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DEMYSTIFYING DIVORCE FOR ESTATE PLANNING AND PROBATE PROFESSIONALS

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This presentation will address the unique issues we face when advising our clients who are divorcing, are divorced or planning to marry. It is impossible to predict whether a client will fit one or more of such criteria, or when and how often. Our job, as the advisors, is to help guide the client through whichever stage of the process they are in, and to help insure against unintended consequences of divorce when death occurs before, during or after. We will review the unique issues regarding how to amend or more often entirely revise the estate plan to correspond with the client's new marital status. We will also explore ways we can address and fix problems arising out of divorce related documents that may frustrate the client's goals, or, worse, may create significant controversy and land them in court.

I. The Divorced Client.

A. Planning

1. Review Existing Documents. When planning for a divorced client, it is important to request and review a client's existing estate planning documents, in addition to documents relating to the divorce decree. Because it is often difficult to get a divorced client to focus on what may appear to be cumbersome legal fees, the advisor should make sure the client understands the effects of the client's existing documents if the client makes no changes.

a. *Powers of Attorney*. If a principal and her spouse divorce after executing a power of attorney designating the opposing spouse as agent, the opposing spouse will be treated as having died when the judgment of dissolution is entered for purposes of all powers of attorney. 755 ILCS 45/2-6(b). We often see powers of attorney that do not name a successor after the spouse. In such case, the principal will no longer have a valid power of attorney.

b. *Wills*. The dissolution of marriage voids every legacy, interest, power of appointment, and fiduciary designation that a divorced spouse bestowed upon a former spouse in a will executed before the divorce judgment. The will takes effect as though the former spouse predeceased the testator as soon as the decree is entered. 755 ILCS 5/4-7(b).

c. *Revocable Trusts*. The entry of an order for dissolution of marriage will effectively revoke a provision or provisions in a trust or trust amendment that a divorcing settlor executed before the divorce judgment when:

    i. the provision pertains to the grantor's former spouse;

    ii. at the time of the divorce judgment, the settlor has the power to revoke, modify or amend the provision, either alone or in conjunction with other persons; and

    iii. neither the governing instrument nor the divorce judgment expressly provide that the provision cannot be revoked by the dissolution of marriage. 760 ILCS 35/1.

When such provisions are revoked, the trust will be administered and construed as though the former spouse died upon entry of the divorce judgment.

However, this automatic removal of an ex-spouse pursuant to the statute will not apply to land trusts, voting trusts, trust deeds or mortgages, liquidation trusts, escrow, instruments under which a nominee, custodian for property or paying or receiving agent is appointed, or Totten Trusts.

2. Review the divorce decree. Before a new plan can be drafted, the advisor must closely examine a previously entered divorce decree and marital settlement agreement to ensure alignment with the client's estate plan. Additionally, there may be documents other than the marital settlement agreement, such as promissory notes or partnership agreements that are important to understand. The advisor should become familiar with all financial obligations, during life or upon death, that a client may have pursuant to the divorce decree. These provisions may include alimony, child support, education obligations, setting up trusts for children, maintaining or establishing life insurance policies and/or trusts, and requirements on how property shall pass at death. These provisions should be considered each time a client makes changes to her estate plan especially if she marries again and has more children. Further, you will want to confirm that your client has fulfilled any immediate obligations under the marital settlement agreement such as transferring accounts or real estate, turning over trusteeship of trusts or establishing new trusts.

3. Drafting Considerations. Divorce obligations typically supersede any contrary provisions in the estate plan. An ex-spouse may have to bring suit in probate or chancery court to effect the provisions of a divorce decree in the event the plan does not fulfill obligations under a divorce decree.

a. It is most often best practices to incorporate specific provisions of the divorce decree and marital settlement agreement or if an acknowledgment that the decree and agreement exist are sufficient. Here is sample language:

> "It is my intention that the provisions of this Will shall satisfy my obligations, if any, pursuant to the terms of a Marital Settlement Agreement (the "Marital Settlement Agreement") executed on DATE, by and between myself and my former husband/wife, NAME. To the extent the provisions of this Will are construed to provide less than I am obligated to provide for NAME under the Marital Settlement Agreement, the terms of the Marital Settlement Agreement shall control."

b. Consider preparing new irrevocable life insurance trusts to fund any payment obligations upon death. Life insurance can be a simple way to ensure fulfillment of obligations pursuant to a divorce decree. By placing the policy in a life insurance trust, the grantor can also ensure that the policy proceeds are outside of her estate upon her death. Further, trusts will allow assets to be protected for the benefit of minor children instead of giving assets outright to an ex-spouse. Be careful not to violate the terms of the decree by changing the beneficiary of a life insurance policy to a trust.

