

ESTATE PLANNING IN THE CONTEXT OF DIVORCE A MATTER OF LIFE AND DEATH

JUNE 2015

The Trusts & Estates Group at Murtha Cullina is pleased to provide clients and friends with information about topics of interest in the estate planning area.

If you have questions about the issues addressed in this newsletter, or any other matters involving estate planning issues, please feel free to contact any of the following attorneys:

Marcel J. Bernier
Alfred R. Casella
Shera G. Golder
Robert A. Heinemann, Jr.
Richard A. Marone
Natale A. Messina
Lisa Newfield
Irving S. Schloss
Sara R. Stadler
Lisa P. Staron
Suzanne Brown Walsh

In Boston:
617.457.4000
In Hartford:
860.240.6000
In New Haven:
203.772.7700
In Stamford:
203.653.5400
In Woburn:
781.933.5505

MURTHA CULLINA LLP
ATTORNEYS AT LAW MURTHALAW.COM

BOSTON HARTFORD NEW HAVEN STAMFORD WOBURN

INTRODUCTION

In the context of one's life, the terms "divorce" and "death" can conjure up equivalent levels of fear. However, rational thought and careful planning can help to mitigate some of that fear as well as allow a person to survive a divorce and contemplate the wisdom of the adage "What does not kill you, makes you stronger." It is best to be prepared. This article will provide some helpful guidance on preparation.

THE EXISTING ESTATE PLAN

It is typically the case, especially with first marriages, that spouses establish reciprocal estate plans that provide generously for the survivor. The shadow of divorce would likely cause a spouse to reconsider. However, because the process can be such a distraction, the issue is often disregarded. Since divorce proceedings can be lengthy, the risk of death prior to final judgment or the execution of a separation agreement that waives inheritance rights is a reality that could allow a divorcing spouse to inherit under an existing Will or the laws of intestacy.

THE EFFECT OF A DIVORCE COMPLAINT

If a divorce complaint has been filed and successfully served, many states implement an automatic restraining order that prevents both spouses from transferring their assets. In addition, there may be prohibitions on changing Wills, trusts and beneficiaries on life insurance policies, pensions and other retirement plans. Further, pursuant to the Retirement Equity Act of 1984 (ERISA), a notarized spousal waiver

is necessary to name someone other than the spouse as beneficiary under a qualified plan.

PRENUPTIAL AND POSTNUPTIAL AGREEMENTS

If the spouses have a prenuptial or postnuptial agreement, it will likely contain provisions governing the division of assets on death or divorce. Accordingly, the documents should be consulted prior to making any changes to an estate plan during the divorce process.

FRAUDULENT CONVEYANCES

The initial reaction of a spouse being sued for divorce is to transfer assets out of the reach of the other spouse. However, since that other spouse is a creditor, transfers of this nature can be considered fraudulent under relevant statutes. These statutes will provide remedies such as avoidance of the transfer, attachment of the transferred asset or the issuance of an injunction against further transfers.

THE SPOUSAL ELECTIVE SHARE

In most jurisdictions, a spouse cannot be completely disinherited and is granted a portion of a deceased spouse's estate by statute. The spouse can elect to receive the statutory share in lieu of what the deceased spouse's Will had provided or even if there was no provision for the spouse at all. This right continues unless a

divorce judgment is final or a waiver of the share was included in a prenuptial or postnuptial agreement or separation agreement.

At least in Connecticut, the spousal elective share applies to only the portion of the deceased spouse's estate that passes through probate under the Will. Assets funded into a revocable trust during life will not be distributed under the Will and so are not subject to the spouse's election against the Will. With that in mind, persons contemplating divorce may fund revocable trusts as a means to further reduce the amount available to a spouse should a divorcing spouse die during the pendency of a divorce proceeding. However, a funded revocable trust is not insulated from a divorce judgment.

PLANNING DURING THE DIVORCE PROCESS

Subject to any automatic restraining orders and depending on the terms of a separation agreement or a governing court decree, a divorcing spouse's new estate planning documents should first comply with any statutory, contractual or court directives. The divorcing spouse's second priority is likely the elimination or minimization of possible transfers to the other spouse. As discussed above and to the extent allowed, an interim plan will often grant the statutory share to the spouse under the assumption that this is the amount the spouse would receive under any circumstance and therefore it is better to avoid the challenge. Other planning considerations such as the appointment of different executors, trustees and guardians for minor children or dependent adult children should not be forgotten. Further, revocation and re-execution of powers of attorney and health care directives is equally important.

