

DIVORCE YOUR CREDIT

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So, you've divorced that lousy no good person to whom you were once married. You are rid of them once and for all. Right? WRONG.

You may still be obligated on creditor accounts with that despicable Ex-Spouse. Credit cards, mortgages, car loans, and installment accounts may still haunt you EVEN IF THE DIVORCE DECREE says the Ex-Spouse is supposed to pay. How do you protect yourself if the mortgage is not paid? What if Ex-Spouse opens a new account after your divorce with YOUR credit information? What if Ex-Spouse is supposed to pay the car payment but gives the car back for repossession?

I.

DEBTS IN MARRIAGE

1.1 Property possessed by either spouse during the marriage or at dissolution is presumed to be community property. **Texas Family Code §3.003 and 3.201. *Easley v. Easley*, 893 SW2d 87 (Tex. App.—Dallas 1994, no writ); *Hopf v. Hopf*, 841 SW2d 898 (Tex. App. – Houston [14th Dist] 1992, no writ).**

1.2 Debts undertaken during marriage are presumed to be community debts, but this presumption may be rebutted by proof that the lender agreed to look only to the separate property of the borrowing spouse for repayment. ***Cockerham v. Cockerham*, 527 SW2d 162 (Tex. 1975), *Jones v. Jones*, 890 SW2d 471 (Tex. App. -- Corpus Christi 1994, writ denied). The agreement may be implied. See *Dunlap v. Williamson*, 683 SW2d 544 (Tex. App. – Austin 1984) *aff'd in part and rev'd in part on other grounds*, 692 SW2d 373 (Tex. 1985); *Humphrey v. Taylor*, 673 SW2d 954 (Tex. App. – Tyler 1984, no writ).**

Sec. 3.201. SPOUSAL LIABILITY.

(a) A person is personally liable for the acts of the person's spouse only if:

- (1) the spouse acts as an agent for the person; or
- (2) the spouse incurs a debt for necessities as provided by Subchapter F, Chapter 2.

(b) Except as provided by this subchapter, community property is not subject to a liability that arises from an act of a spouse.

(c) A spouse does not act as an agent for the other spouse solely because of the marriage relationship.

Added by Acts 1997, 75th Leg., ch. 7, Sec. 1, eff. April 17, 1997.

Property purchased on credit during a marriage is community property unless there exists an express agreement on the part of the lender to look solely to the separate estate of the purchasing spouse for satisfaction of the indebtedness.

***Glover v. Henry*, 749 SW2d 502 (Tex. App. – Eastland 1988, no writ).**

1.3 This paper is not written to suggest that there is some magic way to avoid liability for enforceable debts of the marriage. It is written to suggest ways to mitigate the long-term effect of the performance (or non-performance) of the Ex-Spouse on your client's credit reporting and on your client's balance sheet.

2.

THE CREDIT REPORTING SYSTEM

2.1 The credit reporting system is dominated by the big 3 Credit Reporting Agencies and their local bureaus. The Fair Credit Reporting Act refers to them as Credit Reporting Agencies or CRA's. The local CRA in Houston is CSC which is affiliated with Equifax. The CRAs utilize information provided by creditors and others with information about the credit performance of consumers. These creditors are referred to as "Furnishers" (of information).

2.2 While the technological advances of the last decade may not have dramatically altered the average law office they have dramatically affected the ability of CRAs to store, transport, sort, share, and analyze credit data. This has led to new and aggressive uses for credit information beyond a basic local credit report.

2.3 The most aggressive use of this information is the credit score. Fair Isaac Company creates computer programs that calculate credit scores, commonly referred to as FICO (Fair Issac Company) scores. The range is usually 500 to 850 with a higher score indicating a lesser credit risk. The lesser

credit risk should in turn receive better credit terms. Factors that affect credit scores include amount of credit, amount of credit used as a ratio of available credit, payment history, number and type of credit inquiries, income and employment, length of credit history, and amount of credit activity. A more complete explanation can be found at www.myfico.com.

