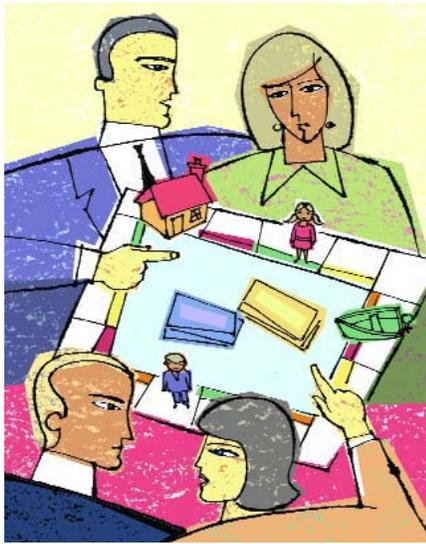


BY GARY B. FREIDMAN



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## Estate Planning in the Face of Divorce: An Ounce of Prevention . . .

As a trusts and estates attorney, my exposure to matrimonial disputes generally begins after one of the parties has died. That is unfortunate. Bitter experience teaches that we lawyers often do our clients' families (excluding the soon-to-be ex-spouse) a great disservice when we fail to promptly focus on the potential estate-related problems engendered by separation and divorce.

### Review the Plan

One of the first items of business when separation or divorce is contemplated should be to review the client's testamentary plan. Your client should revoke any existing will that favors the anticipated ex-spouse and execute a new will with a minimum elective share clause<sup>1</sup> bequeathing the minimum required by law. If there is an untimely death during the divorce proceeding, even intestacy is preferred to a will that leaves everything to the other spouse, especially if your client has children from a prior marriage. In discussing the client's estate plan, ask:

- Is there a revocable lifetime trust favoring the spouse? If there is, amend or revoke it.
- Are there jointly held assets? If there is a house, condo or co-op apartment owned as tenants by the entirety, you probably cannot

do anything about it without the other spouse's cooperation, but a standard minimum elective share bequest clause will offset the value of the survivor's interest.

- Are there life insurance policies naming the soon-to-be ex-spouse as beneficiary? If so, change the beneficiary to a trust for your client's children or, at the very least, to the executors/administrators of the estate.
- Are there retirement plan accounts? If so, change the beneficiary designation where possible. Certain beneficiary designations in plans that are subject to ERISA may not be changed without the spouse's consent. Other designations can and should be changed promptly.
- Are there any Totten trust accounts naming the other spouse as beneficiary? If so, change the account title or amend the client's will to expressly revoke each such account.<sup>2</sup>
- Is there a pre-nuptial or post-nuptial agreement with the spouse? If there is an existing agreement, you need to review it as it may restrict the client's ability to make some of the changes discussed in this article.

You will have to adapt these general recommendations to the specifics of your client's situation. However, the principal assets of the typical client, such as a house, life insurance, retirement plan and bank and securities accounts, can and should be dealt with on an expedited basis.

If estate planning is not something you do, then refer the client to one of your partners or to an estate planning lawyer so that a prompt review of the client's assets can be undertaken and any necessary changes timely implemented. The failure to promptly and properly deal with these issues can cause disastrous results if the client dies unexpectedly during the course of the matrimonial proceeding, or thereafter, without reassessing whom the natural objects of his or her bounty are and redirecting the distribution of assets to them. Even an interim revised plan is better than leaving one in place that does not reflect the client's changed circumstances.

We start with the premise that until a court of competent jurisdiction renders a decree of divorce or annulment, the parties are still spouses.<sup>3</sup> Because spouses, whether or not in the throes of a matrimonial proceeding, are entitled to certain statutory rights on the death of the other, planning for such a

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possibility should be one of the first matters discussed.

These rights include a distributive share in intestacy, an elective share, and so-called exempt property. If the client dies without a will during the course of a matrimonial proceeding, the surviving spouse, if there are issue, is entitled to \$50,000 plus one-half of the residue, or 100% if there are no issue.<sup>4</sup> If there is a will, the surviving spouse is entitled to whatever is bequeathed to him or her, but no less than his or her elective share amount under EPTL 5-1.1-A (the greater of \$50,000 or one-third of the net estate). For deaths occurring after September 1, 1994, the old elective share trusts (one-third of the net estate in trust for the spouse for life, remainder to whomever) no longer satisfy the elective share requirements of EPTL 5-1.1-A. In addition, the spouse is entitled to the "exempt property" described in EPTL 5-3.1.<sup>5</sup>

### Good News, Bad News

The good news is that, if you and the client do nothing and the client survives until the marriage is dissolved but then dies, the former spouse has no claim in intestacy. If there is a will, any dispositions to the former spouse or nomination of him or her as fiduciary are deemed revoked under EPTL 5-1.4.<sup>6</sup> In effect, EPTL 5-1.4 creates a conclusive presumption that where a testator, after executing a will, unless the will expressly provides otherwise, is divorced, the marriage is annulled, is declared a nullity, or is dissolved on the ground of absence, then any dispositions to the former spouse or nomination of him or her as fiduciary are revoked and the dispositions are treated as if the former spouse predeceased the testator.

The bad news is that under current New York law, EPTL 5-1.4 and the conversion by operation of law of a tenancy by the entirety into a tenancy in common<sup>7</sup> are the full extent of the "revocatory effect" of a divorce. In other words, unless you and the client take affirmative action to make the necessary title and beneficiary changes, unintended consequences will result.

