Finalizing a Divorce? Wait, Just One More Thing …

Effective Estate Planning

By Yolanda Kanes

There is hardly anything more stressful in life than divorce. Indeed, according to the often quoted Holmes and Rahe Stress Scale, which analyzed the impact of 43 specified life events on general health, divorce and marital separation came just behind "death" at the top of the list. Thomas H. Holmes and Richard H. Rahe, The Social Readjustment Rating Scale, *J Psychosom Res*, Volume 11, Issue 2, August 1967, pp. 213-218. It should therefore come as no surprise that, at the end of all the legal and emotional wrangling in finalizing a divorce, clients (and, often, their lawyers) are loathe to tackle issues addressing end-of-life.

As an estate-planning attorney, I find that one of the biggest obstacles in accomplishing effective planning is getting clients to embrace the idea that estate planning is not "finished" when the Will, Power of Attorney and Health Care Proxy are done; it is a fluid process, requiring periodic review and adjustment in the face of changing life circumstances. Nowhere is this truer than in the case of a divorce. It may not technically be part of the matrimonial lawyer's wheelhouse to review, re-structure and execute a client's estate plan, but the newly single client's changed circumstances should include a discussion of his or her estate, and how plans for it might need to be adjusted in the face of a finalized divorce.

Basic Estate-Planning Documents

There are several basic estate-planning documents that every person should have in place: a Will (or Living Trust); Power of Attorney; and Health Care Proxy, including a Living Will. Most often, with a married couple, one spouse is the primary beneficiary or appointed agent for the other. At a minimum, all of these documents should be reviewed and revised in the divorce process to remove the ex-spouse.

While there are many states that have statutes that provide for the automatic disinheritance or disqualification of a spouse upon divorce, taking the step of actually redoing these documents to clarify intentions can go a long way in helping clients avoid headaches later. Moreover, if there are no planning documents at all, it is the perfect time to encourage a client to focus on how he or she would want their assets distributed at death and whom they would wish to appoint to make critical decisions on their behalf as to financial and medical matters upon incapacitation. Clients should be made to understand that a failure to put such plans in place not only invites confusion at death, it could force protracted and expensive court intervention in the case of catastrophic illness where there is no appointed agent for financial and/or health affairs.

For those with children, another less obvious aspect of estate planning is to name a guardian upon death. They should be sure to address the guardianship of minor children (those under 18) in a Will or Living Trust, even if provisions have been made in the divorce agreements. Matters concerning an estate are handled by Surrogate's Courts (which do not handle divorce proceedings), and having a guardian designation avoids complications in seeking the enforcement of contractual agreements executed in divorce proceedings.

Encourage clients to make clear their intentions in the event one or both parents are not living. Certainly, there is a strong presumption that a surviving parent of a minor child automatically becomes the guardian. However, this may not always be the case. Where there are circumstances that would weigh in favor of disqualifying the surviving parent from full-time custody, advise clients to prepare a letter to keep with their Wills, stating why the surviving parent may not be an appropriate guardian and why an alternate choice named by the deceased parent might be better. While the letter will not be binding, when combined with documents or other evidence from divorce or custody proceedings, it gives a judge who might be considering who to appoint as a guardian something more to consider.

Life Insurance Policies, Bank/Stock Accounts and Retirement Accounts

Apart from establishing or revising the most basic estate-planning documents, another critical component of tuning up clients' post-divorce estate plan is a review of the beneficiary designations on all of their accounts. For those assets that permit a direct beneficiary designation, a client needs to be advised that account designations trump testamentary provisions in a Will or Living Trust. To be clear, where there are specific account designations, alternate dispositions which are contained in such testamentary documents will be disregarded.

When people marry, they often automatically begin their financial lives together by setting up joint or specifically designated accounts. In fact many, if not all, financial institutions include as part of the new account packages beneficiary designations, which they require before establishing the account. Clients are sometimes surprised when, as part of their estate planning, they review those designations years later and discover that they had, in fact, executed specific designations that may no longer reflect their wishes. Additionally, designations done at the beginning of a marriage usually do not include after-born children; they may identify persons whom the account owners no longer wish to have as beneficiaries. This, in and of itself, may prompt a client to undertake

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more careful planning as they focus on who their intended beneficiaries should be and on establishing a more responsible framework for the distribution of wealth to their after-born children — not only as minors, but beyond the age of majority — through structured trusts. After a divorce, the most prudent course of action is to revisit the designations and start fresh with clear instructions.

State Law Regarding Divorced Spouses

Clients often ask if there are state laws that automatically revoke dispositions to a divorced spouse. While it is true that many states do have such laws, each state has varying provisions, and some do not address all possible dispositions. For example, in New York, The Estate Powers and Trusts Law (EPTL) Sec. 5-1.4 governing disqualification provides as follows:

> § 5-1.4. Revocatory effect of divorce, annulment or declaration of nullity, or dissolution of marriage on disposition, appointment, provision, or nomination regarding a former spouse
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> (a) Except as provided by the express terms of a governing instrument, a divorce (including a judicial separation as defined in subparagraph (f)(2)) or annulment of a marriage revokes any revocable (1) disposition or appointment of property made by a divorced individual to, or for the benefit of, the former spouse, including, but not limited to, a disposition or appointment by will, by security registration in beneficiary form (TOD), by beneficiary designation in a life insurance policy or (to the extent permitted by law) in a pension or retirement benefits plan, or by revocable trust, including a bank account in trust form, (2) provision conferring a power of appointment or power of disposition on the former spouse, and (3) nomination of the former spouse to serve in any fiduciary or representative capacity, including as a personal representative, executor, trustee, conservator, guardian, agent, or attorney-in-fact.
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> (b)(1) Provisions of a governing instrument are given effect as if the former spouse had predeceased the divorced individual as of the time of the revocation.
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> (2) A disposition, appointment, provision, or nomination revoked solely by this section shall be revived by the divorced individual's remarriage to the former spouse.
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> (c) Except as provided by the express terms of a governing instrument, a divorce (including a judicial separation as defined in subparagraph (f)(2)) or annulment of a marriage severs the interests of the divorced individual and the former spouse in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship, transforming their interests into interests as tenants in common … .