B. Death of an Ex-Spouse.

Once a judgment for dissolution of marriage is entered, the obligations of each party are set by the judgment. 750 ILCS 5/413(a). Many judgments contain provisions for continuing obligations on behalf of one spouse to the other, or both, which can take various forms.

1. Life Insurance to Secure Maintenance or Child Support. Life insurance is a universal planning tool that necessarily becomes an important issue in a divorce. It is important to keep track of how the life insurance will be impacted by the divorce settlement. *See Estate of Comiskey*, 125 Ill. App. 3d 30 (1st Dist. 1984).

a. In *Estate of Comiskey*, the issue before the Court was whether to give a minor half of the proceeds of the life insurance policy on the life of a divorced father who died.

b. The father had agreed in divorce settlement to give one half of life insurance policy proceeds to each of two children.

c. One half had lapsed because of one child's emancipation—so the emancipated child's portion reverted to the father, whose named beneficiary was father's widow. The remaining child, a minor, was entitled to one half of the proceeds of the policies.

d. The court specifically relied upon *Riser v. Riser 7 Wn. App. 647, 501 P.2d 1069 (1972).*

2.Former spouses or Children as Creditors of the Estate in Probate Court. How do rights of former spouses or children hold up against other creditors when a decedent fails to uphold his or her obligations under a divorce judgment? Often, the injured party, whether it be the surviving former spouse, or a child of the decedent, generally has a valid claim against the estate of the decedent. In some cases, the injured party can have a superior right to the creditors.

For example, a child is entitled to proceeds from a life insurance policy when his father agreed to name him as a beneficiary in the divorce settlement. *In re Estate of Beckhart*, 371 Ill. App. 3d 1165, 1168 (3d Dist. 2007).

a. In this case, the settlement agreement required that the decedent name his son as the beneficiary of the life insurance policy the decedent had through his employer.

b. The decedent failed to do so before he died and as a result, the proceeds went to his estate.

c. The spouse filed a claim on behalf of her son.

d. The court held that the child obtained a vested contingent right to those benefits when the settlement agreement was entered, and the judgment became final.

e. It came to light that the proceeds had already been spent on expenses of the Estate. The Court ordered that upon remand, the Trial Court must determine a remedy to make the son whole.

3. Child Awards. Child Awards are second-class claims and should be considered early in the probate process. One of the first things an Executor can and often should do for dependent children (can be minor or adult dependent) is to apply to the Court for Child Awards. Child Awards can also be the basis for direct conflict, albeit unintentionally, between a decedent's children and his former spouse.

a. Child Awards are listed as second-class claims pursuant to 755 ILCS 5/18-10. The amount awarded is set in part by statute, and additional amounts are within the discretion of the Court. The award is supposed to reflect "support" for the child(ren) during the administration period of the Estate, or, nine months. The statute provides set amounts for

child awards for minor and adult dependent children. There is a distinction in the statute for children whose parent left a surviving spouse as opposed to one who did not.

i. $10,000 per child applies in both instances. 755 ILCS 5/15-2 (a)-(b).

ii. $20,000 additional (to be divided equally or as otherwise directed by the Court), as a minimum, applies when there is no surviving spouse. 755 ILCS 5/15-2(b).

iii. The child's legal representative (whether the parent, GAL or other) may petition the Court for more than the statutory amount. The additional amounts should be applied for in a liberal fashion in most cases so long as the award can be substantiated. The Court has wide discretion to determine the award. See *In re Estate of Swisher* (1983), 114 Ill. App.3d 42, 448 N.E.2d 182.

iv. Child awards should be thought through carefully with the input of all affected parties, even when a divorce preceded the death. Families need to find a way to work together even with the bitter taste of the divorce potentially still within recall.

b. Counsel for the Estate must decide how funds should be distributed for purposes of Child Awards on a case by case basis. Such award can be:

i. payable to parent; or

ii. payable to legal guardian

c. *Conflicts of interest can arise between the children and the surviving parent.* When minor children are involved, a conflict of interest arises between the surviving former spouse and the minors, especially as the sole heirs of the decedent. In many cases, a guardian ad litem or "GAL" can be utilized as the "eyes and ears of the Court" to help guide the Court and ensure the minors are protected.

i. The most common result is that a GAL may be appointed by the Court. *Ott v. Little Co. of Mary Hosp.*, 273 Ill. App. 3d 563, 571 (1st Dist. 1995). In *Ott*, the court held that a GAL can be appointed to act for a minor's best interests. The GAL can do anything in the minor's best interest—including settling a case.

ii. The relationship between a guardian and a ward is equivalent to that of a trustee and a beneficiary. *Rucker v. Rucker*, 2014 IL App (1st) 132834, ¶ 55.

