Divorcing couples should not overlook their joint debt liability when contemplating how best to divide their marital assets or debts. Separated spouses can enter into a notarized written agreement to divide their assets and debts, and go their separate ways. These written agreements are legally binding contracts commonly referred to as ‘property settlement agreements’. As the name implies, property settlement agreements specify who receives which assets as well as the debt each party agrees to pay. Property settlement agreements routinely obligate whoever is responsible for paying a debt to fulfill his or her obligation to the extent that the other spouse no longer needs to pay. Property settlement agreements typically include language indicating that each party “holds the other party harmless” with respect to the debt he or she has agreed to pay.

As with other types of contracts, property settlement agreements usually address the remedies available when a spouse breaches the contract by failing to pay money on a debt as laid out in the agreement. The non-breaching party can file a lawsuit against the other party for breach of contract. Property settlement agreements usually require the breaching party to pay any legal fees incurred by the party who filed the suit. However, there are certain legal obstacles that exist which can impede a spouse's efforts to collect money from the breaching party.

The failure of a party to pay a debt he or she has agreed to pay has particular consequences when both spouses are liable for the debt. In cases where the divorcing couple owes money to a joint creditor, the creditor has the right to try to collect the unpaid debt from either or both parties. The natural tendency of the non-breaching party is to present the joint creditor with a copy of the property settlement agreement with the expectation that the creditor will only pursue the other party for payment. However, creditors on joint debts are not parties to property settlement agreements between spouses, and therefore are not bound to adhere to these. This means a joint creditor can still sue both parties for unpaid debt regardless of what the property settlement agreement stipulates. Furthermore, the property settlement agreement will not prevent a join creditor from issuing a bad mark on both parties' credit rating in the event of late payments or a default.

Unfortunately, many divorcing couples are unaware of this reality when they enter into a property settlement agreement and the undesirable implications of joint debt become all too apparent very quickly once collection notices start rolling in because other party failed to pay their share.

There are a number of ways divorcing couples can avoid this outcome. One way is by paying off any joint debt at or before the signing of the property settlement agreement. As the parties negotiate the property settlement, each party can make preparations to begin paying off any debt each has agreed to take during their settlement negotiations. Options for paying the debt include using available funds in that party's individual name, refinancing a joint mortgage loan under one name, or transferring joint credit card account balances to a new or existing individual account. For some parties, it is simply not feasible to pay off all their joint debt prior to executing the property settlement agreement and having joint debt is an unavoidable risk. Ideally, however, parties sign their property settlement agreement with no joint debt surviving, and avoid any issues of lingering joint debt altogether.

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