

LEGAL UPDATE

August 2008 By: *Eric B. Woldenberg, Jeffrey A. Asher and Alan S. Laufer*

NEW YORK LAW AMENDED TO BROADEN REVOCATORY EFFECT OF DIVORCE ON DISPOSITIONS TO FORMER SPOUSE AND NOMINATIONS OF FORMER SPOUSE AS FIDUCIARY

The New York State Legislature amended Estates, Powers and Trusts Law (EPTL) Section 5-1.4, governing the effect of divorce on dispositions to a former spouse in a Will. The amendment came following a report of the New York State Office of Court Administration's Surrogate's Court Advisory Committee spotlighting many inconsistencies in the language of the statute. The amendment was signed into law by Governor Patterson on July 7, 2008 and is effective on that date.

EPTL Section 5-1.4, as amended, provides that a divorce, annulment, or dissolution of a marriage revokes (unless otherwise stated in the governing instrument) any revocable (a) disposition or appointment of property to a former spouse, including dispositions by last will and testament, by "transfer on death" account registration, by revocable living trust and/or by beneficiary designation; (b) provision conferring a power of appointment on the former spouse; and (c) nomination of the former spouse in a fiduciary capacity, such as executor, trustee, guardian, agent or attorney-in-fact. Any joint tenancies between former spouses shall be transformed by operation of law into tenancies in common upon divorce, annulment or judicial settlement. Dispositions, appointments and/or nominations which an individual does not have a right (either by law or under a governing instrument) to revoke at the time of the divorce, etc., such as that which might be contained within an irrevocable life insurance trust, are not revoked by the application of new EPTL Section 5-1.4.

Prior to its amendment, EPTL Section 5-1.4 applied only to dispositions, appointments, and/or nominations contained within a Will. The amendment to EPTL Section 5-1.4 comes as a result of an extensive review of former EPTL Section 5-1.4. The legislative history of new EPTL Section 5-1.4 suggests that the amendment is intended to rectify the shortcomings of the statute, and to harmonize New York law with that of other jurisdictions. For example, the applicable New Jersey legislation, New Jersey Statutes Annotated Sections 3B:3-13 and 14, generally mirrors the new EPTL Section 5-1.4. Similar statutes exist in states such as Washington and Texas.

On the other hand, Connecticut General Statutes Section 45a-257c is still applicable only to dispositions and/or appointments in a Will. Moreover, whereas new EPTL Section 5-1.4 includes a judicial separation as an event causing revocation, Connecticut specifically provides that judicial separations that do not terminate the marriage do not trigger any revocation.

New EPTL Section 5-1.4 continues the rule contained in former EPTL Section 5-1.4 that the provisions of the governing instrument are given effect as if the former spouse predeceased the divorced maker of the governing instrument, and that a revoked disposition, appointment, provision or nomination is revived by the divorced individual's remarriage to the former spouse.

An important addition to EPTL Section 5-1.4 is a provision holding harmless a payer or other third party, such as a bank, life insurance company or retirement plan administrator, for having paid a beneficiary (including a former spouse), or for having taken any other action, in good faith reliance on the validity of the governing instrument, before such payer or other third party received written notice of the divorce, annulment, or remarriage.

Finally, it should be noted that specific language in the Will or other governing instrument can still override the application of EPTL Section 5-1.4.

Divorced individuals should understand that most dispositions to former spouses will be automatically revoked unless specifically “saved” by language in the governing instrument. These automatic revocations may result in incomplete beneficiary designations in a variety of documents. Accordingly, divorced individuals should now take the opportunity to identify and complete any incomplete instructions and designations remaining as a result of the application of new EPTL Section 5-1.4. Failure of divorced individuals to name new beneficiaries in certain instruments could lead to the client’s “estate” being designated the default beneficiary. Consequently, assets that were once non-probate property because of spousal beneficiary designations may now require a probate proceeding. This means that estate plans that were once designed to avoid probate may now instead require probate to judicially construe missing fiduciary appointments as a result of the revocations under EPTL Section 5-1.4.

The foregoing is merely a discussion of the amended EPTL Section 5-1.4 and is not intended to provide legal advice. If you would like to learn more about this topic or how Pryor Cashman LLP can serve your legal needs, please contact one of these members of the Trusts and Estates Group: Richard L. Kay at rkay@pryorcashman.com or 212-326-0844, Eric B. Woldenberg at ewoldenberg@pryorcashman.com or 212-326-0865; Jeffrey A. Asher at jasher@pryorcashman.com or 212-326-0817; or Alan Laufer at alaufer@pryorcashman.com or 212-326-0403.

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Jeffrey is a legal commentator for Court TV, CNN Headline News, and The CBS Early Show in Trusts and Estates and Elder Law matters. He is a peer-elected member of the Estate Planning Council of New York City, Inc. and a member of the Trusts and Estates Section and Elder Law Section of the New York State Bar Association, and the Connecticut Bar Association. He is a speaker with National Business Institute, Inc., the New York State Bar Association, and a frequent lecturer for various financial institutions, civic groups, and community organizations. He is approved as a continuing education credit provider by the Certified Financial Planner Board of Standards, Inc. and the Connecticut Department of Insurance.



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Alan's practice includes drafting and structuring complex wills, trusts, agreements and other estate planning documents; representing executors, trustees and beneficiaries in difficult estate administration issues; and representing fiduciaries before the Internal Revenue Service and state taxing authorities in connection with estate and gift tax issues. Alan has successfully litigated will contests, disputed administrations and accountings and actions against fiduciaries.

Alan has represented clients in connection with complex issues involving the organization and administration of charitable organizations, including public charities, private foundations, charitable lead trusts and charitable remainder trusts; obtaining tax exemption of charitable organizations from the Internal Revenue Service; potential excise tax liability of charitable organizations and managers of charitable organizations; and state law issues regarding charitable organizations, including issues regarding corporate governance and compliance with charitable solicitation laws.