

## **Estate Planning Issues in Family Law**

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### **STOP!**

Before negotiating a settlement agreement, the attorney for a party obtaining a divorce should consider the estate planning consequences.

The interaction of matrimonial law and estate planning has become less settled as several decisions have broken with precedent. Further, the complexities and discomfort of the divorce process may cause the parties to fail to deal with the consequences of the death of one of the parties.

### **Here follows a checklist of issues:**

1. Does the client have a will? If the client dies intestate, the surviving spouse will be entitled to between 50 percent and 100 percent of the probate estate, and will have the right to be administrator. This is so even if the couple is estranged and separated. In re Estate of Barbara L. Brackett, (Unpublished) (App. Div. 7-11-96).
2. Should the client's existing will be replaced? If so, should it disinherit the other party to the divorce action? There is no right to an elective share of one-third if the couple is 'living separate and apart' or under circumstances which would give rise to an action for divorce. N.J.S.A. 3B:8-1. The death will terminate the divorce action and a claim for equitable distribution. However, Carr v. Carr, 120 N.J. 336, 576 A.2d 872 (1990), provides a remedy of a constructive trust for the surviving spouse under doctrine of quasi-contract. Unfortunately, the original Carr case did not make clear what amount is to be used to fund the constructive trust remedy. On remand the trial court held that amount awarded is not limited to either right of election or equitable distribution. Carr v. Burgess, 264 N.J.Super. 191, 623 A.2d 1384 (Ch.Div. 1991), aff'd, 264 N.J.Super. 10, 623 A.2d 1384 (App.Div. 1994). It is possible that a bequest under a will to the spouse for an amount equal to the elective share will defeat a claim for a greater amount in a constructive trust. The minimum amount likely to be awarded in equitable distribution should be considered. The elective share can also be satisfied in the form of a lifetime trust. N.J.S.A. 3B:8-17.
3. Should the client move for a pendente lite order to bar the other spouse from changing a will, as well as beneficiary designations on life insurance policies and retirement plans? Orders relating to life insurance and retirement plans are common. It may not be advisable to raise the issue of wills, as this matter may not have occurred to the opposing counsel.

4. Did the couple create any irrevocable life insurance trusts, educational trusts for children or other estate planning devices which should be considered in settlement negotiations? Do the original terms of a trust agreement terminate the rights of a spouse upon divorce? Should policies in an irrevocable trust be allowed to lapse, or may the trustees take other actions with respect to the res which would be appropriate for the beneficiaries under the changed circumstances?
5. During the marriage, did either spouse burn up their own unified credit under the estate tax system to benefit the children of the other spouse? Should this affect the equities of the property settlement?
6. Death usually terminates alimony. N.J.S.A. 2A:34-25. Is there any provision in the settlement agreement to replace this income if the payor dies? The statute specifically allows the Court to order life insurance to be provided. N.J.S.A. 34-25. If the payor is uninsurable, the Court may order the creation of a trust fund. *Jacobetti v. Jacobetti*, 135 N.J. 571 (1994).
7. Although child support obligations continue after death, *Black v. Walker*, 295 N.J.Super. 244, 263 (App. Div. 1996), is there a practical means of securing payment of child support? If not funded by life insurance, can the other parent hold up the conclusion of the administration of the estate until the child is fully emancipated? Educational support obligations also continue. *Kiken v. Kiken*, 149 N.J. 441, 694 A.2d 557 (1997)(overturning the Appellate Division). In one case, the entire life insurance policy on an unmarried father were awarded to the mother for child support, even though there was a contrary beneficiary designation. *DeCeglia v. Estate of Colletti*, 265 N.J.Super. 128, A.2d 590 (App.Div. 1993). While the Family Part sometimes orders a party to provide certain terms in a will, there are better solutions for continuing support of a former spouse or children. An order requiring terms in a will raises questions of the enforceability, and the interpretation in the event of a remarriage or the birth of other children.
8. If life insurance is obtained to secure payment of alimony, child support or educational expenses, will the policy proceeds be included in the taxable estate of the decedent under I.R.C. 2042? Could a life insurance trust be used to keep it out of the decedent's taxable estate as well as the surviving ex-spouse's taxable estate. If the life insurance is includible in the taxable estate, would the tax apportionment clause of the decedent's will prevent the estate taxes from coming from the life insurance?
9. If life insurance is required to be maintained, how does the beneficiary know the premiums are being paid? Instead of having the insured/payor spouse purchase the policy and pay the premiums, it may be safer to have the insured spouse make cash payments directly to the ex-spouse, who will then pay the premiums. If an ex-spouse fails to maintain the required insurance, and then dies, an amount equal to the required policy proceeds will be enforceable against his or her estate. *Macquiling*

