SEVEN DEADLY SINS:
HOW DIVORCES END UP ONE-SIDED

CHATTANOOGA TAX PRACTITIONERS

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Divorce Failures – Missed Opportunities and Dark Corners

The "Deadly 7 Sins" in divorce:

1. Failure to Identify Assets
2. Failure to Classify Assets
3. Failure to Value Assets
4. Failure to Analyze Lifestyle
5. Failure to Negotiate from a Position of Strength
6. Failure to Understand Pensions
7. Failure to Consider Tax Consequences

> "Today you must excel at the filtering the world. You must be able to cut through the clutter and zero in on the emotions or facts or events that really matter. You must learn to distinguish between what is merely important and what is imperative. You must learn to place less value on all that you can remember and more on those few things that you must never forget.
>
> "But you must also learn the discipline of applying yourself with laser-like precision. . . . Success, whether as a manager, a leader, or individual performer, does not come to those aspire to well-roundedness, breadth, and balance. The reverse is true. Success comes most readily to those reject balance, who instead pursue strategies that are intentionally imbalanced. This focus, this willingness to apply disproportionate pressure in a few selected areas of your working life, won't leave you brittle and narrow. Counter-intuitively, this kind of lopsided focus actually increases your capacity and fuels your resilience."
>
> Marcus Buckingham
> The One Thing You Need to Know

1. Failure to Identify Assets

Property and Debt Division – Tennessee, like most states, is an "equitable distribution" state. Statutes list factors for courts to consider when dividing marital property.

> (c) In making equitable division of marital property, the court shall consider all relevant factors including:
>
> (1) The duration of the marriage;

(2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;

(3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;

(4) The relative ability of each party for future acquisitions of capital assets and income;

(5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;

(6) The value of the separate property of each party;

(7) The estate of each party at the time of the marriage;

(8) The economic circumstances of each party at the time the division of property is to become effective;

(9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;

(10) The amount of social security benefits available to each spouse; and

(11) Such other factors as are necessary to consider the equities between the parties.

Discovery and Identification – sources of information include:

1. Written discovery – Interrogatories, RPD's;
2. Depositions;
3. Subpoenas;
4. Quicken and other programs on personal computer;
5. Personal financial statements filed with banks as part of mortgage or loan applications;
6. Tax returns – 1040, 1120, W-2, K-1, 1099-DIV, 1099-INT, reported capital gains and losses; and
7. County assessor, county register, and secretary of state.

Dissipated assets may be added back to marital estate for determination of equitable distribution.

2. Failure to Classify Assets

Tennessee Law: Classification of Separate vs. Marital Property.

1. All property acquired during a marriage will be presumed marital property unless acquired by inheritance or gift to one spouse exclusively.
2. Appreciation of separate property can be marital or separate, but may maintain its separate status unless spouse can prove substantial contribution to appreciation or preservation. By statute this can be proven if spouse performs role as homemaker, parent, or family financial manager.
3. Appreciation of marital property is almost always marital asset.
4. Separate property may also become marital property by creating a rebuttable presumption of a gift to the marital estate by:
   a. Commingling – "inextricably mingled" and not segregated;
   b. Transmutation -- treated in such a way as to give evidence of an intention that it becomes marital property. One method of causing transmutation is to purchase property with separate funds but to take title in joint tenancy. This may also be done by placing separate property in the names of both spouses.

Non-owner Spouse Paying Taxes on Appreciation of Separate Property Is Held Substantial Contribution to Preservation and Appreciation.

"[E]arly in the marriage, Wife inherited an aggregate amount of $600,000 after the deaths of her father, grandfather, and sister, and this money was placed in a PaineWebber investment account. Husband's name never appeared on the account and, rather than using the dividends or capital gains for day-to-day expenses, the income from such account was reinvested each year back into the account. . . . Husband did pay the taxes on the dividends and capital gains the investment account generated over the course of the marriage from his employment income. Such account generated income, ranging from approximately $18,000 to $36,000, each year from 1992 to 2002. At the time of trial, the PaineWebber account held assets valuing $706,881.86."[1]

