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Column
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*80 STEP TWO IN ANY DIVORCE PROCEEDING: SEE AN ESTATE PLANNING ATTORNEY

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I will not argue whether estate planning should be reviewed immediately prior to or immediately after any divorce filing. While arguments can be made as to why the estate planning probably should be done even before a divorce is initiated, I will assume the client (herein referred to as the "client spouse" and referred to in the feminine) has already met with a divorce attorney. This article is intended to shed light on why the next step--step two in the process--should be addressing the client spouse's estate planning. I urge the family lawyers I know to have all new divorce clients see an estate planning attorney as soon as possible after the initial divorce consultation. I would meet during the initial consultation, if they'd invite me. Simply put, any attorney representing a client spouse involved in a divorce proceeding should strongly urge the client spouse to spend at least an hour with an estate planning attorney.

Why should divorce proceedings automatically lead to estate planning? There are several vital reasons.

Revising Existing Documents

As a result of the divorce, it seems likely that the mutual goals and aspirations of the client spouse and the husband from whom a divorce is being sought (herein referred to as the "divorcing spouse" and referred to in the masculine) have been altered. Those mutual goals may have been expressed in prior estate planning. Such reciprocal estate plans likely need to be revised.

During happier times in their marriages, many client spouses created estate planning documents leaving everything to their spouses. Such wills or revocable trusts undoubtedly expressed the client spouse's intent at that time; however, assuredly, the client spouse's attitudes changed once the divorce began. If the client spouse does not want to spend the rest of her life with the divorcing spouse, it is unlikely she intends to leave all of her assets to him if she dies. Yet, unless she sees her estate planning attorney, that may well be what happens.

Therefore, it is imperative for the divorcing spouse to see a competent estate planning attorney as soon after the divorce is initiated as possible. The client spouse needs to provide copies of any existing estate planning documents (wills and trusts--revocable or irrevocable) plus an accurate inventory of assets. Then the estate planning attorney can properly advise her how her assets will pass on her death. Assuming the client spouse has new estate planning goals, the client spouse and the estate planning attorney should address how to best achieve those interests. Most likely the client spouse will need new estate planning documents entirely. Moreover, the client spouse may need to

consider other means of asset disposition in order to minimize elective share (as described in more detail below). Nevertheless, the process must be initiated and the client spouse must begin to examine the consequences of her current estate plan.

Intestate Share Plus Nontestamentary Assets

Second, those client spouses who have no existing formal estate planning documents need to be introduced to an estate planning attorney who can advise them what will happen with their assets upon their death (during the pendency of the divorce), if nothing further is done. At a minimum, such clients should learn that the laws governing nontestamentary transfers and the laws of intestate succession assume a surviving spouse is entitled to his intestate share (maybe 100 percent) of the estate and his interests in nontestamentary transfers (e.g., via joint ownership or beneficiary designation) unless a final decree of divorce has been entered. In Florida, the entry of such a decree causes the divorcing spouse to be considered predeceased both for purposes of the intestacy statute and for most of the *81 nontestamentary assets. Thus, the filing of a divorce action--it does not matter if it is filed by the client spouse or the divorcing spouse--does not cause the divorcing spouse to forfeit his intestate share or his rights to inherit other nontestamentary transfers. All of this needs to be considered and addressed by the client spouse.

Next, when someone dies owning individually titled assets and has no will, the state law provides a statutory scheme for disposition. In Florida, for example, if the client spouse is still married and has no children, the divorcing spouse receives 100 percent of the client spouse's assets--no matter how advanced or acrimonious the divorce proceeding may be. If there are children of the same marriage, Florida law provides to the surviving spouse the first $20,000 plus one-half of the balance of the estate. The laws of intestate succession apply only if the client spouse has no will. Thus, these rules are circumvented very easily by simply creating a will. The ease with which these rights may be overcome highlights why it is essential for the client spouse to be referred immediately to an estate planner.

While the estate planner is considering a will for the client spouse, he or she also will review the asset ownership. Any client spouse seeing an estate planning attorney must make an inventory of her assets and how they are titled. If assets are jointly titled, there may need to be an accommodation before the joint tenancy can be severed. I do not usually advise clients to singlehandedly attempt to change title in this case. Instead, I usually advise the client to discuss the joint assets with the divorce attorney and consider if an accommodation can be reached. If not, the client spouse must be apprised that death prior to resolution of the case may result in the divorcing spouse receiving those assets.

Also, the client spouse must consider all assets owned with beneficiary designations. Certain assets cannot be changed without the divorcing spouse's consent--i.e., qualified pension plan benefits. Other assets can be changed quickly and easily. Beneficiary designations on IRAs and/or life insurance policies, for example, are easy to alter and the custodian of the IRA or the insurance carrier can provide standardized forms for the client spouse's use.

Again, in almost all cases, a client spouse involved in a divorce proceeding will wish to change these beneficiary designations. It is rare and unusual for a client spouse who addresses her estate planning with an attorney to reply that she wishes all her assets to pass to her divorcing spouse.

Elective Share Rights

While a client spouse may wish to disinherit a divorcing spouse completely, in some cases that goal is unattainable. In Florida, a surviving spouse has a right to elect to take 30 percent of the probate estate of the first spouse to die, even if the surviving spouse is intentionally omitted from the estate plan and a divorce is pending. This must be considered and addressed.