When reviewing a matrimonial client's estate plan, you should inquire whether the client has created any revocable lifetime trusts, which have become increasingly popular will substitutes. Often when the client has created a lifetime trust, the will is a simple one that merely "pours over" any non-trust assets to the pre-existing trust. Under current law, the dissolution of the marriage has no effect on dispositions under a trust because EPTL 5-1.4 currently has no application to lifetime trusts.

Similarly, since there is no automatic revocation of Totten trust accounts, beneficiary designations of life insurance policies, annuities, retirement accounts and other death benefits which pass independently of the client's will, it is imperative that you review with the client those policies, accounts and death benefits, the current beneficiaries, and the client's choice of new beneficiaries.

Jointly owned property presents special problems, because each joint tenant owns a one-half undivided interest in the whole with a right of survivorship. Although a co-tenant cannot unilaterally affect the ownership of the other co-tenant's interest, he or she can destroy the right of survivorship by transfer or conveyance of his or her interest.<sup>8</sup>

An example of the disastrous consequences that can result from a lack of

adequate planning is *Storozynski v. Storozynski*.<sup>9</sup> There, the husband and wife were divorced in November 2000, but the husband never changed the beneficiary designations (from the wife) on his life insurance policies and his IRA accounts. The husband died in October 2002. When the wife sought to collect the life insurance and IRA account proceeds, the husband's estate sought to enjoin collection based on vague waiver language contained in the parties' divorce agreement. The Appellate Division held that the wife was entitled to the proceeds and that the agreement was insufficient as a waiver because the insurance and the IRA account were not specifically mentioned and a waiver of such rights may not be inferred.

Needless to say, but for the current privity rules, this can be a malpractice claim waiting to happen.

Over the past several years, bills have been introduced in the New York State Assembly<sup>10</sup> to extend the revocatory effect of a divorce beyond a will. However, to date, no bill has passed both houses of the state legislature. Even if passed, the "revocatory effect" legislation only solves part of the problem when the marriage is dissolved. It would still have no application if the client dies during the course of the matrimonial proceeding.

When it comes to advising clients who are experiencing marital difficulties, an ounce of prevention can avoid potentially weighty, unintended results. ■

1. Examples of such clauses may be found in many of the leading will drafting treatises such as Klipstein & Bloom, *Drafting New York Wills: Law and Forms* § 10.07 Form 1 (3d ed. 2004).

2. EPTL 7-5.2(2) requires that the will specifically describe the account as "being in trust for a named beneficiary in a named financial institution."

3. The myriad of circumstances where a "spouse" is disqualified under the EPTL are beyond the scope of this article. In sum, EPTL 5-1.2 provides that: "A husband or wife is a surviving spouse within the meaning, and for the purposes of 4-1.1, 5-1.1, 5-1.1-A, 5-1.3, 5-3.1 and 5-4.4, unless it is established satisfactorily to the court having jurisdiction of the action or proceeding that" the surviving spouse is disqualified as such by virtue of divorce, annulment, declaration of the nullity of the marriage, a decree of separation rendered against the spouse, abandonment by the survivor which continued until death, or the failure of the spouse to support the other spouse, provided that the spouse had a duty and the means to do so.

4. EPTL 4-1.1.

5. The exempt property consists of, *inter alia*, (a) \$15,000 in money or other property; (b) furniture, utensils, a sewing machine, appliances, computers, and clothing of a value up to \$10,000; (c) books, pictures, video and computer tapes, discs and software of a value up to \$1,000; (d) domestic animals with food, farm machinery, a tractor and lawn tractor, of a value up to \$15,000; and (e) a car of a value up to \$15,000.

6. This is contrary to what had been the common law rule in New York. Prior to September 1, 1967 (the effective date of chapter 952 of the Laws of 1966, which added EPTL 5-1.4), a decree of divorce or annulment, by itself, did not effect a revocation of a testamentary disposition in favor of a spouse. *In re Hollister*, 18 N.Y.2d 281, 274 N.Y.S.2d 585 (1966), *overruled in part on other grounds by In re Maruccia*, 54 N.Y.2d 196, 445 N.Y.S.2d 73 (1981). EPTL 5-1.4 provides:

(a) If, after executing a will, the testator is divorced, his marriage is annulled or its nullity declared or such marriage is dissolved on the ground of absence, the divorce, annulment, declaration of nullity or dissolution revokes any disposition or appointment of property made by the will to the former spouse and any provision therein naming the former spouse as executor or trustee, unless the will expressly provides otherwise, and the provisions, dispositions and appointments made in such will shall take effect as if such former spouse had died immediately before such testator. If a provision, disposition or appointment is revoked solely by this section, it shall be revived by testator's remarriage to the former spouse.

(b) The provisions of this section apply to the will of a testator who dies on or after its effective date, notwithstanding that the will was executed and the divorce, annulment, declaration of nullity or dissolution was procured prior thereto.

7. *Freeman v. Freeman*, 112 A.D.2d 805, 492 N.Y.S.2d 307 (4th Dep't 1985).

8. *In re Suter*, 258 N.Y. 104 (1932).

9. 10 A.D.3d 419, 781 N.Y.S.2d 141 (2d Dep't 2004).

10. See, e.g., A4037 of 2001 which was referred to the judiciary committee and not reported out of committee. In 1995, as A7862, the bill passed the Assembly but did not pass the Senate.



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