



Divorce: stuck in the middle

A client's divorce can be a financial planning opportunity, as long as you can avoid the minefields. **LIAM EGAN** reports.

With more than a third of marriages reportedly now failing in Australia, there can be few financial planning practices left untouched by the phenomenon in one way or another.

Unlike life's two certainties, death and taxes, divorce is difficult to provide for, and its occurrence can change a client/planner relationship irrevocably.

Client retention

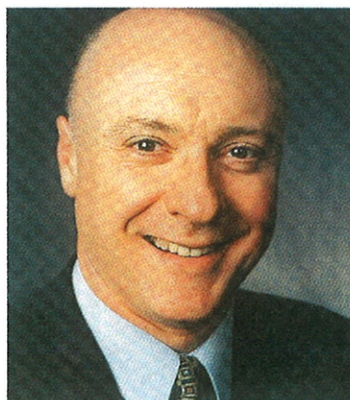
A few financial planners may have a sufficiently strong client relationship to retain one or both spouses during, and even postdivorce, but in many cases the

announcement of a marriage breakdown signals the end of any relationship going forward.

It doesn't necessarily have to be this way, however, according to two specialist divorce lawyers, who believe divorce offers both challenges and opportunities for planners.

The challenge for planners is to avoid becoming the subject of a negligence claim from one spouse or both, that could cost their insurer hundreds of thousands of dollars, or more, and increase their professional indemnity cover.

The opportunity on the other hand,



Peter Townsend

is to act as a scrupulously impartial adviser to both spouses during the split and property settlement, and ultimate-

ly retain one or both as future clients. However, this can lead to some tricky situations for financial planners, especially in regard to confidentiality, according to Peter Townsend, principal lawyer of Townsends Business and Corporate Lawyers.

In the absence of any specific clauses in their agreement with clients, planners have a contractual or common law duty to both spouses that "certainly extends to a duty of confidentiality beyond the termination of his retainer", he says.

"That duty means a planner cannot assist one spouse by revealing something of the couple's financial position to another party that is confidential. If, for example, one spouse has a financial arrangement that a planner is

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aware of, but the other spouse is not, the planner cannot reveal this to the spouse not in the know.”

Court orders

While the contractual or common law duty of confidentiality arises out of the type of relationship the planner has with the clients, Townsend says the obligation to give evidence in court takes precedence over this.

“If the duty of confidentiality is frustrated by the manner in which the court acts, a planner has to comply with court orders or be held in contempt.”

By giving evidence in court a financial planner could, in theory, be in breach of contract, although Townsend has “never heard of any planner ever actually being in this position in practise”.

legal liability would exist,” Townsend says.

And the more a financial planner knows about the circumstances of a failing marriage, the greater their duty of care under the act to avoid a conflict of interest, he adds.

“If a planner knew his advice could detrimentally affect one or the other spouse, then there would be a major conflict of interest, and he would not be able to give any advice to either client during the divorce.

“In this case, a planner would have to terminate his retainer agreement with one or the other of the parties, or send both spouses off to other planners until the division of property has been worked out.”

Property division

Townsend says there’s no legal reason why a planner cannot continue to act

THINGS A PLANNER SHOULD TELL DIVORCING CLIENTS

- To consider changing their will
- To consider changing the death nomination on their superannuation fund
- To implement severance of the joint tenancy of jointly-owned accommodation
- To formalise a process for accessing funds in joint accounts until the divorce is finalised
- To consider changing their e-mail password/s

property division decisions and the forward planning, provided they do not breach any confidentiality or privacy obligations in relation to the other spouse.

Argyle Partnership solicitor Nabil Wahhab says planners should “make a point of getting to know both spouses equally in the interests of knowing exactly who their client is, given that these days nearly one in three marriages fail”.

He adds: “Often planners will maintain contact mainly with the husband, when, in many cases, some or even all of the family’s assets, such as a share portfolio, are in the wife’s name for tax purposes,” he says. “In that case, the wife and not the husband is actually the client, and this becomes very significant in determining the actions of the planner during the divorce.

“What often comes out in family law cases I attend is that the wife is the one with assets in her name but she has never met the planner, and invariably she believes the planner is biased in favour of the husband.”

Mediation

The way a planner deals with both spouses in the event of divorce is the determinant of whether a planner retains one or both spouses as clients, Wahhab says.

“I always emphasise to planners that they can be an integral part of the solution to the financial settlement by



Nabil Wahhab

acting as an impartial facilitator between the husband and wife and the lawyers.

“Planners are ideally positioned to achieve an outcome for both spouses where the asset pool is preserved without having to spend significant amounts of money on legal fees.”

Wahhab says financial planners are as important to divorcing clients after their divorce as before their divorce.

“Planners should also remember that if both clients have settled their family law dispute with a minimum spent on lawyers, they will have more money to invest as clients post divorce.”

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In terms of section 945 A of the Corporations Act, there’s also a legal duty on any person giving personal financial product advice to take into account the relevant personal circumstances of the client.

“If a planner was put on notice of a client’s pending divorce, and did not take this into account in their advice and there was a loss suffered, then a

for one, or even both, parties with future planning needs once the property division has been resolved. He also says there is no legal reason why a financial planner could not terminate the relationship with one spouse in favour of advising the other on hearing of their intention to divorce.

The financial planner could then advise the chosen spouse both on the

Mediation: It’s good to talk about it

Advising clients to settle their differences independently can save time and money, writes **LIAM EGAN**.

Planners are increasingly using mediation and independent assessment services to become involved in the resolution of family law disputes between clients.

Argyle Partnership solicitor Nabil Wahhab says mediation and independent assessment offers a potentially quick and cheap alternative to divorcing clients, compared to having a judge order the division of their jointly-held property.

Other benefits include less emotional stress on spouses (and children), early dispute resolution, and easier communication with each other post-divorce, he says.

“Mediation and independent assessment allows both spouses

to walk away feeling they have achieved the result they wanted to achieve, and therefore lays the foundation for future communication to continue.

“Going through a family court hearing, by contrast, can leave one or both spouses unhappy, resulting in poor communication going forward.”

Planners are an integral part of the independent assessment and mediation process because of their intimate knowledge of each spouse’s financial position, according to Wahhab.

“Effectively, their role is to assist the mediator and independent assessor to divide the couple’s assets, and they could also be involved in the mediation itself.”

“They can help to tell the mediator where both clients are coming from in their demands, and often the mere familiarity of their presence during mediation can be a source of comfort to both spouses.”

Participation increases a planner’s chances of retaining both spouses as clients, he says, now that their “asset position has changed and their risk position also”.

Mediation represents a service to both spouses, as opposed to acting for one client, in which the assessor and mediator will provide an opinion on the division of their matrimonial assets.

“The parties can then either accept that opinion, and document



it as orders of the court, or they can use the opinion in further negotiations between them.

“It allows parties to get a divorce for between \$5,000 and

\$6,000 in legal fees and gets them the result that a judge may tell them anyway, having spent up to \$100,000 each or between them in total.”