4.Ambiguous Marital Settlement Agreements. Divorces can take a long time and procuring a settlement between the spouses can be an emotionally taxing while at the same time highly complicated effort that requires input and consensus from multiple parties (the spouses, their attorneys, mediators, financial advisors, other family members and more). From time to time, despite the amount of hard work and substantive input from both sides, something goes wrong after the ink is dry. Perhaps there was an unanticipated contingency or, worse, an ambiguity exists in the final document that but for a death of one of the parties, would otherwise go unnoticed.

When ambiguities exist in a divorce settlement agreement, or, if the decedent dies without fulfilling obligations under the agreement, the surviving former spouse is often left with no alternative other than to turn to the courts. This is of course an unfortunate result as one of the worst things that can happen to a family after the tragic loss of a parent is reliving a contentious divorce – but this time the parties are not the same. Because the family court no longer maintains jurisdiction over the matter, as previously discussed, the issues will most likely be addressed in Probate Court. Probate Court becomes a new forum for the family and, unfortunately, a place where old wounds become fresh again.

There is not a significant amount of research at this point to provide clarity on the myriad issues. However, with divorce rates continuing to hover around fifty percent of all marriages, problems will continue to unfold as former spouses fail to survive the obligations under their marital settlement agreements. The agreements tend to increase in complexity as do divorces in general. We have provided some sample cases below which highlight some of the issues that are unfolding when a former spouse sues another's estate over a poorly drafted or easily misinterpreted agreement.

a. Allton v. Hintzsche, 373 Ill.App.3d 708 (2007) is another case about life insurance but also an example of how common language, found in many divorce settlement agreements, can cause serious problems upon the death of a party to the divorce.

i. Husband and wife with two children got divorced. Husband had an existing life insurance policy pre-divorce with wife named as beneficiary.

ii. A judgment for dissolution of marriage was entered and the parties entered into a settlement agreement which was adopted by the Court. The agreement purported to obligate both husband and wife to the children with respect to life insurance, however the agreement did not specifically reference husband's existing policy.

iii. Husband died six months after the divorce judgment was entered and made final and both the (now former) wife and the executor of deceased former husband's estate made claims to the proceeds.

iv. There were two possible interpretations of certain provisions regarding life the husband's obligations to "maintain" life insurance and the Court found these provisions to be ambiguous.

v. The Court provided a detailed and important analysis of this situation which is more common than many of us realize. This case is meaningful not only for divorce attorneys, but for estate planning and probate attorneys as well. "When interpreting a marital settlement, courts seek to give effect to the parties' intent. The language used in the marital [settlement] agreement is generally the best indication of the parties' intent. When the terms of the agreement are unambiguous, we determine the parties' intent solely from the language of the instrument. An ambiguity exists when an agreement contains language that is susceptible to more than one reasonable interpretation. Where the language is ambiguous, parol evidence may be used to decide what the parties intended. *Allton v. Hintzsche, Ill.App.3d* at 711 [citations omitted]. The Court held that parol evidence needed to be used because intent could not be ascertained based on a simple reading of the language. *Allton v. Hintzsche, Ill.App.3d* at 712.

vi. Incidentally, this case also supports the holding that equity requires proceeds be properly paid to the intended beneficiaries in a divorce decree (which could include a former spouse or children) when the insured simply fails to change the beneficiary in accordance with the divorce settlement. *Allton v. Hintzsche*, *Ill.App.3d* at 711. Practitioners should ***take note*** that this is an example of when beneficiary designations do not always control; a stark contrast to the same facts but applied to a beneficiary designation for a pension plan, as mentioned earlier in the outline.

b. *McWhite v. Equitable Life Assur. Soc. of U.S.*, 141 Ill. App. 3d 855, 859 (1st Dist. 1986) provides yet another example of life insurance "up for grabs" as a result of (most likely) innocuous and seemingly unintentionally vague provisions of a marital settlement agreement referring to life insurance proceeds.

i. In *McWhite*, the former wife of the decedent was claiming an interest in all proceeds from employer-maintained life insurance policies owned by decedent, on behalf of her minor child, along with decedent's second and current wife.

ii. The decedent had been required to name the minor child as the irrevocable beneficiary of the employer policies. At the time of the divorce, decedent had two policies. He obtained more insurance through his employer prior to his second marriage. Eventually, he named his second wife as the beneficiary of the policies obtained post-divorce.

iii. The two wives came to a settlement, but everyone was too tired to draw up and sign a court order on the spot. Former wife's attorney went back to her office, drafted an order, and had it approved by new wife's attorney. Former wife's attorney took the steps to take it to the Judge for signature, but the Judge was very busy that day, so the attorney left without a signed Order.

iv. What happened next was that the former wife (shockingly) reneged on the settlement and decided her child should get ALL the proceeds based on the decision of other case law, namely *Schwass (In Re Schwass* 126 Ill.App.3d 512 (1984). The former wife's arguments were mostly based on certain "ambiguous" provisions of the marital settlement agreement which stated, "any and all life insurance policies maintained by his employer." *McWhite v. Equitable Life Assur. Soc. of U.S.*, Ill.App.3d at 857.

