



TRUST AND ESTATE CONSIDERATIONS THROUGHOUT THE DIVORCE PROCESS

Sean Saari, CPA, ABV, CVA, MBA

Barry A. Fischman, CPA, MST

Robert A. Ranallo, CPA, ABV, JD, CVA, CFF



MARCUM
ACCOUNTANTS ▲ ADVISORS
marcumllp.com



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Today's Speakers

MODERATOR



**Robert A.
Ranallo**

Partner
Marcum LLP

PANELISTS



**Sean
Saari**

Partner
Marcum LLP



**Barry A.
Fischman**

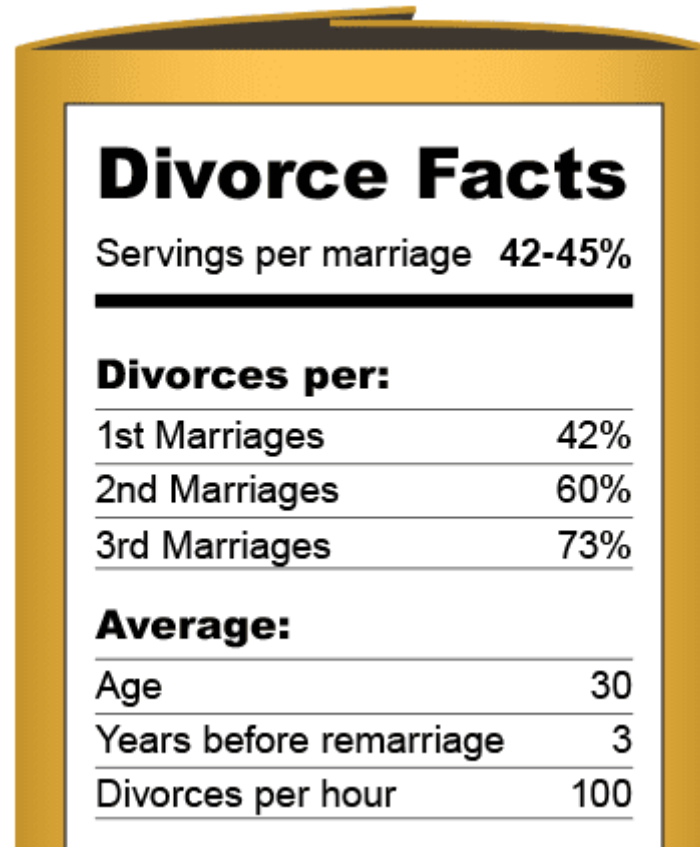
Partner
Marcum LLP



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Divorce – Almost More Common Than Not



Divorce Facts

Servings per marriage 42-45%

Divorces per:

1st Marriages	42%
2nd Marriages	60%
3rd Marriages	73%

Average:

Age	30
Years before remarriage	3
Divorces per hour	100

Source: McKinley Irvine Family Law



Broad Considerations

- ▶ Estate planning during and after a divorce
 - ▶ What should be considered?

- ▶ What happens during and after the process of separation and divorce?
 - ▶ State law considers you legally married until the final divorce ending the marriage is signed by the judge



Review Existing Estate and Trust Documents

- ▶ Wills
- ▶ Health Care Proxy
- ▶ Power of Attorney
- ▶ Insurance trusts and existing policies
- ▶ Existing trusts
 - ▶ Revocable Trusts
 - ▶ Irrevocable Trusts
- ▶ Guardianship for minor children
- ▶ Consider trusts for minor children



Review of Prior Gift Tax Filings

- ▶ Look at both federal and state gift tax returns
- ▶ Was there gift splitting?
- ▶ What is the amount of exemption remaining for each spouse?
- ▶ Were there completed gifts?
 - ▶ Running of the statute of limitations
 - ▶ Was there adequate reporting on the gift tax returns including valuations if necessary?
- ▶ Were premiums paid for life insurance policies owned by irrevocable trusts reported as gifts?



What Can and Cannot Be Changed?