(*see also* Cal.Prob.Code § 6122 for California state law on divorced spouse).

For those who do not execute or re-execute documents during and after divorce, EPTL 5-1.4 offers some protection. But a careful reading of the statute makes clear that it is not a savings clause on all matters. First, the statue only applies to the divorced spouse. No protection is afforded during proceedings. It is only after a final decree, judgment or order (or a judicially recognized agreement of separation) dissolving the marriage is entered that the statute affords any relief. Second, disqualification only applies to the divorced spouse (yes, I am repeating myself). This means that if provisions (or fiduciary nominations) have been made that include members of an ex-spouse's family in testamentary and life documents (*i.e.*, parents, siblings, etc), the divorce will not invalidate those designations.

The harsh repercussions of being less than diligent in these matters are underscored by recent case law in New York. In *Matter of Lewis*, the estate of Robyn Lewis, who died at age 43, became embroiled in litigation with her former father-in-law when he presented a copy of a Last Will and Testament that named her divorced husband (his son) as the primary beneficiary of a home that had been owned by the decedent's family for generations. The former father-in-law was named as the secondary beneficiary under the Will. While Ms. Lewis's ex-husband was deemed disqualified under EPTL 5-1.4, the disposition to the secondary beneficiary was not. Despite testimony from her family that Ms. Lewis had executed a second Will after the divorce that changed the beneficiaries, when this purported new Will could not be produced, the court found for the former father-in-law. The findings were subsequently sustained by the Appellate Division, Fourth Department. (*See Matter of Lewis*, 14 A.D.3d 203, 978 N.Y.S.2d 527, 2014 N.Y. Slip Op. 00009.)

In affirming the lower court's decision, the court observed that "we have previously held that the provisions of EPTL 5-1.4 apply only to former spouses, not to members of the former spouse's family." *See also In re Estate of Coffed*, 59 A.D.2d 297 (1977) at 300. The case is instructive not only as to the substantive law, but also to the practical point that care should be taken to re-draft testamentary and life documents and to also make sure that the documents are in a place where they can be readily found in the event of death or incapacitation.

Retirement accounts require a special note. Usually, the matrimonial practitioner will focus on these assets as part of the marital estate when settling on the division of marital assets and spousal support. However, clients should not be left to assume that the divorce will revoke designations on any accounts that are not specifically dealt with, in writing, as part of the divorce proceedings. While the protections of EPTL 5-1.4 appear to extend to retirement accounts, certain "qualified"

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retirement plans and benefits are governed by the federal guidelines of The Employee Retirement Income Security Act of 1974 (ERISA), which has specific provisions relating to how plan administrators must act when turning over accounts pursuant to existing beneficiary designations. A client is best served when it is not left to the discretion of a plan administrator in possession of a written designation to decide if the designation has been invalidated by a divorce under state law. At the very least, any conflict between federal and state law on this issue will result in unnecessary delays and expense, as the administrator will not release the subject account in the face of uncertainty, without court direction. Unless proper waivers are obtained from the divorced spouse and the designations are changed to reflect updated, post-divorce intentions, there remains a risk that the divorced spouse will be able to claim rights under the retirement accounts, notwithstanding the general provisions of applicable state law.

The Minefield of Irrevocable Trusts: A Note to the Matrimonial Practitioner

It is important for matrimonial lawyers to note that EPTL 5-1.4 applies only to revocable instruments; it does not apply to irrevocable instruments and, most specifically, irrevocable trusts. Under New York law, an irrevocable trust can only be amended by the grantor with the acknowledged written consent of all of the beneficiaries (EPTL 7-1.9.). Thus, if a grantor of a trust designates their spouse as a trustee or beneficiary of an irrevocable trust and they later divorce, if the trust itself does not contain language disqualifying the spouse upon divorce such spouse might still be able to act a trustee and continue to enjoy benefits as a beneficiary of the trust.

The problems under this scenario are obvious. Thus, one inquiry while representing a client's interest in divorce proceedings that could prove very beneficial is to ask about irrevocable trusts created during the marriage that name spouses as trustees or beneficiaries. Identifying problem language in an irrevocable trust can pre-empt more difficult problems after the divorce. A soon-to-be ex-spouse can be asked to execute trustee resignations or waivers of beneficial interest during the divorce proceedings. Getting such waivers after the divorce is final can be a monumental challenge without proper waivers. As is evident, when dealing with irrevocable trusts, the statute will not render such nominations or bequests void after the divorce.

Conclusion

Despite the undoubted difficulties in untangling the myriad issues in divorce — or even, to use a more modern phrase, in a "conscious uncoupling" — it is important not to lose sight of the impacts on assets of later life events beyond the divorce. While state laws might hold some protection for those clients who have not been diligent enough to properly address their post-divorce estate planning needs, they should be mindful of the importance of undertaking measures to ensure the results secured in divorce are honored both in life and after death.

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