v. The Court agreed that the language in the agreement was ambiguous because it was "reasonably susceptible to more than one meaning." *McWhite v. Equitable Life Assur. Soc. of U.S.*, Ill.App.3d at 865. However, after careful analysis, the Court found that the ambiguity did not expand the minor's rights beyond the intent of the parties at the time of the divorce and that generally a beneficiary's superior equitable right to proceeds do not extend to additional policies purchased at decedent's option through an employer. *McWhite v. Equitable Life Assur. Soc. of U.S.*, Ill.App.3d at 865.

vi. In the end, the Court upheld the initial settlement agreement and both the new wife and the minor child split the proceeds at issue. However, this was a technical legal

result (and an interesting lesson in all settlement agreements in general). The author believes that this case can be used to deter similar litigation.

5.Effect of Continuing Obligations in Divorce Settlements in the Event of Death.

Sometimes the divorce does not give the parties a clean break. For financial reasons they may remain connected for extended periods of time. The death of one party after the divorce, while the former spouses are still connected, can cause significant issues for the estate of the decedent, the survivor and for the children.

a. Parties' Primary Residence. It is very common for divorcing parties to divorce without having the parties' residence sold and proceeds divided. There are many factors that cause this result:

i. Uncooperative Real Estate Market - *In re Marriage of Courtright*, 185 Ill. App. 3d 74, 78 (3d Dist. 1989). In this case, the wife had the house on the market since the time of the divorce and although she has received several offers, the highest offer thus far was well below the court-determined value of the home. The court held that she made a good-faith effort to sell the house.

ii. Desire to Leave Family/Children in the Home for a Certain Period of Time - *In re Marriage of Zirngibl*, 237 Ill. App. 3d 1049, 1057(1st Dist. 1991). Because the father was the sole provider, the court held that he could maintain ownership of and reside in the house until the child's 18th birthday. At that point, the house would be sold, and the proceeds would be divided.

These may seem like rather common issues and curiously relevant to the topic at hand. It is important to realize that while the parties still own property together, if one of them dies, whether they are divorced yet or not, there is now a "new" owner of the property - typically the estate of which their children are the heirs or legatees. This may create difficulties for all parties with respect to what might otherwise be a simple residential real estate transaction. Problems arise when the parties both remain on title at the death of just one of them and frequently the joint title remains by accident. The parties will forget to execute and/or record the appropriate deed necessary to carry out the property distribution of the MSA. Depending on myriad factors surrounding the residence, there could be a forced sale at an inopportune time and of course additional unnecessary legal fees, court costs, etc. surrounding the sale.

b. Other Types of Obligations. Former spouses may leave the marriage with contractual obligations to confirm payouts from illiquid marital assets such as businesses, investment real estate or other unique personal assets. When the obligor dies, the former spouse may not have any superior rights to the continued payments over other creditors, whether personal or business, unless the payments are structured appropriately and secured, for example, with life insurance.

Also, if the payee under such an arrangement dies, then there could be similar complications with respect to the continued receipt of the payments unless specifically provided for in the settlement. Even worse, the payments could cause the payee's estate to go into probate and be exposed to the payee's creditors; an unintended result.

II. The Divorcing Client.

A. Planning

A client may come to you before they have announced to their spouse that they want a divorce. They want to know what their options are and if they should do any planning before telling their spouse. First, you should consider whether you can continue the relationship. If you represent both spouses jointly you may have to terminate the representation immediately or else inform both spouses of the potential divorce.

Further, a client likely will want to amend fiduciary designations in their estate planning documents. Some clients may want to keep a spouse as a fiduciary even after a divorce when it comes to certain decisions. However, many clients will want to cut out their soon to be ex-spouse during and after the divorce. Further, some clients wish to wait until the divorce is final to do a brand-new plan. It is important to remember that while the ex-spouse will be cutout of all revocable documents upon divorce, state divorce laws that deem an opposing spouse to have predeceased for designation purposes generally do not apply prior to the divorce being finalized. See 755 ILCS 5/4-7(b).

1.Review Premarital/Postmarital Agreements. Review any obligations your client may have due to premarital or postmarital agreements. Discuss these with your client to make sure they comprehend the risks and advantages as well as their obligations upon divorce and death.

2.Gather Documentary Evidence. If you represent a spouse individually you will want to take some steps in preparation of the potential divorce. First you should review the client file and any prior notes or asset schedules. This can provide evidence of asset ownership to show which spouse originally owned an asset as well as the basis of the property. Review files for asset schedules obtained when planning was done or other evidence of original asset ownership. Handwritten notes or information provided by the client may not be definitive, but it can be a starting point for negotiations and determining ownership. When divorce is contemplated, begin to gather the written evidence to show the character of the property and the intent behind the particular transaction.