- ▶ State law
 - ▶ Automatic restraining order on assets
- ▶ Beneficiary designations
- ▶ Trust Amendments



Reaching the Desired Outcome

- ▶ What can be done to avoid unintended results?

- ▶ Alimony trusts
 - ▶ Can allow paying spouse to avoid income tax liability on earnings from assets used to pay alimony

- ▶ Impact of prenuptial / postnuptial agreements

- ▶ Coordination of divorce counsel and estate counsel
 - ▶ Important to involve all of a client's advisors when dealing with divorces involving high net worth individuals – there are a lot of moving, yet interconnected, parts



Forensic Investigation of Trusts

- ▶ Is the trust an alter-ego of the grantor or beneficiary?
 - ▶ For example, spouse sets up and funds a trust for benefit of children but uses the trust assets to purchase new residence or pay for personal expenses

- ▶ When can a trust be pulled back into the marital estate?



Estate Planning as a Tool to Settle Cases

- ▶ Significant flexibility to use estate planning as a tool in settlement vs. going to trial
- ▶ Can be used to bridge gaps in disputes over asset values / property division
 - ▶ Begin transferring assets to trusts for benefit of children?
 - ▶ Spouses must still be left with enough assets to live off of
- ▶ Allows for utilization of discounts for lack of control / marketability if structured appropriately



Long-Term Planning for Children

- ▶ Not trying to be pessimistic, just realistic
- ▶ Consider putting gifted assets into trusts to make separate property claims / tracing easier for the children down the road
 - ▶ Consider naming multiple beneficiaries of a single trust in order to demonstrate that the trust assets are intended to benefit more than just a single individual



Separate Property Tracing

- ▶ Assets acquired via inheritance or gift are typically considered separate property
 - ▶ Separate property also typically includes assets owned prior to the marriage
 - ▶ Division of assets to be “equitable,” not necessarily “equal”
- ▶ Tracing of separate property is likely necessary to support separate property claim
 - ▶ Particularly if inherited / gifted assets were commingled with marital assets rather than kept in a separate account / trust
 - ▶ Commingling doesn’t prohibit a separate property claim, but it makes the tracing more complicated



Separate Property Tracing

- ▶ Spouse making the separate property claim has the burden of proof, which is often satisfied via asset tracing
- ▶ Supportability of tracing often depends on the existence of supporting documents that may be needed for many historical years



Separate Property Tracing

- ▶ Separate property tracing documentation
 - ▶ Bank / investment account statements
 - ▶ Cancelled checks
 - ▶ Gift / estate tax returns
 - ▶ Assignment / transfer documents
 - ▶ Tax returns / K-1s
 - ▶ Real property ownership records



Separate Property Tracing

- ▶ Common Tracing Methods

- ▶ Prorata

- ▶ Identifies deposits, withdrawals, and appreciation/depreciation as either:

- ▶ Marital

- ▶ Separate

- ▶ Mixed

- ▶ Lowest Intermediate Balance / Marital Out First

- ▶ Assumes marital funds used before separate funds

- ▶ Clearinghouse / Identical Sum Inference

- ▶ Equivalent (or nearly equivalent) in time and amount



Post-Divorce Considerations

- ▶ Revisit the estate plan once the divorce is finalized
 - ▶ Don't want to unintentionally leave former spouse as a beneficiary on accounts, insurance policies, etc.

Contact Information



**Robert A. Ranallo, CPA,
ABV, JD, CVA, CFF**

6685 Beta Drive
Mayfield Village, OH 44143

P: (440) 459-5860

Bob.Ranallo@marcumllp.com



Sean Saari, CPA, ABV, CVA, MBA

6685 Beta Drive
Mayfield Village, OH 44143

P: (440) 459-5865
C: (440) 479-4593

Sean.Saari@marcumllp.com



Barry A. Fischman, CPA, MST

555 Long Wharf Drive, 8th Floor
New Haven, CT 06511

P: (203) 781-9630
C: (203) 627-6411

Barry.Fischman@marcumllp.com



Thank You

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