"Wife admits that all income generated by the account was always reinvested back into the account to allow it to grow. This trend never changed for a period of almost ten years. Not only did such actions constitute preserving the separate asset, allowing it to grow rather than using funds in the account to pay taxes, but, by utilizing marital funds to pay the taxes rather than funds in the account itself, such contributions allowed the PaineWebber account to appreciate more than it otherwise would have, if the funds in the account had been used to pay the income taxes. Finally, given the amount of income generated by the account and the taxes the parties had to pay on such account, such contribution is real, significant, and more than merely indirect. Therefore, such contribution is substantial under these facts. We also note that Husband's income paid the family's expenses and Wife was financially dependent upon Husband. Such indirect contributions have been noted by Tennessee courts in finding a party substantially contributed to the preservation and appreciation of the increase in value of a separate asset."[2]

[1] *Schuett v. Schuett*, W2003-00337-COA-R3-CV, 2004 WL 689917, *1 (Tenn. Ct. App. March 31, 2004).
[2] *Schuett v. Schuett*, W2003-00337-COA-R3-CV, 2004 WL 689917, *3 (Tenn. Ct. App. March 31, 2004).

The Type of Asset Matters: Appreciation of Residence. A Wife's efforts of cleaning and maintaining a house can be enough to find a substantial contribution to the marital residence even if appreciation in value is due to market forces.[3]

Separate Property

In Tennessee, "separate property" means:

(A) All real and personal property owned by a spouse before marriage, including, but not limited to, assets held in individual retirement accounts (IRAs) . . . ;

(B) Property acquired in exchange for property acquired before the marriage;

(C) Income from and appreciation of property owned by a spouse before marriage except when characterized as marital property under subdivision (b)(1);

(D) Property acquired by a spouse at any time by gift, bequest, devise or descent;

(E) Pain and suffering awards, victim of crime compensation awards, future medical expenses, and future lost wages; and

(F) Property acquired by a spouse after an order of legal separation where the court has made a final disposition of property.

T.C.A. Section 36-4-121(b)(2).

T.C.A. Section 36-4-121(b)(1)(B) states:

(i) "Marital property" includes income from, and any increase in the value during the marriage of, property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation;

(ii) "Marital property" includes the value of vested and unvested pension benefits, vested and unvested stock option rights, retirement, and other fringe benefit rights accrued as a result of employment during the marriage;

(iii) The account balance, accrued benefit, or other value of vested and unvested pension benefits, vested and unvested stock option rights, retirement, and other fringe benefits accrued as a result of employment prior to the marriage, together with the appreciation of the value, shall be "separate property." In determining appreciation for purposes of this subdivision (b)(1)(B)(iii), **the court shall utilize any reasonable method of accounting to attribute postmarital appreciation to the value of the premarital benefits**, even though contributions have been made to the account or accounts during the marriage, and even though the contributions have appreciated in value during the marriage; provided, however, the contributions made during the marriage, if

[3] *Silvey v. Silvey*, E2003-00586-COA-R3-CV, 2004 WL 508481, *6 (Tenn. Ct. App. March 16, 2004). "Under the facts in *Harrison* [*Harrison v. Harrison*, 912 S.W.2d 124 (Tenn.1995)] the property subject to classification was non-residential acreage and both the husband and wife acknowledged that the sole cause of the property's appreciation in value was the construction of an interstate highway in the area." *Id.* at *5.

made as a result of employment during the marriage and the appreciation attributable to these contributions, would be "marital property." When determining appreciation pursuant to this subdivision (b)(1)(B)(iii), the concepts of commingling and transmutation shall not apply;

(iv) Any withdrawals from assets described in subdivision (b)(1)(B)(iii) used to acquire separate assets of the employee spouse shall be deemed to have come from the separate portion of the account, up to the total of the separate portion. Any withdrawals from assets described in subdivision (b)(1)(B)(iii) used to acquire marital assets shall be deemed to have come from the marital portion of the account, up to the total of the marital portion;

[Emphasis added.]

T.C.A. Section 36-4-121(b)(1)(C) states: " 'Marital property' includes recovery in personal injury, workers' compensation, social security disability actions, and other similar actions for the following: wages lost during the marriage, reimbursement for medical bills incurred and paid with marital property, and property damage to marital property."

T.C.A. Section 36-4-121(b)(1)(D) states: "As used in this subsection, '**substantial contribution**' may include, but not be limited to, the direct or indirect contribution of a spouse as homemaker, wage earner, parent or family financial manager, together with such other factors as the court having jurisdiction thereof may determine." (Emphasis added.)

Separate property may become marital property if both spouses made a substantial contribution to its appreciation or preservation.