3.Review beneficiary designations. Beneficiary designations are difficult to challenge, and it is important to ensure that the beneficiary designations are accurate at each phase of the marriage and divorce.

a. Qualified Plans. Non-qualified plans, such as IRAs, carry no restrictions regarding beneficiary changes. The client needs spousal consent to remove his or her spouse as the designated beneficiary under ERISA-qualified plans.

The U.S. Supreme Court has held that a retirement plan properly pays proceeds of the plan to a deceased employee's former spouse where the employee failed to change the beneficiary after the divorce. *Kennedy v. DuPont Savings and Investment Plan*, U.S.,129 S.Ct. 865. In that case, the employee designated his first spouse as his beneficiary while they were still married. They divorced, and the employee later died while married to his second spouse. The second spouse claimed the money from the plan, but her claim was denied due to the beneficiary designation still naming the first spouse.

The second spouse's claim was denied notwithstanding the existence of a waiver of rights to the plan by the first spouse in her divorce decree with the now deceased employee. Unfortunately, the waiver was not enough to defeat the beneficiary designation. The documents governing the pension plan specifically provided that could change the beneficiary only by signing a new form. The result: the second spouse got nothing.

b. Examine life insurance beneficiary designations. If a divorce settlement agreement requires that life insurance be kept in place for the benefit of a former spouse, child or other beneficiary, Illinois law gives that beneficiary preference with respect to the proceeds. *IDS Life Ins. Co. v. Sellards*, 173 Ill. App. 3d 174, 177 (1st Dist. 1988).

i. In *IDS Life*, as part of a divorce settlement, the husband agreed to make his children the irrevocable beneficiaries of certain life insurance. Husband later remarried and changed the beneficiary of the life insurance to his new wife. The new wife was unable to defeat the superior rights of the children as named beneficiaries per the divorce agreement.

ii. "The law is well settled in Illinois that when a marital settlement agreement requires an insured to maintain life insurance for the benefit of a particular beneficiary, the beneficiary has an enforceable equitable right to the proceeds of the insurance policies against any other named beneficiary, except one with a superior equitable right." *IDS Life* Ill. App. 3d at 179, citing *Koenings v. First National Bank Trust Co.* (1986), 145 Ill. App.3d 14, 16, 495 N.E.2d 671, 673; *In re Schwass* (1984), 126 Ill. App.3d 512, 514, 467 N.E.2d 957, 959.

4. Non-marital property. Take steps to protect non-marital property from commingling. This can be achieved by: (1) re-registering assets in the name of a separate revocable trust; (2) removing the other spouse's designation as agent under a power of attorney; and (3) removing any other potential signs that may cause a third party to believe that the opposing spouse has an ownership interest in the property.

With respect to trusts established by a third party for the client's benefit, be careful not to let trust distributions follow a pattern that could give rise to an expectation of entitlement with respect to either income or principal distributions. This could cause a judge in divorce proceedings to include such distributions as income in calculating the ultimate settlement breakdown.

Ideally this kind of separation has already existed in the marriage, but if spouses have put each other's names on certain property, one may try to argue that it is marital property.

5. Fraudulent conveyances. Review all contemplated transfers considering the applicable state Uniform Fraudulent Transfer Act or Uniform Fraudulent Conveyances Act. 740 ILCS 160.

Conveyances of marital property may be overturned and can create problems with the court. When a spouse transfers marital property for no consideration, the opposing spouse likely will have a right to rescind the transfer. 740 ILCS 160/5(a)(2). Plus taking an action like this may disfavor the transferring party in the court's opinion. Any conveyance that may be rescinded also may cause the court to question

whether the conveyor is acting in good faith before the court. It is important to ALWAYS CHECK WITH THE CLIENT'S MATRIMONIAL ATTORNEY WHEN ADVISING A CLIENT TO TRANSFER ASSETS WHILE A DIVORCE IS IN PROGRESS.

6. Asset registration. The client should look for situations where he or she made spousal transfers exclusively for asset protection purposes.
Many states recognize that transfers of marital property between spouses, incident to tax planning, generally are not completed with the intent of making a gift. However, to show that property is not marital property pursuant must be done through clear and convincing evidence pursuant to the terms of the new statute. 750 ILCS 5/503(b).