PLANNING POST-DIVORCE

Depending on where one is domiciled, a finalized divorce may cause a revocation of an existing Will or void any provisions for the benefit of one's former spouse. Revocation of an existing Will would clearly require that a new Will be executed. Even if only the provisions of an existing Will related to one's former spouse are voided, a number of questions still arise. Who will receive the assets in the absence of a spouse and are these designations still appropriate? Who will serve as the executor if the previous spouse was named? Who will serve as guardian of any minor child?

Estate plans involving trusts or implementing tax planning further complicate matters. Certain estate plans involving tax planning may require that you be married to enjoy certain estate tax benefits.

These plans may no longer be useful or effective after a divorce. Also, previous gifting techniques taking advantage of one's married status will no longer be available after divorce. Provisions in trusts related to one's former spouse may be voided, thus raising similar questions to those identified above.

On the other hand, certain estate planning documents may not be voided upon divorce. Even after a divorce, a designation of beneficiary on a life insurance policy or retirement account naming a former spouse may still be valid. If this was done in coordination with an existing estate plan, it will need to be re-evaluated.

Divorce agreements and judgments will often require implementation of certain estate planning measures. It is essential to make sure that one's estate planning documents are in compliance with any requirements. For instance, a divorcing spouse may be required to obtain life insurance for a period of time for children's education expenses. Special attention should be provided to these requirements in a divorce agreement, as any error could end in one's estate becoming involved in costly litigation.

Finally, divorcing spouses often find themselves contemplating re-marriage in the future, which involves a host of additional concerns and issues. For instance, those entering into a second marriage may want to provide for a new spouse on their passing, while also making sure that assets "stay in the family" and not pass to their new spouse's children. Trusts can be very helpful in this circumstance.

CONCLUSION

Estate planning before, in contemplation of, during and after divorce requires careful consideration. It is essential that the planning be done under the supervision of divorce counsel. However, utilization of a well-versed estate planner is equally essential. Consult your Murtha Cullina attorney for assistance.

This newsletter is one of a series of publications by Murtha Cullina LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult your own lawyer concerning your own situation and any specific legal questions you may have.

AUTHORS



ROBERT A. HEINIMANN, JR.

As an associate in the firm's Trusts and Estates Department, Mr. Heinemann is responsible for the development and implementation of estate plans for clients. His practice also includes estate and trust administration, probate proceedings, tax planning and business succession planning. Mr. Heinemann has experience in conservatorship proceedings in Connecticut Probate Districts, as well as the Title XIX application process. He also has experience counseling clients in contested trusts and estates matters.



NATALE A. MESSINA

A partner in Murtha Cullina's Business Finance practice in Hartford, Mr. Messina has extensive experience in the areas of tax planning, compliance and controversy, business and corporate law, trust and estate planning and estate administration. His client base consists of privately-owned businesses and business owners, high net worth individuals, corporate executives, and professionals. He assists business clients with mergers, acquisitions and dispositions, reorganizations and various tax-related transactions. Mr. Messina counsels family-owned businesses in all aspects of business succession planning while coordinating with related personal estate and trust planning, and provides high net worth clients with sophisticated individual tax, estate, gift, trust and financial planning. He has acted as an adjunct professor in taxation at the University of Hartford and Quinnipiac University. He is also a Certified Public Accountant.



TRUSTS & ESTATES NEWS

The Trusts & Estates Group Welcomes New Partner, Lisa Newfield

Lisa Newfield is a member of the firm's Trusts and Estates Department. Ms. Newfield devotes much of her practice to personal estate planning for individuals, major gift planning for non-profit institution development offices and planned giving for non-profit institutions and philanthropists. Ms. Newfield is a noted lecturer on charitable giving, exempt organization and various trusts and estates and tax topics. She has spoken before many bar associations, educational institutions and charitable organizations, including, but not limited to, the National Conference on Philanthropic Planning, Trusts and Estates Law Section of the New York State Bar Association, Pace University School of Law, and The Westchester Women's Bar Association. She has contributed to Tax Planning Tips for Professional Advisors, the newsletter of the United Jewish Appeal-Federation of Jewish Philanthropies of New York. Ms. Newfield has also appeared on Westchester County's local cable show "Financial Planning with Legal Ease."