Separate property issues become more complicated when the competing spouse claims to have contributed to the separate property's appreciation or preservation. For example, if the Wife owned the house prior to the marriage and the Husband helped build and pay for an addition to the house and helped make mortgage payments, arguably the house was "transmuted" into marital property. Another common circumstance arises when the Husband received an inheritance and put the money into an account titled in both parties' names — the law may consider that the Husband gifted the money to the marital estate unless there is convincing evidence that both parties intended for the property to maintain its separate property status.

3. Failure to Value Assets

Most common failures include:

1. Businesses
2. Intellectual property – *i.e.*, right to use Jack Ryan in a novel
3. Goodwill
4. Receivables
5. Work in progress – contracts, cases
6. Stock options
7. Pensions
8. Collections

9. Personal property
10. Real estate

Tennessee accepts valuation as of date as near as possible to divorce, not date of separation.

1. Parties may express opinion about value of owned assets
2. For complex assets, expert testimony strongly recommended
3. Worry about built in capital gains tax liability
   a. Tax impact considered at trial only if likely to be liquidated soon
   b. For settlement purposes, better practice is to advise client to consider capital gains even if asset is not to be liquidated soon

Day v. Day - A Lesson for Clients and Lawyers

Lesson teaching importance of:

1. Completing discovery;
2. Using knowledgeable forensic accounting experts; and
3. Knowing business valuation law.

Kimberly Beard DAY v. John Arthur DAY
Court of Appeals of Tennessee.
Day v. Day, 2002 WL 13036, (Tenn. Ct. App., Jan. 4, 2002)
Appeal from the Chancery Court for Williamson County

OPINION

I.

The parties were divorced by judgment of absolute divorce entered April 20, 1999. The judgment incorporates their detailed 14-page marital dissolution agreement ("the MDA"). . . . It was filed with the trial court on April 20, 1999, the date on which the parties' judgment was entered. Both parties were represented by counsel. . . .

II.

On April 17, 2000, three days shy of the one-year anniversary of the entry of the parties' judgment, Wife filed a motion styled "Motion for Relief from Judgment." In her motion, she avers that the MDA and the judgment "contain provisions [that] are based on the mistake or inadvertence of the parties or the excusable neglect of her attorney." . . .

> Wife's motion identifies a number of alleged "mistakes" in the MDA:
> 1. The first ground of the motion correctly quotes the MDA as providing that "[i]t is the intent of the parties ... to divide the[ir] property ... in an equitable fashion, with [Wife] to receive marital property of slightly greater value than [Husband]." The motion's first ground for relief alleges, in general terms, that the division was not equitable and that she did not receive property of "slightly greater value" than that awarded to Husband. . . .
> 4. Wife alleges that the MDA "fails to take into account" a fee and expense award of approximately $950,000 granted to Husband's law firm in a class action suit. It is alleged that the fee was approved by the court in which the action was pending three days after the entry of the parties' judgment. . . .
> 8. Wife charges that Husband's interest in his law firm was incorrectly valued at $22,500. She claims that this value fails to include the "cash assets" of the firm, "nor was it based on

any actual appraisal of the assets of the law firm." . . .

V.

At the outset, it is important to note what this case is *not* about. There is no allegation--and not a scintilla of proof before us--of fraud on the part of Husband. The remarks of [current] Wife's counsel at a hearing on January 3, 2001, clearly delineate Wife's position with respect to this:

> Your Honor, we have painstakingly shown to the Court multiple mistakes, inadvertence, not rising to the level of fraud by any means. I will repeat again as I have before, we are not alleging that Mr. Day has committed fraud. In fact, I don't deny that it appeared that they tried to spoon-feed [Wife's former attorney who negotiated the MDA] with information and he just ignored it. But the fact is that mistakes were made clearly in reviewing the marital dissolution agreement. . . .

. . . . Assuming, without deciding, that Wife was mistaken in the particulars outlined in her motion, none of these mistakes can be traced to inappropriate conduct on the part of Husband. In addition, there is nothing in the record to support her contention that the subject mistakes were those "of the parties," *i.e.,* both of the parties. Furthermore, there is nothing before us demonstrating that Wife could not have ascertained what she alleges are the true facts simply by pursuing diligent discovery. On the contrary, there is substantial evidence in the record that all of the "mistakes" alleged by Wife could have been rectified by discovery permitted under the Rules of Civil Procedure. She argues that she relied on her attorney to her detriment; maybe so, but such is not a basis for Rule 60.02(1) relief. Certainly, this does not amount to a showing that she was justified in failing to avoid these "mistakes." . . . We also find no evidence in the record of "excusable neglect"; carelessness does not constitute such neglect. . . . Husband is entitled to summary judgment as to the remaining allegations of Wife's Rule 60.02(1) motion.