Section 503(b) provides, in part:

> *(b)(1) For purposes of distribution of property, all property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage is presumed marital property. This presumption includes non-marital property transferred into some form of co-ownership between the spouses, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. The presumption of marital property is overcome by showing through clear and convincing evidence that the property was acquired by a method listed in subsection (a) of this Section or was done for estate or tax planning purposes or for other reasons that establish that a transfer between spouses was not intended to be a gift.*

7. Drafting Issues.

a. Modifying pre-divorce. Changing the terms of a will or trust during divorce proceedings can be problematic. Review state law regarding a spouse's forced share at death. In Illinois, a surviving spouse is entitled to: (1) one-third of his or her deceased spouse's entire estate if the deceased spouse leaves a descendant, or (2) one-half of the entire estate if the deceased spouse leaves no descendant. 755 ILCS 5/2-8(a). Further, if there are minor children, the surviving spouse will likely be custodian for any assets directed to the minor children.

b. If a client does not have a revocable trust, consider whether it is appropriate to establish one as part of the estate plan. Assets in a revocable trust generally are not subject to the spousal forced share. However, depending on the timing of the creation of the trust or other planning documentation, the transfer to a revocable trust may be considered a fraudulent transfer.

c. Consider whether decanting or merging can be used to amend unfavorable terms before a divorce is finalized. This should not be done without consultation with the divorce attorney and consider a fiduciary obligation your client may have. For example, consider an irrevocable gift trust of which Husband was the grantor and Wife was the trustee. Wife's family gifted shares of a family limited partnership to the trust. Husband's attorney drafted the trusts. During the divorce proceedings Wife discovered that the trust stated that in the event of divorce, Wife was deemed to be deceased for all purposes of the trust in which event an unsophisticated brother of Husband would become the trustee. While one may argue that Wife's family should have taken a closer look at the trust before gifting property, Wife may still be able to take active steps to amend these

provisions before the divorce is final.

d. During divorce negotiations, a spouse would be wise to consider any irrevocable trusts and their value to the opposing spouse. Consider including the opposing spouse's resignation as trustee of an irrevocable trust among the items being negotiated. Some irrevocable life insurance trusts grant rights to third parties to remove or otherwise change trust beneficiaries.

8. Transfer Tax Issues.

a. *Gift tax marital deduction.* A married individual can transfer gifts to his or her spouse tax-free, even in the year of divorce, provided that the gifts are made before the dissolution of marriage and neither spouse remarries during the year. IRC § 2523(a). A client may want to consider this as part of the divorce negotiations to allow a gift to made to a soon to be ex-spouse without worrying about the tax implications.

b. *Split Gifts.* The IRS allows gifts to be split in the year of divorce, provided that the gifts are made before the cessation of marriage and neither party remarries during the year. IRC § 2513. Again, this may be considered as part of the divorce negotiations, especially if the spouses had a habit of making split gifts throughout the marriage.

c. *Post-Divorce Transfers*. Certain transfers among former spouses after the divorce will not be considered a gift if such transfers meet the requirements of IRC § 2516. If a transfer occurs incident to the divorce, and pursuant to a written agreement entered into before the end of the marriage, the transfer will not be a gift so long as the divorce occurs within a 3-year period beginning on the date one year before such agreement is entered into (regardless of whether the divorce decree approves the agreement) and: (i) the transfer is between former spouses in settlement of marital or property rights; or (ii) the transfer serves to provide a reasonable allowance for support of children of the (former) marriage.

9. Income Tax Consequences

For income tax purposes, transfers between spouses are tax-free regardless of any gain or loss. IRC § 1041(a). Property transfers between former spouses incident to divorce will also qualify for this gift tax marital deduction. IRC § 1041. However, to show than a transfer is incident to divorce, it must occur within (a) one year after the cessation of marriage or (b) six years after the end of the marriage, if the transfer is made pursuant to the terms of a divorce or separation instrument. These transfers will be treated as gifts for income tax purposes and therefore the transferee spouse will take the transferor spouse's carryover basis. The divorcing couple should specifically identify the assets to be transferred in the divorce agreement to qualify for this treatment

Before the enactment of the Tax Cuts and Jobs Act, alimony payments were deductible to the payor and includible in the payee spouse's income. IRC § 71. However, under the new law, with respect to agreements entered after December 31, 2018, the deductibility and includability provisions expire. Because alimony payments are fraught with bad feelings, one possible solution is an alimony trust. Alimony trusts provide for a consistent income stream, assuring steady payments to the payee regardless of problems the obligor may encounter during the payment period. Further, the trust serves to lessen concerns regarding the payee spouse's potential creditors and the payee spouse's ability to manage and

administer the funds since there is a trustee who is managing the assets and expending funds for the payee spouse's needs and support.