- v. Estate of Macquiling, 211 N.J.Super. 69, 510 A.2d 717 (Law Div. 1986). This will provide no remedy if the probate estate is not large enough to satisfy the liability.
10. The final judgment of divorce causes a revocation of those portions of a last will and testament relating to the former spouse. N.J.S.A. 3B:3-14. Should the will be otherwise reviewed after the divorce? The named executors, trustees and guardians for minors do not automatically change upon divorce, even if they are relatives of the former spouse. The advisable estate tax planning will dramatically change.
  11. Has the client revised the beneficiary designations of retirement accounts employee benefits? If minor children are named as beneficiaries, the proceeds may be controlled by the former spouse. It may be advisable to create an intervivos trust to receive these benefits, or to have them flow into the probate estate and be held by a testamentary guardian.
  12. Do the terms of a final judgment of divorce or settlement agreement clearly and specifically void previously made beneficiary designations for retirement plans, death benefits and life insurance policies? The cases are divided as to whether a general waiver revokes beneficiary designations. See Vasconi v. Guardian Life Insurance Co., 124 N.J. 338, 590 A.2d 1161 (1991); In re Estate of Lancken, 290 N.J.Super. 556 (Ch.Div. 1996); In re Death of Santos, 283 N.J.Super. 26, 660 A2d 1271, (Ch.Div. 1994), aff'd, 282 N.J.Super. 509, 660 A2d 1206 (App.Div. 1995).
  13. Have the parties considered making use of the unified credit amount of each party to save on estate taxes on the transfer of assets to their common children? If one ex-spouse is less wealthy, he or she may not make use of the unified credit amount, which is currently \$625,000, and is scheduled to increase to \$1 million by 2006.
  14. Will the payment of alimony and property settlements to the former spouse be exempt from gift tax consequences? In most cases I.R.C. 2516 will apply, but the rules should be reviewed prior to final settlement.
  15. Is there an opportunity under the divorce settlement agreement to make transfers to the children without using up unified credit? Non-taxable transfers may "provide a reasonable allowance for the support of issue of the marriage during minority." IRC 2516(2). Even if required by the settlement agreement, transfers in trust for children by a parent will not be exempt from gift tax unless other parent bargained away real rights to obtain them. Spruance, Trustee v. Commissioner, 60 T.C. 141, aff'd, (Unpublished)(3rd Cir. 10-29-74). A trust which benefits an ex-spouse can provide a remainder interest for the children with a time value of money discount. Rev. Rul. 79-363, 79-2 C.B. 345.
  16. Will future inheritances by other ex-spouse, which will constitute a Lepis change in circumstances allowing for a change in child support or alimony payments? Aronson v. Aronson, 245 N.J.Super. 354; Stiffler v.

Stiffler, 304 N.J.Super. 83 (Ch.Div. 1997). In contrast, gifts and inheritances are not subject to equitable distribution. N.J.S.A. 2A:34-23. Should the payor of child support or alimony request their own parents to alter their estate planning to prevent a Lepis change? Even if placed in trust, could these assets eventually be considered subject to levy, as under Florida law? Thumess v. Thumess, (Unreported) (Family Part, Monmouth County, 1997). Could sprinkling powers given to the trustees prevent this?

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