4. Failure to Analyze Lifestyle

Tennessee Alimony

1. Type – One of Four
   a. Transitional Alimony
   b. Rehabilitative Alimony
   c. Alimony *In Futuro* (also called “Periodic”), and/or
   d. Alimony *In Solido* (also called “Lump Sum”)

2. How much?
   a. Determine need and ability to pay
   b. Determination of income
   c. Reduce income by reasonable expenses

3. How long?
   a. Length of marriage very important
   b. Determine if supported spouse can be rehabilitated and if so, how soon

4. Modifiability – statutory provisions apply if not modified by agreement

5. Termination
   a. Death of Payor or Payee

b. Cohabitation with Third Party
c. Other

6. Taxation – deductible/includable or non-deductible/non-includable

7. Bankruptcy – new tighter laws in 2005
   a. Federal bankruptcy law controls state divorce law
   b. Some limited protection may be added
   c. In some situations, alimony can be at risk for discharge but less under new law

8. Security (Life Insurance)

Alimony – How Much and How Long?

Determining the amount of and length of an alimony obligation is a very important negotiation. Other than the applicable statutory factors, the family law attorney will want to know:

- Does the client already have an opinion about the amount and length of time he/she ultimately will agree upon paying or receiving?

- Does the recipient spouse claim to need to complete an undergraduate or graduate degree?

- Is there a significant disparity in income?

- How much money does the supporting spouse have left over each month after normal routine bills, child support, college savings/tuition, debt obligations, and a reasonably conservative lifestyle? This is called the supporting spouse's "ability to pay."

- What is the recipient spouse's monthly shortfall after child support, normal routine bills, normal and routine children's extra expenses not covered by child support, debt obligation, and a reasonably conservative lifestyle? This is called the recipient spouse's "reasonable need."

- Does either spouse have a particularly strong emotional response to the topic?

- Has there been a set track record of support? Was there a temporary support award? Was the amount enough/too much?

- Will the recipient spouse likely receive greater than 50%-55% of the marital estate? (If so, the supporting spouse may claim that a disproportionate property division includes a pre-paid portion of alimony.)

- How does the judge typically view this particular case?

- Is there a "spotted cow" appellate case that will impact negotiations? ("Spotted cow" describes an appellate case discussing alimony with very similar facts, like length of marriage, earnings ranges of both spouses, and education.)

- What is the negotiating skill of opposing counsel?

Calculating the supporting spouse's ability to pay and calculating the recipient spouse's reasonable need are two of the most important tasks in this process. Note that the Sworn Statement of Income and Expenses completed by the client is one of the first schedules to analyze. If the client has one, most family lawyers value input from the financial advisor.

A forensic accountant can also be a great benefit. The forensic accountant (or client's financial advisor) can map out the future based on some reasonable financial expectations and projections. For example, if the client is completing a master's degree in teaching, the client's future income can be predictable. Financial consultants can also predict future mortgage expenses, household expenses, and tax expenses decades in the future. Whether representing the supporting spouse or recipient spouse, the data can be entered into a spreadsheet (or financial advisor's program), and determine the client's ability to pay or reasonable need.

5. Failure to Negotiate from a Position of Strength

Settlement Perspectives – How is a "good deal" determined?

1. What is smart? Compare to likely outcome at trial.
   a. Most commonly discussed criteria
   b. Does not match with divorcing party's expectation

2. What is comfortable for the client?
   a. Completely subjective
   b. Perceived "fair result"

3. What is the very best "deal" possible?
   a. Every minute of parenting time
   b. Every penny

Typical Negotiating Leverage Categories:

1. **Actual Leverage** – A concrete and definite advantage in the event the matter is tried. Examples include:

   - Long-term marriage over 20 years for alimony;
   - Wrongdoing already found by judge in contempt hearing;
   - "Smoking gun" e-mail;
   - Actual admission seriously eroding opposing party's credibility on an important issue in the case.

2. **Perceived Leverage** – A less definite or emotional advantage likely to be perceived by the parties as an important matter even though the court may not consider it as strongly. Examples include recent decision to be more involved with the children's lives and post-separation adultery without children.

3. **Procedural Leverage** – Advantage due to complying with procedural court rulings when the other side has not complied. For example, the opposing party being late on

court-imposed scheduling order deadlines for discovery or deposition. Even though the court may allow an extension, there are generally only so many opportunities for excuses and exceptions.