a. An alimony trust can appoint a third party to administer the payments and therefore reduce contention between the parties.
b. Payments to the trust are not deductible under §71 but after 12/31/2018, that will no longer be a factor. However, if a lump sum transfer to a trust occurs and is made pursuant to IRC § 2516, the payor spouse will not have to worry about the deductibility of the payments. However, it is unclear whether distributions from the trust would be income to the recipient spouse.
c. Payor can benefit from a "known quantity" payment to the trust and reduce anxiety of unpredictable future income for both parties.
d. The trust can also "insure" against a spendthrift payee.
e. Once an alimony trust is funded, the trust relieves the payor spouse of future tax obligations when trust income is paid to the payee spouse. The payee is taxed on distributed income, and the trust is taxed on undistributed income.
f. To be effective, the trust should be irrevocable. However, the trust provisions can provide that upon termination of the grantor's support obligation pursuant to the divorce documents, the trust principal will revert to the grantor.
g. This reversion interest might normally cause the trust to be a grantor trust for income tax purposes, IRC § 682 treats an alimony trust like a non-grantor trust. Therefore, the beneficiary spouse is taxed on the income distributed and the trust pays income taxes on any excess income that is not distributed.

B. Death of a Party During the Divorce Proceedings.

What happens when a husband or wife dies before the divorce becomes final? The short answer is they are still married, and the divorce can potentially be viewed as a non-factor. The concept of the "termination" of a divorce due to death is called abatement. "Generally, death of a party during the course of a divorce proceeding has been held to abate the action." *Brandon v. Caisse* 145 Ill.App.3d 1070, 1072 (1986). The basis for such abatement is that the court's personal and subject-matter jurisdiction to change a person's marital status is extinguished at death. 750 ILCS 5/401(b). A divorce case that is abated will usually be transferred to Probate Court. The three cases summarized below, illustrate the legal technicalities surrounding abatement and provide guidance for the practitioner when this unexpected situation occurs. Although the divorce is "over" the issues between the parties are not necessarily dead. Frequently surviving spouses will find that the fight continues; only the parties may change. Don't forget that the client's existing documents, if he or she has any, will still apply. Only the final decree can affect the existing plan.

In re Marriage of Platt, 2015 IL App (2d) 141174, ¶ 18.

In this case, a husband filed for divorce against his wife. Wife sought to add husband's girlfriend, with whom he was living after being left disabled in a motorcycle accident, as a party to the action. (It is unclear whether girlfriend was his guardian). Girlfriend was added as a third party including to the ultimate divorce judgment. The husband then married girlfriend, and subsequently died in a skydiving accident.

i. Husband had a U.S. Government pension which was supposed to be divided

between both former and new spouse pursuant to a QDRO which was never procured in connection with settlement agreement.

ii. New wife attempted to argue that former wife could not seek to enforce the judgment and that the action abated due to lack of jurisdiction of the trial court.

iii. The Court disagreed with new wife on many levels.

iv. Because the dissolution judgment was final when the husband died, the action did not abate. The Court retained jurisdiction and the former wife was entitled to enforce the pension provisions in the dissolution judgment against the surviving spouse, who was a party to the judgment.

In re Marriage of Ignatius, 338 Ill. App. 3d 652 (2d Dist. 2003).

i. In this case, during the dissolution proceeding, the trial court enjoined the parties from transferring or otherwise disposing of the marital assets. Shortly thereafter, wife was diagnosed with terminal cancer and succeeded in having the injunction modified, via court order, so that joint tenancies would be severed, and she could then dispose of her portion of those assets for estate planning purposes.

ii. The wife died before the tenancies were divided and arguably, husband was in violation of the court order. However, upon her death, the divorce was not final; no judgment of dissolution had been entered. Wife's sister, as her executor, intervened in the divorce case seeking to have the Court enforce the court order to sever the joint tenancies and to perform an accounting and divide the property.

iii. Husband argued that the Court had no authority to enforce the Order or any other part of the case as a result of wife's death and lack of dissolution judgment; the action had abated.

iv. The Court reaffirmed the abatement analysis by quoting: "It has long been the rule in Illinois that the death of either party to a divorce action prior to final judgment deprives the circuit court of jurisdiction over all aspects of the marriage relationship." *In re Marriage of Ignatius* 338 Ill.App.3d at 658, quoting *In re Estate of Chandler*, 90 Ill. App. 3d 674, 677 (1980) [citations omitted]. It went on to explain that despite the wife's sister's desire for the Court to do so, the Court was unable to simply let the wife's sister, as intervenor, step into her shoes and carry out her wishes; the statute does not provide for that scenario and the sister would have to find another avenue. *In re Marriage of Ignatius* 338 Ill.App.3d at 659.

v. There was no specific evidence in this case that the parties took their dispute to Probate Court, however, the Court provided direction in that regard by implying that although the dissolution action abated, it was possible that the wife's sister would be able to help achieve her sister's legacy goals in Probate Court. Using various tools in Probate Court, such as Citations which were specifically mentioned, or the issue of husband's alleged violation of the injunctive court order, the Court tried to demonstrate the abatement was not a "dead" end. *In re Marriage of Ignatius* 338 Ill.App.3d at 661.