2.4 Fair Isaac provides a basic scoring model to Equifax (FICO), Experian (Empirica) and TransUnion (Beacon). These scores are essentially the same but with subtle nuances based upon criteria selected by the CRA.

2.5 Furnishers can also use unique scoring models from Fair Isaac. For instance, a mortgage company may place greater emphasis on length of credit history and credit to income ratios. An automobile finance company may place a greater weight on prior repossessions and current income levels. Identical scores between scoring models are almost impossible because of the variance of information and the different scoring criteria.

2.6 The use of credit reports has accelerated in the last 3 years. Credit reports are now routinely used for:

1. Housing applications for rental and purchase;
2. Credit applications;
3. Employment applications;
4. Insurance applications and rating systems;
5. Government security clearances; and
6. Review by existing creditors.

The only certainty in this system seems to be that the importance of credit information about an individual will grow in importance.

3.

YOU DIVORCED YOUR EX.

NOW FINISH IT AND DIVORCE YOUR CREDIT.

3.1 This author is not a family law practitioner but offers these suggestions to your family law practice to monitor and maintain the credit health of your client.

3.2 **Client Intake.** Have your client bring a copy of their credit report to an initial conference or early client meeting. If they do not have a copy, get

one. Review the report and have your client verify the listed credit accounts. Be suspicious of any accounts recently opened. Don't overlook the inquiries section for it may tell you that a new account has been opened in your client's name and without your client's consent.

3.3 **Discovery.** Ask for a copy of the Ex Spouse credit report or obtain an authorization to do so. DO NOT REQUEST A CREDIT REPORT ON EX-SPOUSE without permission or authorization. This may be an Impermissible Access claim pursuant to **15 USC 1681b**. See the section below for more information on this.

3.4 **Temporary Orders.** The Temporary Orders should restrict the Ex-Spouse from opening new credit, selling, transferring or encumbering existing assets, or increasing existing debt other than is necessary for the maintenance and support of the family.

3.5 **Divorce Decree.** The decree should divide the debts AND enjoin the Ex-Spouse from applying for or obtaining new credit in the Ex-Spouse's name without written authorization.

4.

SUGGESTED ACTION AFTER THE DIVORCE

4.1 The October 18, 2004 Houston Chronicle Business Section column *State Your Case* asked this question:

Q: My husband and I had several joint credit cards when we got divorced last year but I forgot to cancel them. I just learned he ran up quite a bill on one of them and is not making the payments. Now the credit card company has contacted me and tells me I must pay the bills. Do I have any recourse other than to pay and try to seek reimbursement from him?

The remainder of this paper will discuss ways to deal with this and other all too common post divorce credit problems. Whether a creditor is secured (usually auto or home) or unsecured (credit cards, store accounts, utilities) and whether it is delinquent or current makes a difference in how to respond. The following will address Secured and Unsecured responses.

4.2 In brief summary, here are the steps that should be taken to

Divorce your client's credit.

- a. **Close ALL joint accounts with low or zero balances.** This is probably the biggest area for future problems. That forgotten department store credit card, furniture store account, mail order account, or emergency credit card may be inactive but open. **CLOSE IT.** If necessary, have the client open a new account in the client's name only. This should be done as soon as possible but no later than 90 days after the divorce.
- b. **Obtain a credit report 90 days after the divorce.** Review the report and confirm all accounts and activity. Take immediate action if unknown accounts have appeared or questionable activity has occurred.
- c. **Obtain Duplicate notices for joint credit.** Contact the creditor and request DUPLICATE notices for open joint accounts with balances. Even if Ex-Spouse is ordered to pay the account by the divorce decree, Client may still have an obligation to the creditor. Knowing about the problem early is probably the easiest way to correct it. If the creditor refuses to send additional notices to Client, Client may have created the affirmative defense of equitable estoppel or waiver in a later collection lawsuit by the creditor.
- d. **Make accord and satisfaction offers.** Offer a sum of money in exchange for a release on the debt. See the outline below.
- e. **Communicate with the CRAs.** Let them know about the divorce and any name changes. Aggressively dispute any incorrect items on the credit report. See the outline below.
- f. **Create a plan for dealing with the debt.** Client should set priorities for dealing with all post-divorce debt and follow a disciplined approach to dealing with it. Too often Clients in financial trouble become disoriented when they receive collection calls or dunning letters from creditors. Sticking to a post divorce debt plan can help the client stay on track.

