courts classified the assignment as a marital agreement and that â??the businesses became wifeâ??s separate property when the parties entered into the marital agreement.â?•22 The husband was not entitled to any compenÂsation for the business in the divorce.

While there were additional circumstances at play in *Shenk*, one can easily see how this issue could arise in a variety of circumstances. Take the following hypothetical scenario for example.

Spouse A starts and grows a government contracting business during the marriage while Spouse B has limited involvement. Spouse A determines that transferring a majority ownership of the business to

Spouse B would allow the business to get preferential status as a woman- or minoriÂty-owned business. The businessâ??s corporate attorney prepares documents transferring 51 percent of the comÂpany from Spouse A to Spouse B.

If the parties later divorce, it is entirely possible the transfer of ownership caused the 51 percent to be Spouse Bâ??s *separate properÂty*, cutting Spouse A out of any of the value of that portion in equitable distribution. To make matters worse, Spouse Aâ??s 49 percent *may still be marital property of which Spouse B could get a share of in the divorce*. Given the number of government contractors in Virginia, this hypothetical may be a very real scenario for some of you.

A third scenario that is not uncommon to see is the impact of transferring assets to an irrevocable trust during a marriage. Because assets owned by an irrevocable trust are not owned by either of the spouses, those assets are not available for division in a divorce. In some cases, irrevocable trusts are drafted in such a way that one spouse is entitled to the

ongoing benefits of the trustsâ?? assets and may even retain control over the assets such that they remain the functional owner. While an income stream flowing from an irrevocable trust may be considered as income for spousal support, the disadvantaged spouse has no access to the value of the assets in equitable distribution.

Consider a scenario where a business started, owned, and operated by one spouse during a marriage is transferred into an irrevocable trust for estate planning purposes. While the trust technically owns the business, the spouse might retain control as the CEO, earn a significant salary, and continue to benefit from its success. But for the transfer of ownership to the trust, the other spouse would expect to be compensated for the value of the company in a divorce. Instead, the business would likely be excluded from the marital estate unless the disadvantaged spouse can successfully attack the validity of the trust. While there is not clear case law on this issue, the uncertainty alone can greatly impact the disadvantaged spouseâ??s position.

Transfers of real estate or business interests are but two of the many scenarios where agreements or other legal documents signed by happily married spouses can have uninÂtended consequences in the event of a divorce. **While it would be impossible to include an exhaustive list of those situations within the confines of this article, the authorsâ?? hope is to raise awareness that *any* agreement between married persons should be given extra scrutiny by the drafter.** The potential for such an agreement to have unintended detrimental consequences for one spouse is real and significant. â??

Endnotes

1 *Smoot v. Smoot*, 233 Va. 435, 357 S.E.2d 728 (1987).

2 9 Virginia Practice Series, Family Law: Theory, Practice, and Forms Â§11:1, p. 622, (Dale M. Cecka et al. eds., 2019) (citing â??Report of the Joint Subcommittee studying Â§ 20-107 of the Code of Virginia to the Governor and the General Assembly of Virginia,â?• House Document No. 21 (January 1982).

3 *See*, e.g. *Sawyer v. Sawyer*, 1 Va. App. 75, 335 S.E.2d 277 (1985); *See also*, e.g., *Bosserman v. Bosserman*, 9 Va. App. 1

4 *Dotson v. Dotson*, No. 0234-03-4, 2004 Va. App. LEXIS 204, at *5 (Ct. App. May 4, 2004).

5 *Id*.

6 *Id*.

7 *Id*.

8 Va. Code Â§ 20-107.3(A)(1).

9 *Beck v. Beck*, Record No. 1082-99-2, 2000 Va. App. LEXIS 658, at *1 (Ct. App. Sep. 19, 2000).

10 Va. Code Â§20-107.3(A)(3)(h).

11 *Utsch v. Utsch*, 266 Va. 124, 126, 581 S.E.2d 507, 507 (2003).

12 *Id*. at 129.

13 *Id*. at 129.

14 *Utsch* at 129.

15 Cr. *Cirrito v. Cirrito*, 44 Va. App. 287, 605 S.E.2d 268 (2004)(Husband titled his separate properties in joint name to protect his personal assets and the Wife did not show donative intent to make a gift).

16 *See Hopkins v. Griffin*, 241 Va. 307, 310, 402 S.E.2d 11 (1991) (holding a contract under seal needed no further evidence of consideration, citing to *Watkins v. Robertson*, 105 Va. 269, 54 S.E. 33 (1906)).

17 Va. Code Â§ 20-147 et seq. Va. Code Â§ 20-155

18 Virginia Code Â§ 20-155.

19 *Willis v. Willis*, 72 Va. App. 743, 768, 853 S.E.2d 536, 548 (2021).

20 *Shenk v. Shenk*, 39 Va. App. 161, 170, 571 S.E.2d 896, 901 (2002).

21 Va. Code Â§ 20-150 (emphasis added).

22 *Shenk* at 177.

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