4. **Status Quo Leverage** – By keeping the status quo, the parties believe one party is unfairly benefiting from the simple passage of time. For example, if one party is supporting the other party by way of a consent agreement or a court order, if the amount is larger than the award will likely be at trial, the paying party will perceive that the other party is benefiting from the status quo. This is one of the most misunderstood forms of leverage and can be devastating to one party or the other.

Common Negotiation Methodology:

1. Driven by one or more attorneys
   a. Incremental approach – common
   b. Entrench – too common

2. Machiavellian Negotiating Techniques
   a. Driven by clients
   b. Mediation oriented

Machiavellian Negotiating Tactics

The goal of unfair/unreasonable tactics is to destabilize emotions of opponent. Depending on their severity, these unfair or unreasonable tactics do not mean they rise to the level of being unethical or in "bad faith." The person facing these tactics must be able to identify them and understand them for what they are in order to respond effectively.

- Extreme claims followed by small, slow concessions.
- Take-it-or-leave-it offers.
- Personal insults and attacks.
- Exaggerating or misrepresenting facts during negotiating. Some posturing during negotiations is normal and to be expected. Aggressive posturing is unprofessional and counter-productive.
- Asking the last person to make an offer to bid against himself.
- Time-wasting settlement conferences.
- Complaining about inability to pay.
- Committing to a course of action that reduces options and binds the other party's hands.
- Mixed signals with "red herrings." Red herrings are small issues that opposing party claims are extremely important but actually mean very little.
- "Backing up." After obtaining a concession, reversing an earlier agreement or changing a previously negotiated amount. Unfortunately, this is common. Lawyers who regularly "back up" quickly obtain a reputation for this tactic. It makes their future negotiations much more difficult than they need to be because of the resulting lack of trust or professional respect. A good defense to the "backing up" tactic is to demand "global settlement" exchanges. Demanding a "global settlement" proposal is not a perfect solution.
- Playing "flinch." Piling demands on until the other side reaches the breaking point. This may be manifested in the large number of changes to previous positions, inventing new issues not previously mentioned, or "circling back around" to address points previously settled.

- Threats: drastic consequences promised or predicted if one's demands are not met. This does not include promising depositions or protracted litigation. That is always a factor whether or not it is expressed.
- "Belittling" the options and choices available to the other side. There is a subtle but important difference between belittling and poor-mouthing.
- Unprofessional conduct. Small infraction - taking cell phone calls during meetings. Large infraction - belittling the other lawyer's experience or understanding of the law.
- Good cop/bad cop tactics. This is very common.
- Change styles or stated goals in the middle of negotiations.

Alimony Negotiation Terms and Definitions

1. Breaking point – a predetermined number beyond which a client will or should not settle and head to court. Example of exchange from attorney and client: "Let me repeat back to you what you are telling me. You understand that we could receive less than what is being offered in court, but you will not settle for less than $2,500.00 per month alimony for 8 years. That is your breaking point."

2. Mid-point. In alimony negotiations, know and understand the importance of a mid-point. A "mid-point" means the half-way point between the client's current settlement position and the opposing party's most recent settlement position.

3. Client's desired settlement range. Always a good thing to know. Be sure to explain Present Value.

General Strategic Negotiating Concepts

1. In every negotiation, the party with the stronger relative negotiation position never has as strong a position as that person believes.

2. As well, in every negotiation, the party with the weaker relative negotiating position rarely perceives their position as weak as the other person perceives their position.

3. Always avoid over-reacting. If the sink is broken, there may be no need to tear down the whole house.

4. When an opposing party is likely to win a particular point, never concede it, but consider offering it. Steer into the skid.

5. For a negotiation to be successful, the negotiation is not required to be perfect.

6. Failure to Understand Pensions

Some family lawyers may struggle with the following questions:

1. *How is a pension plan valued?* Rarely by taking the number presented on the most recent pension benefits statement.

2. *What separate interests mean for an alternate payee?* They describe rights to payments after QDRO administration.

3. *What are pension "elections?"* Each pension has at least one very important choice between alternative treatments as part of a QDRO.

4. *What is a "pre-retirement survivor annuity"?* A "pre-retirement survivor annuity" is a pension plan's duty to pay money following the death of the Participant or Alternate Payee. If the applicable election was made, the death of the Participant (after payments began to the Alternate Payee) does not affect the amount of the Alternate Payee's benefit.

5. *Does federal law require pension plans to provide pre-retirement survivor annuity benefits?* Yes.