Of course, the effort for the client depends on their credit history, the number and duration of joint credit accounts, age, income potential and a host of other variables. But at least some effort should be placed on this area of growing importance.

5.

UNSECURED CREDIT

5.1 Unsecured credit in the name of both spouses is a quandary. This most often is in the form of a credit card or a store charge card although it could be a small loan with a financial institution. Revolving credit is perhaps the most difficult to analyze and rectify.

5.2 **The VISA card example.** Assume that your client and Ex-Spouse had a VISA card with a particular creditor that had a balance at divorce of \$10,000.00. You have negotiated the allocation of that debt to the Ex-Spouse.

5.3 The creditor will probably not remove your client's name from the account unless it is paid in full. The community estate does not have (or does not want to) close the account. If the account is current it will probably not suspend charge privileges so that the balance can continue and possibly increase. What if the Ex-Spouse keeps the account open, makes new charges, and pays the new charges in full along with the interest each month for three years? What is your client's obligation? What can your client do to minimize or extinguish the obligation?

5.4 **Common law Accord and Satisfaction.** The defense of accord and satisfaction rests on the formation of a new contract, express or implied in which the parties agreed to discharge a preexisting obligation in a manner otherwise than was originally agreed. *Jenkins v Henry C. Beck Company*, 449 SW2d 454, 455 (Tex. 1969); *Kerrville HRH v. City of Kerrville*, 803 SW2d 377, 388 (Tex. App. – San Antonio 1990, den); The accord is the agreement between the parties and the satisfaction is the execution or performance of that agreement. An accord and satisfaction constitutes a bar to any action on the original obligation. *Harris v Rowe*, 593 SW2d 303, 306 (Tex. 1979) (*tender of satisfaction is on condition that acceptance will discharge underlying obligation*); *Houchins v. Scheltz*, 590 SW2d 745, 751 (Tex. Civ. App. – Houston [14th District] 1979, no writ) (*agreement to convey realty interest in satisfaction of claim for legal fees plus execution of warranty deed conveying promised interest constituted accord and satisfaction that barred claim for fees*). This type of accord and satisfaction is applicable for creditors that do not fit the definition for the statutory Accord and Satisfaction.

5.5 **Statutory Accord and Satisfaction.** For most credit card lenders, auto finance companies, mortgage companies and other large lenders, the applicable law is **Tex. Bus. & Com. Code §3.311** (hereafter referred to as "3.311") which states:

§ 3.311. Accord and Satisfaction by Use of Instrument

- (a) Subsections (b)-(d) apply if a person against whom a claim is asserted proves that:
- (1) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim;
 - (2) the amount of the claim was unliquidated or subject to a bona fide dispute; and
 - (3) the claimant obtained payment of the instrument.
- (b) Unless Subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.
- (c) Subject to Subsection (d), a claim is not discharged under Subsection (b) if either of the following applies:
- (1) The claimant, if an organization, proves that:
 - (A) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place; and
 - (B) the instrument or accompanying communication was not received by that designated person, office, or place.
 - (2) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This subdivision does not apply if the claimant is an organization that sent a statement complying with Subdivision (1)(A).
- (d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

Texas Business and Commerce Code §3.311.

The most difficult part of this statute is to obtain the disputed payment mailing address that will almost always be different than the address on the monthly statement payment coupon. This may require some research on the Internet, phone calls to the creditor or a review of the account statements and agreements to find such an address. Even though this may be a frustrating search, keep looking and DO NOT send the correspondence to the payment coupon address.

