

## ESTATE PLANNING IN THE WAKE OF DIVORCE

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### I. Intersection Between Divorce and Estate Planning.

- a. A divorce has a huge impact on the client's estate plan. Most divorce attorneys do not also do estate planning and may overlook the impact of divorce on a client's estate plan.
- b. As estate planners and financial professionals, it is important to discuss this with clients who are going through a divorce.

### II. Statutory Revocation of Dispositions to a Former Spouse

- a. Wis. Stat. Sec. 854.15 seeks to revoke certain dispositions of property and agency appointments made to a former spouse.
- b. Excerpt of §854.15:
  - (1) DEFINITIONS. In this section:
    - (a) "Disposition of property" means a transfer, including by appointment, of property or any other benefit to a beneficiary designated in a governing instrument.
    - (b) "Divorce, annulment or similar event" means any of the following:
      1. A divorce, annulment, or other event or proceeding that would exclude a spouse as a surviving spouse under s. 851.30.
      2. A termination of a domestic partnership or other event or proceeding that would exclude a person as a surviving domestic partner under s. 851.295.
    - (c) "Former spouse" means a person whose marriage to the decedent or domestic partnership with the decedent has been the subject of a divorce, annulment or similar event.
    - (d) "Relative of the former spouse" means an individual who is related to the former spouse by blood, adoption or marriage and who, after the divorce, annulment or similar event, is not related to the decedent by blood, adoption or marriage.
  - (2) SCOPE. This section applies only to governing instruments that were executed by the decedent before the occurrence of a divorce, annulment or similar event with respect to his or her marriage to the former spouse.
  - (3) REVOCATION UPON DIVORCE. Except as provided in subs. (5) and (6), a divorce, annulment or similar event does all of the following:
    - (a) Revokes any revocable disposition of property made by the decedent to the former spouse or a relative of the former spouse in a governing instrument.
    - (b) Revokes any disposition created by law to the former spouse or a relative of the former spouse.
    - (c) Revokes any revocable provision made by the decedent in a governing instrument conferring a power of appointment on the former spouse or a relative of the former spouse.

(d) Revokes the decedent's revocable nomination of the former spouse or a relative of the former spouse to serve in any fiduciary or representative capacity.

(e) Severs the interests of the decedent and former spouse in property held by them as joint tenants with the right of survivorship or as survivorship marital property and transforms the interests of the decedent and former spouse into tenancies in common.

(4) EFFECT OF REVOCATION. Except as provided in subs. (5) and (6), provisions of a governing instrument that are revoked by this section are given effect as if the former spouse and relatives of the former spouse disclaimed the revoked provisions or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce, annulment or similar event.

(5) EXCEPTIONS.

(am) This section does not apply if any of the following applies:

1. The express terms of a governing instrument provide otherwise.
2. The express terms of a court order provide otherwise.
3. The express terms of a contract relating to the division of the decedent's and former spouse's property made between the decedent and the former spouse before or after the marriage or the divorce, annulment or similar event provide otherwise.
4. The divorce, annulment or similar event is nullified.
5. The decedent and the former spouse have remarried or entered into a new domestic partnership before the death of the decedent.

(bm) If the transfer is made under a governing instrument and the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is inapplicable to the transfer. Extrinsic evidence may be used to construe the intent.

(6) REVOCATION OF NONTESTAMENTARY PROVISION IN MARITAL PROPERTY AGREEMENT. The effect of a judgment of annulment, divorce or legal separation on marital property agreements under s. 766.58 is governed by s. 767.375 (1).

### c. Notes on §854.15

i. In §854.01(2) the definition of "governing instrument" includes the following:

1. Wills, deeds, trust agreements, insurance or annuity policy, contract, retirement assets (pensions, profit-sharing, retirement, or similar benefit plan), marital property agreement, and beneficiary designations.

ii. In §851.30 "surviving spouse" is defined as:

1. "A person who was married to the decedent at the time of the decedent's death", however, the definition does not include "an individual who obtains or consents to a final decree or judgment of divorce from the decedent . . ."

iii. Practically, §854.15 may apply if the MSA has been signed, but decedent spouse passes prior to the final judgment.

1. 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% of the marital property.
  - a. Most courts will require that the spouse is kept as beneficiary while the divorce is pending, unless otherwise agreed.

iv. 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.

### III. Beneficiary designations

- a. As described above, §854.15 seeks to revoke certain dispositions of property, including a former spouse as a named beneficiary on a decedent's beneficiary designation (life insurance proceeds, individual retirement account, investment account, bank accounts, TOD designation)
  - i. But because the above statute has exceptions, including the decedent's intent, divorced couples cannot rely solely on this statute.
- b. Qualified plans (governed by ERISA) override state laws, including the provisions of §854.15.
  - i. 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 and state statutes.
    1. 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.
- c. Practical implications of not updating beneficiary designations post-divorce judgment:
  - i. When dealing with certain benefit providers, such as life insurance companies, the burden is on the policy owner to inform said provider of the divorce and implications of Section 854.15.
    1. If a life insurance company, for example, pays out a policy to a former spouse who was still named as a beneficiary on that policy because the company was never informed that the insured was divorced, the life insurance company is relieved of their wrong doing.
      - a. The rightful beneficiaries must then chase the former spouse for the proceeds of that policy, which is a difficult, expensive and time-consuming process, and caselaw is not consistent in holding that the former spouse is not entitled to those proceeds.