Brandon v. Caisse 145 Ill.App.3d 1070 (1986)

i. Wife Faye brought an action against her husband Armand for dissolution of marriage. Three days after closing arguments, before final judgment, Faye died. Thereafter, Linda Brandon, the executor of Faye's estate was substituted as a party for her. Armand filed a motion to dismiss based on abatement since a judgment of dissolution had not been entered; it was denied.

ii. Two months after Faye's death the judge entered a judgment of dissolution and distribution of property. Armand appeals and contends that since a judgment of dissolution had not been entered before Faye's death, the proceedings for dissolution abated. The estate maintains that although there was never a formal judgment of dissolution entered, the litigation was ripe for judgment and based on prior case law did not abate.

iii. The court went through a discussion of the prior case law (most importantly, *In Re Marriage of Davies* 95 Ill.2d 474 (1983)) and determined that the legislature changed the law based on the prior cases. The law now states, "The death of a party subsequent to entry of a judgment for dissolution but before judgment on reserved issues shall not abate the proceeding." 750 ILCS 5/401(b).

iv. The court applied the statute and states that the cause of action abated on Faye's death and reversed the trial court.

If you have a client facing impending death during a divorce proceeding, consider whether it is prudent to ask for an immediate judgment on the divorce and to hold everything thing else on reserve to avoid abatement (similar to *Chandler* 90 Ill.App.3d 674 (1980).

III. The "Engaged" or "Almost Married" Client.

Before a client marries for the first time or prior to a client's remarriage following death or divorce, a unique planning opportunity exists with the Premarital/Prenuptial Agreement (endearingly referred to as the "Prenup"). Often clients with disparate balance sheets are first in line to enter into these agreements (and often prodded by older generation family members as a carrot to remain entitled to future benefits of family wealth), but in reality, any couple can benefit from the goals that can be achieved. Many estate planners draft these agreements or represent clients in a "reviewing" capacity. It is also a perfect time for the soon-to-be-married to put an estate plan in place. If segregating assets for marital purposes is a goal, then having a plan in place before the marriage provides a vehicle for the spouse to keep their assets separate and reduce the risk of co-mingling or transmutation of property.

A. General Provisions.

Premarital Agreements are creatures of state law and in Illinois are governed by the Illinois Uniform Premarital Agreement Act 750 ILCS 10/et.seq. To be valid and enforceable, the Prenup must be in writing and signed voluntarily, without duress, by both parties to the marriage. The Prenup becomes effective as of the date of the parties' marriage. The Prenup can define the parties' rights and responsibilities with respect to financial issues if the parties divorce or when one of them dies.

B. Tax Provisions.

1. Using Portability as an "Asset." Under the 2017 Tax Cuts and Jobs Act, the exemption amount attributable to a less wealthy spouse becomes more valuable as an "asset" to the spouse with a taxable estate. More than ever, as a rule, Premarital Agreements should include a provision which obligates a surviving spouse to file a Federal Estate Tax Return for purposes of making an allowable portability election. A recent Oklahoma Supreme Court case established that an executor has a fiduciary obligation to make the election on behalf of a surviving spouse. The surviving spouse is the only person who can make the election and the only person with an interest in the value of the election. *In re Estate of Vose. 390 P.3d 238 (Okla.2017)*

2. With income tax planning becoming more relevant than ever, review "funding" provisions carefully. Payments pursuant to a Premarital Agreement may be subject to fulfillment with assets that are includible in the payee's income.

3. Alimony provisions will need to be reviewed, if not potentially amended, based on change in law related to taxability of alimony.

C. General Planning.

1. Parties can use these agreements to provide a "bare minimum" to a surviving spouse and then use the estate plan to augment benefits.

2. Premarital agreements are the best way to protect family wealth by establishing rights and responsibilities well in advance of a divorce.

Divorce attorneys and estate planning attorneys have more in common than either side may wish to admit. We often are interacting with a client in a vulnerable position. We ask them uncomfortable questions. We want to know their beliefs and values regarding money and family relationships. Perhaps most rewarding, they must trust us with their most personal and private issues.

Too often divorce proceedings only consider what occurs between a couple on divorce but do not consider the further looking future—potential remarriage of a party and the unavoidable death of both parties. While a couple is already in a vulnerable position discussing what happens with property division and child custody, they should consider how their current and future estate planning may be affected.

Estate planning attorneys and divorce attorneys are already planning for worst case scenarios. When combined, the discussion can be somewhat depressing. However, if divorce decrees are not considered when estate planning, worst case scenarios can become reality. While it may be possible to clean up ambiguous or incomplete provisions in marital settlement agreements before an ex-spouse dies, issues can arise upon one's death. It is best to avoid these issues during life. When dealing with divorced client, an estate planning attorney should consider all divorce documentation. Such documentation should be reviewed periodically to determine if any circumstances have changed or if they should be considered in estate planning.