5.6 Good Faith and Payment: 3.311(a)(1) and (3). The Client should write a letter and send a qualified good faith payment. The letter should explain why the amount of the payment is in good faith and tender the payment in the FULL satisfaction of your client's obligation for the debt. Do not offer a token amount in the hope that it will be cashed. Emphasize the facts about the account and your client's benefit from the charges or lack thereof. Do not complain about the Ex-Spouse's character or the non-payment or late payment of child support or other non-related obligations. If the creditor cashes the check and "obtained payment on the instrument" you have an accord and satisfaction. **Section 3.311(a)(3).**

5.7 Bonafide Dispute: 3.311(a)(2). A bonafide dispute must exist as to the account. Some suggested bonafide disputes: 1) the account balances were incurred exclusively by the Ex-Spouse, 2) the account was opened by the Ex-Spouse; 3) the charges on the account were not used for the necessary maintenance of the community estate; 4) client never consented to the account; and 5) the balance was incurred primarily by the Ex-Spouse during the pendency or immediately after the divorce.

5.8 Conspicuous Statement: 3.311(b). The tender of the debt must be done in a conspicuous fashion pursuant to 3.311(b). In addition to a restrictive endorsement on the payment method, you should attach a letter to explain the dispute and a directive to return the check if it is not accepted as payment in full of the disputed debt. If the creditor cashes the check in spite of these obvious warnings there may be an accord and satisfaction.

5.9 Affirmative Defense: Disputed Payment Location Notice: 3.311(c). Section 3.311(c)(1)(A) states that a claimant is to send a "*conspicuous statement to the person against whom the claim is asserted that communications*

concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place.” Do not send the statement to a payment processing center.

5.10 **Estoppel: Fair Credit Billing Act.** Another possible remedy is the Fair Credit Billing Act, 15 U.S.C. § 1666. (FCBA). The FCBA requires the merchant and/or credit card company to investigate disputes in a prompt manner and to notify the customer if the dispute is decided unfavorably to the customer:

§ 1666. Correction of billing errors

- (a) **Written notice by obligor to creditor; time for and contents of notice; procedure upon receipt of notice by creditor;**
- (b) **Billing error;**
- (c) **Action by creditor to collect amount or any part thereof regarded by obligor to be a billing error;**
- (d) **Restricting or closing by a creditor of account regarded by obligor to contain a billing error;**
- (e) **Effect of noncompliance with requirements by creditor.**

15 U.S.C. § 1666

If your client suspects that the soon to be Ex-Spouse is using credit cards improvidently or with the intent of impacting the divorce settlement, the client may complain about the credit card. While this may not cause the credit charge to be reversed, it may strengthen your client’s case at a later time that the charges did not properly belong to the client. The client can also use this if it has obtained duplicate statements and new charges are being made to the account from which client receives no benefit.

5.11 **Letter to Creditor.** See Exhibit A for both short and long forms of letters to an unsecured creditor which include accord and satisfaction language.

6.

SECURED DEBT

6.1 Secured Debt must be approached differently than Unsecured Debt. Secured Debt is usually a joint obligation of the community estate and is most often for the homestead or a vehicle. There is less risk of default in such a

debt because (hopefully) there is equity or necessity. After all, where will Ex-Spouse live or what will Ex-Spouse drive?

6.2 **Title, Debt and Possession.** These three are often separated in a post Divorce setting. For example, Client may live in the house (possession); Ex-Spouse may be required to pay the installments pursuant to the Divorce Decree (Debt); Client may own the home (Title); and Ex-Spouse may retain an interest to be paid when the home is sold.

6.3 **Notice of default.** In order to cure a default or avoid a foreclosure or repossession, Client needs to know about it. In the example above how will your client learn about a missed payment if one occurs? The Ex-Spouse may, and probably will, have the payment notices sent to his address. Client should request duplicate notices be sent to Client. An alternative is to obtain access to account information through the internet. The creditor may not cooperate so a provision may need to be written into the divorce decree to provide this information for the pendency of the joint debt.

6.4 **Security interest.** In the example above a dangerous condition may be created for Ex-Spouse. Ex-Spouse may be obligated to pay installments pursuant to certain behavior by Client. If Client does not perform what can he do? Ex-Spouse may have to utilize some creditor like remedies to enforce his position with Client.