**Practice Tip:** Inform and ensure your clients update their estate planning documents and beneficiary designations immediately following the judgment of divorce, as §854.15's revocation of former spouse's beneficiary interest cannot be relied upon.

### IV. Implications on Wills and Trusts

- a. Wills:
  - i. As noted above, §854.15 will serve to revoke certain transfers to a former spouse, such as transfers under a Will.
  - ii. Legal Guardians and Minor Children:
    1. While your client's former spouse is the most likely candidate to be the guardian of any minor children from the marriage, it is

recommended that the client re-execute their Will and appoint new guardians, in the event of incapacity or death of the former spouse while the children are minors.

2. The newly executed Will would serve as evidence of your client's wishes regarding the guardian of their children.

b. Trusts

- i. As noted above, §854.15 will serve to revoke certain transfers to a former spouse, including dispositive provisions under a joint trust agreement.
- ii. Clients should be advised to execute a new, single, revocable trust to insure:
  1. Assets titled in the name of a joint trust are updated as necessary
    - a. Most often the house, which should be re-titled into the name of the client's single trust
  2. Shares for children are held in trust until specified ages
    - a. Creditor & spendthrift protections
  3. Trustee and successor trustee appointments
    - a. Usually the client does not want the former spouse to serve in this role
  4. Provisions to provide for compensation and living arrangements of minor children and legal guardians
  5. Any specialized business succession planning and planning for out-of-state property

V. Powers of Attorney and Timing of the Invalidation

a. Durable (Financial) Power of Attorney:

- i. Wis. Stat. §244.10(b) & (e) state that an agent's power to act under a validly executed financial power of attorney document ends *when an action is filed* for the dissolution of the agent's marriage to the principal, unless the power of attorney document explicitly accounts for these instances.

1. Upon filing for divorce, the spouse's authority is revoked.
  - a. Is a successor agent listed?
    - i. If a successor is not listed, then the client is left without protection.

b. Health Care Power of Attorney

- i. Wis. Stat. §155.40(2) states that if the health care agent is the principal's spouse or domestic partner and a *judgment for divorce is granted*, the HCPOA is revoked and the entire instrument is invalid, *even if other family members or friends are listed as successor agents*.
  1. The HCPOA is only invalidated after the divorce is granted.
    - a. Consider whether the client wants his or her soon-to-be ex-spouse making medical decisions while the divorce is pending.
  2. The granting of a divorce invalidates the *entire* HCPOA, not just the appointment of the former spouse.
    - a. Very important to update immediately!

- c. Practical Implications
  - i. Financial institutions and medical providers may not know that a divorce has been granted or filed.
    - 1. They may rely upon the documents on file and allow a former spouse or soon-to-be-ex-spouse to act, regardless of the statutory revocation.
- d. Practice tips:
  - i. Encourage your clients to update their POAs immediately upon filing for the divorce, as necessary.
    - 1. Provide the updated documents to health care providers and financial institutions.
  - ii. This is especially crucial in “gray divorces” or divorces in which a party’s legal competency could be an issue.
    - 1. Without valid POAs, an adult guardianship action may be necessary.

## VI. Implications on Irrevocable Trusts

- a. Divorce attorneys who do not also do estate planning will be particularly unfamiliar with irrevocable trusts, so it is important to help your clients raise issues related to these trusts as part of the divorce process.
- b. Consider whether the former spouse is named as trustee or a beneficiary of the trust.
  - i. If so, and that is not the intention post-divorce, then the divorce judgment (or marital settlement agreement) should address the changes that are needed upon granting the divorce, if possible.
    - 1. Without this, it could lead to lack of cooperation post-divorce or post-judgment litigation.
  - ii. Non-Judicial Settlement Agreements could be used to modify the trust.
  - iii. Without agreement, a court petition to modify the trust may be needed.
- c. The award and treatment of the client’s interest in an irrevocable trust should be addressed in the divorce judgment (or settlement agreement).
  - i. The irrevocable trust should be treated as an asset for property division and specify who is awarded the trust.
  - ii. Is the trust marital or individual property?
    - 1. This will impact property division.

## VII. Life Insurance for Minor Children

- a. Most divorce judgments will include provisions regarding each spouse’s obligation to maintain life insurance for the benefit of minor children.
  - i. Important to check the terms of the divorce judgment when helping a client post-divorce.
  - ii. Discuss the importance of creating trust provisions for minor children.
    - 1. If you are working with the client while the divorce is pending, make sure the divorce attorney uses language in the divorce judgment that allows the life insurance to be placed into a trust for

the benefit of the minor children, rather than naming the children directly.

## VIII. Summary: Timing of Updates Recommended

- a. Immediately Upon Filing:
  - i. Health Care Power of Attorney
  - ii. Durable Power of Attorney
- b. Immediately Upon Granting of Divorce
  - i. Estate Planning Instruments
    - 1. Wills, Revocable Trusts, Irrevocable Trusts, etc.
  - ii. Beneficiary Designations
    - 1. Especially ERISA retirement accounts