Estate Planning in the Wake of a Divorce

By Eido M. Walny

The process of divorce has far reaching consequences beyond the simple bonds of marriage. After the divorce, there can be residual legal issues in addition to the emotional toll a divorce client may experience.

One area that divorce attorneys should think about with their clients both during and after a divorce is the area of estate planning. Estate planning is often ignored, even though there can be severe consequences to ignoring estate planning issues in the divorce context.

Wis. Stat. section 854.15 seeks to revoke certain dispositions of property and agency appointments made to a former spouse, including a former spouse named on a beneficiary designation form. As a result, Wis. Stat. section 854.15 will serve to revoke certain transfers to a former spouse, such as transfers under a Will, and property will pass as if the former spouse had disclaimed the property. In theory, this statute should sever certain sections of old estate planning documents. But because the statute has exceptions, including the decedent's intent, clients should

not rely solely on this statute. This statute is not a saving grace for those who do not update their estate documents. Consider these practical implications of not updating an estate plan:

1. When dealing with certain benefit providers, such as life insurance companies, the burden is on the client to inform the provider of the implications of section 854.15. As a result, if a life insurance company, for example, pays out a policy to a former spouse who was named as a beneficiary on that policy because the company did not know the insured was divorced, the life insurance company is relieved of wrongdoing. The rightful beneficiaries must then chase the former spouse for the proceeds of that policy, which is a difficult, expensive, and time-consuming process.

2. Qualified plans that are governed by ERISA trump state laws, including the provisions of section 854.15. This means that certain retirement accounts, such as 401(k)s, will be paid to the named beneficiary of the account regardless of marital status. So, if a former spouse is named as the beneficiary of the 401(k), that former spouse will rightfully and legally collect those proceeds if the client dies, and other family members will have no legal recourse.

3. Unlike wills, which only take effect when a person dies, powers of attorney take effect during life. Health care powers of attorney literally have life-and-death implications. And while Wis. Stat. section 155.40(2) revokes a former

spouse's authority if named as an agent, the health care provider may not be aware that a divorce occurred, especially in the confusion of the situation at hand. Durable powers of attorney (sometimes called financial powers of attorney) have a statutory revocation under Wis. Stat. section 244.10(2)(c) when an action for divorce or annulment is merely filed – likely to help avoid fraudulent actions by the spouse/agent. But here again, there are practical implications to consider: the financial institution may not know a divorce is pending and may rely on the documents on file.

As a result, it should be common practice to update powers of attorney, both health and financial, upon the filing of divorce papers and provide the updated documents to health care providers and financial institutions so they are aware of the changes.

Because of the practical implications outlined above, divorce attorneys should inform clients of these consequences and advise them to immediately redo their estate plans once the divorce is final. Particular attention should be paid to naming new beneficiaries, naming new agents (e.g., personal representative, trustee, power of attorney), and nominating a guardian for minor children. However, it is not advisable for clients to remove the soon-to-be-ex-spouse as a beneficiary during a divorce because of the implications of marital property law and the spousal election to 50 percent of the marital property.

Post-divorce, it is extremely important that clients immediately update all plans and policies with beneficiary designations. Particular attention should be paid to life insurance policies, IRAs, 401(k)s, bank accounts, and transferable-on-death (TOD) investment accounts. Clients should not rely on section 854.15 to handle this for them.

It is good practice to inform the client of these estate plan considerations in the closing letter. The client should be informed of the consequences and practical issues in not updating his or her estate plan, and should be advised to meet with an estate planning attorney on updating the documents and beneficiary designations.

Certain estate planning documents are not easily changed, particularly certain irrevocable trusts. While more challenging to change, no such document is impossible to alter. Ideally, these sorts of trusts should be addressed in a divorce judgment. The judgment may not change the trust directly, but may address the conditions and consequences of the trust agreements in a way that the parties can agree. If that is overlooked, as it often is, Wisconsin offers the ability to enter into a non-judicial settlement if all of the affected parties can agree to certain changes. And when all else fails, the court is available to entertain petitions to change these documents. However, it is best to deal with these changes while the divorce is still pending, rather than hoping for cooperation post-divorce. It is wise for a divorce attorney to ask the client to see the estate planning documents the client has executed. If the lawyer is unsure whether any of the documents are irrevocable, he or she should consult with an estate planning attorney to determine whether any amendments need to be addressed in the divorce judgment.

Because of the pitfalls divorce clients can face if these estate planning changes are not addressed, it is wise for divorce attorneys to bring these issues to the client's attention before the divorce is finalized and then remind the client again in the closing letter. A divorce has a huge impact on the client's estate plan, so raising this issue should be on every divorce case's "to-do list" to adequately prepare the client for life post-divorce.

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