6.5 **Letter to Creditor.** See Exhibit B as a form letter to a secured creditor.

7.

FAIR CREDIT REPORTING ACT

7.1 The Fair Credit Reporting Act 15 USC 1681, et.seq. (FCRA) regulates the consumer credit reporting industry. One of the fundamentals of the FCRA is that the information in the files of the CRAs is assumed to be correct. This presumption of accuracy can be very exasperating because most consumers do not learn of a problem until they are in the middle of a credit application. In fact, they may have received notices of rate increases or

cancellations on credit cards and other debts and never linked it to information on their credit report.

7.2 The FCRA is a technical law which is dominated by the big three CRAs and their business practices. While some of the principals of law may be fairly simple, the learning curve is steep because it requires a significant immersion into the business practices of the CRAs and furnishers. An understanding of the computer programs, the sharing of large amounts of electronic data, and the motivations of the consumer data industry are almost as important as the FCRA itself. Additionally, each CRA utilizes a single national law firm that handles almost all of their consumer complaint litigation.

7.3 The remaining section is not written as any treatise on the FCRA or any component of it. Nor is it suggested to be a comprehensive list of all remedies. The following section is a list of the most common types of FCRA complaints.

7.4 **Disputed Accuracy.** The FCRA operates on the presumption that the information in the CRA files is accurate. That presumption may be rebutted by a consumer dispute. **15 USC 1681i.** Upon a complaint, the CRA must investigate the complaint and cannot charge a fee to do so. Within 30 days the CRA shall either forward the complaint and any additional information to the furnisher. After a response from the furnisher the CRA must:

- a) confirm the information as reported,
- b) revise its report as necessary, or
- c) delete the information entirely.

If the CRA retains the information as submitted by the furnisher, it must note that the consumer disputes the account. A copy of a dispute letter to a CRA is attached to this paper as Exhibit C.

7.5 **Mixed Credit Files.** Mixed File Cases involve the blending of the credit files of two persons. This frequently happens for similar sounding names and can be a real problem for the affected person. Imagine the chance of a mixed credit file if your name is John Jones or Juan Garza? Or if you are a Jr., Sr., or the Third? The CRA's often resist complaints in this area because of the difficulty of the correction. Simply put, the computer programs are not programmed to make

these distinctions. Accordingly, your client may be extremely frustrated and will probably need the help of an FCRA practitioner.

7.6 Identity Theft and Fraud. These are similar to a Mixed Credit File situation except that someone has obtained your client's social security number, driver's license number or other significant information. Even if the pattern of charges is obvious, the CRA's often require tedious documentation of the claim. Accordingly, your client may be extremely frustrated and will probably need the help of an FCRA practitioner.

7.7 Impermissible access. The FCRA limits the permissible purposes for the use of a credit report. **15 USC 1681b.** Reports in litigation are not allowed absent a debtor-creditor or other allowable relationship. A divorce between spouses is not one of those permissible purposes. *Chiappeta v. Telefson* 1985 WL 1951 (N.D. Ill. 1985). *Rodgers v. McCullough*, 296 F. Supp. 2d 895 (W.D. Tenn. 2003). However, an award of alimony may create a creditor relationship which allows the creditor spouse to obtain the credit report. *Chiappeta v. Telefson* 1985 WL 1951 (N.D. Ill. 1985).

8.

Summary

8.1 For most family law practitioners a divorce property settlement consists of child support, homestead, retirement accounts, and debt division. Unfortunately, the credit impact of these decisions is rarely considered. Post divorce credit planning is even more rare. Consider your client's future credit in planning your next divorce proceeding.

APPENDIX

Exhibit A: Unsecured Credit Letter.

Exhibit B: Secured Credit Letter.

Exhibit C: Credit Dispute Letter.

Exhibit D: Post Divorce Credit Letter.

Your FICO Score	Your interest rate	Your monthly payment
720-850	5.56%	\$857
700-719	5.69%	\$869
675-699	6.22%	\$921
620-674	7.37%	\$1,038
560-619	8.53%	\$1,157
500-559	9.29%	\$1,238