For instance, can the elective share be satisfied with a disposition in trust? Not in Florida. In other jurisdictions, state law permits such, and then the client spouse may prefer to leave the minimum necessary in a trust for the divorcing spouse, with the children, for example, being the ultimate beneficiaries on the divorcing spouse's death. Such a plan may be preferable to completely disinheriting the divorcing spouse only to permit him to take a portion of the client spouse's estate via the elective share. Once the divorce is final, this provision can be eliminated. In

Florida, however, an interest in trust does not satisfy the elective share--and the Real Property, Probate and Trust Law Section of The Florida Bar has proposed legislation to alter this.

Nevertheless, in Florida the elective share can be avoided completely. The client spouse need only make all of her assets pass in a nonprobate environment, as all nonprobate assets are beyond the reach of the elective share. Thus, all jointly owned assets, all assets with beneficiary designations, all totten trust accounts ("in trust for"), and all assets in revocable or irrevocable trusts are not subject to the elective share. In many cases in Florida, for example, after a divorce is initiated the client spouse is well advised to create and fund a revocable trust. A client spouse's desire to minimize her divorcing spouse's access to her assets in the event of death may be a tantamount concern and must be addressed at the outset of the representation. Again, if the client spouse is not introduced to the estate planner at the very outset of the divorce proceeding, very undesirable and tragic consequences could ensue upon the client spouse's untimely death prior to the entry of a final order or decree of divorce. This issue of funding a trust after a divorce has been initiated has never been addressed in a Florida appellate decision. However, there are no decisions saying a spouse in a divorce cannot change her will or reorder her affairs in such a manner as to minimize her divorcing spouse's post-death rights. So long as such planning does not hinder or delay the divorcing spouse's rights to such property in the divorce proceeding, such planning should be permissible.

Guardianships and Trusts for Children

For a myriad of reasons, many client spouses are distrustful of their divorcing spouses, and almost all ***82** would do virtually anything for their children. Therefore, any divorcing spouse with minor children must revise her estate plan (or create one). Some client spouses have fears as to the divorcing spouse's competency to care for the children. In some cases, caring for the children is not the concern, but caring for the client spouse's money is. To some degree, the estate planner's ability to help in this arena is limited. In many cases, custody is being awarded jointly. In those cases, if the client spouse dies, the divorcing spouse will unquestionably be the guardian of the children. In other cases, even if custody is not joint, the presumption in favor of appointing a natural parent as guardian is so overwhelming that, again, the client spouse should be advised that the divorcing spouse ultimately will be the children's guardian no matter what the estate planner attempts to do. Moreover, in my experience, many client spouses are comfortable and satisfied with that being the case. Often the client spouse wants the children to be with their father if she dies. However, I still advise the client spouse to name a guardian of the person for her children. What if the client spouse and her divorcing spouse die simultaneously? What if the father fails or declines to serve? What if he is ineligible to serve (past history of abuse or criminal record)? In all of these examples, the client spouse should have a guardian appointed in her will to show her intent in case the other natural parent is not serving for any reason.

Regarding her property, however, most client spouses have very different feelings. They may be comfortable with the father caring for their children as their guardian of the person, but they rarely want the divorcing spouse to have control over their money once they are gone. For many client spouses, it is equally as bad to leave the divorcing spouse in control of the money as it would be to leave the money outright to him. For that reason, the client spouse must create trusts for the children and must nominate trustees--and successor trustees.

If the fear of having a former spouse manage the children's money is not bad enough to compel the client spouse to create trusts for her children in her new (or revised) estate planning documents, then the ability to avoid a guardianship should be compelling. Without trusts, any money left to the children winds up in a court-directed guardianship. Guardianships are costly and time consuming. Moreover, a judge--whom the client never met (and who usually never meets the children)--becomes the arbiter of how her money will be spent for her children. No thanks! Furthermore, guardianships terminate (in Florida) at the age of 18. Should any child receive a large sum of money outright at the age of 18? What will the child do with the money? Can you spell "Corvette"? I doubt it would be good for any child to receive a large amount of money outright at that age and stage in life. Thus, trusts for the children should be established to protect the money from the divorcing spouse, to protect it from guardianship proceedings, and also to protect it from the children themselves.

First Estate Planning Experiences

Finally, sometimes divorce brings wealth to a client spouse who lacks experience managing it. Her divorcing

spouse may have controlled the finances exclusively in the past. Therefore, it will be important for that client spouse to meet the types of professionals who can help her plan her estate. Her old estate planning may be inadequate to cope with her new wealth. For example, she may now need to address estate tax considerations. Moreover, the client spouse may not have experience managing accountants and investment advisers. As a result of the pending divorce, it may be appropriate for the client spouse to begin the process of estate planning and wealth management for the first time. In many cases the divorce lawyer, along with the estate planning lawyer, can help comfort the client spouse and ease her into asset management responsibilities. As a result of their probate and estate planning practices, estate planning attorneys are very experienced with and attuned to the issues of managing new wealth.

Conclusion

As addressed in this article, there are many good reasons why the second step for many client spouses should be to the estate planning attorney's office. They need to consider and address their changed circumstances and their changed estate planning objectives. Any lawyer representing a client in a divorce should advise the client to see an estate planning attorney. Indeed, it would be a shame to ignore the complicated legal issues relating to the client spouse's estate planning which are made acute by the initiation of the divorce proceedings.

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This article is submitted on behalf of the Family Law Section, Jane Louise Estreicher, chair, and Sharon O. Taylor, editor.

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