6. *What if that election is not made?* If the Alternate Payee dies before the pension begins to make distributions, all benefits revert to the Participant, leaving the Alternate Payee with nothing.

7. *Will the Alternate Payee generally be able to elect to receive benefits at the Participant's earliest retirement date?* Yes, but it may affect the amount of benefits.

8. *What are "subsidized early retirement benefits?"* Increases in benefits directly flowing from early retirement programs.

9. *Are cost of living adjustments always automatically shared?* No, it is better practice to include in the divorce settlement and QDRO that COLA's should be shared proportionately.

10. *Do Alternate Payees always receive payment of funds as surviving spouses?* No, the plan's specific election should be made and included in the QDRO.

7. Failure to Consider Tax Consequences

A. Alimony – Front end loading
B. Property Division – built in capital gains
C. Tax Liens on Real Property – see below

Federal Tax Liens in Divorce Proceedings From the Internal Revenue Service

Scenario *– You are representing Mrs. Jones in a divorce proceeding against Mr. Jones. In the course of negotiating a settlement agreement, Mr. Jones agrees to transfer his interest in the couple's residence to Mrs. Jones in order to eliminate any requirement for him to pay alimony. You complete the agreement, obtain judicial approval and secure a quit-claim deed from Mr. Jones, relinquishing his interest in the property to Mrs. Jones. The quit-claim deed is properly recorded in the office of the Register of Deeds.*

- *Have you properly protected your client?*
- *Did you do a title search on the property to see if there are any*

encumbrances against the property, such as a Notice of Federal Tax Lien ?

All too often, in the above scenario, the property is quit-claimed to Mrs. Jones without knowledge of the fact that the property is encumbered by a Notice of Federal Tax Lien. The quit-claim deed is recorded, and Mrs. Jones thinks Mr. Jones is out of her life. Then, several years later, when Mrs. Jones decides to sell or refinance the residence, title search reveals a Notice of Federal Tax Lien – either against Mr. Jones solely, or against Mr. and Mrs. Jones jointly - which pre-dates the quit-claim action.

In these situations, Mrs. Jones is faced with either (1) having to pay the Internal Revenue Service a portion, or all, of the equity in the property to secure a release or subordination of the Notice of Federal Tax Lien, or (2) having to hold the property until Mr. Jones satisfies the federal tax lien or until the lien period expires. In many instances, Mr. Jones will have insufficient assets or income to satisfy the federal tax lien by other channels. Mrs. Jones is financially harmed, because she does not actually receive the net sales proceeds as contemplated in the divorce settlement agreement. Significantly, the Service is not a party to this divorce agreement, so its statement that Mr. Jones is solely responsible for the unpaid tax liability is ineffective. The Service looks to both spouses as equally and wholly responsible for any joint tax liabilities arising from the marriage.

If you determine that a Notice of Federal Tax Lien encumbers, or potentially encumbers, property that is involved in a divorce, you should work to address the lien through the settlement portion of the proceeding. If the lien is against only one spouse, and the property is to be transferred to the other spouse, certain Internal Revenue Code provisions can be effective to allow the property to be "discharged" from the lien. Such a discharge may or may not require payment to the Service, depending on the specifics of the case.

Internal Revenue Code section 6325(b) provides the authority for discharge of property from the effects of a filed Notice of Federal Tax Lien. While the terms "discharge of lien", "release of lien" and "withdrawal of lien" are often used interchangeably, it is important that the distinctions of these three procedures be understood.

- "Discharge of lien" refers to the specific release or exemption of particularly described property from the effects of the notice of lien.
- "Release of lien" is a general or global satisfaction of the federal tax lien that can only occur through payment of the liability, or when the underlying assessment(s) become "legally" unenforceable through passage of time.
- "Withdrawal of lien," or more properly, "Withdrawal of Filed Notice of Federal Tax Lien," may be appropriate even though the tax assessment on which the notice of lien is based remains unsatisfied. A withdrawal is a nullification of the Notice of Tax Lien filing, not a cancellation or satisfaction of the tax liability. Procedural errors in the filing of the notice or a determination that the interests of both the taxpayer and the government would be enhanced by such withdrawal are the usual conditions under which such withdrawals are issued. A withdrawal is not a tool to simply remove a valid Notice of Lien from the taxpayer's credit bureau file.

IRS Publication 783 (http://www.irs.gov/pub/irs-pdf/p783.pdf) explains how to make application for a Certificate of Discharge.

END OF MATERIALS