What Every Estate Planner Should Know About Divorce[1]

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Over the past 20 years, marriage rates have declined, largely because couples are getting married at a later age. In the 1960s, the median age for first marriages was about 20 for women and 23 for men. By 2016, the median ages had increased to 28 for women and 30 for men.[2]

Divorce rates similarly have declined, from a high for first marriages of approximately 50% in 1979 to a more recent general divorce rate of about 41% - again largely due to the increased ages for first marriages.[3] But the divorce rate for older married couples (euphemistically called "grey divorces") is on the rise – currently about 34% of all divorces, which is almost double the rate of any other age group. And, not surprisingly, divorce rates for subsequent marriages after divorces are quite high – 60% for second marriages and 73% for third marriages.[4]

What does this mean for lawyers? **More business!** Not just for divorce lawyers, but for estate planners as well. There are three general times that estate planners play (or should play) a critical role relating to divorces. First, when doing estate planning for married couples, whether innocuously for wills and trusts or more directly for pre- and post-nuptial agreements. Second, when a divorce is contemplated or pending. And, third, after a divorce has been finalized.

Taking these "opportunities" in reverse order:

Post-Divorce Planning Opportunities

Like most lawsuits, the overwhelming majority of divorce cases are settled rather than going to trial. Divorce lawyers are focused on getting the case settled as favorably as

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1 Copyright © 2025 Gaslowitz Frankel LLC.

2 U.S. Census Bureau, Number, Timing, and Duration of Marriages and Divorces: 2016 (Issued April 2021).

3 Id.

4 106 Divorce Statistics You Can't Ignore: 2022 Divorce Rates and Impact on Children, Financeonline.com/divorce-statistics.

possible for their clients. They often do not realize that their now-divorced clients have not thought about their pre-divorce estate planning. And the now-divorced clients (and maybe the divorce lawyers as well) likely do not understand that although their wills have been invalidated by the divorce decree as a matter of law (as to spouses), in North Dakota, whether other estate planning vehicles also are invalidated – such as trusts, brokerage and insurance beneficiary designations, and non-qualified retirement accounts, etc. – depends on the whether the controlling document provides otherwise. See N.D.C.C. § 30.1-10-04(2)(a) (2009) ("Except as provided by the express terms of a governing instrument, . . . [a divorce decree] revokes any revocable disposition or appointment of property made by a divorced individual to the individual's former spouse."). Nor do many divorce lawyers understand how or when they can persuade the court to include trust assets or distributions in the equitable division of marital assets as part of the divorce property settlement. As a general, rule, divorce lawyers sometimes overlook (or do not understand) these nuances when negotiating settlements.

This is a great business opportunity for estate planners. Newly divorced spouses need to update their estate plans as soon as possible after the divorce is final. Not only should they terminate old powers of attorney and healthcare directives (if they did not already do so while the divorce was pending), but they should execute new wills, powers of attorney, and healthcare directives. They also should (with the assistance of a good estate planner!) – review all financial account ownership and beneficiary designations, life insurance policies, retirement accounts, and trusts. Some (but not many) financial institutions include default provisions regarding divorces in their standard account opening documents, but even the default provisions are not always the same. Many divorce decrees (and settlement agreements) fail to address beneficiary designations for life insurance, but even when they do, absent adequate enforcement mechanisms, the insurance company will only pay death benefits to the designated beneficiary.

Opportunities for Estate Planners When Divorce Pending (or Contemplated)

The most critical (and often overlooked) planning opportunities happen while a divorce petition is pending.

1. Review Existing Documents.

As an initial matter, divorce attorneys (and their clients) often do not understand existing estate-planning documents. Many of these documents were prepared jointly (or, at least, the married spouses thought they were for the mutual benefit of both of them and the family in general) or for tax reasons; and, one or both spouses likely do not really understand them.

So, reviewing existing estate-planning documents is a critical first step for a spouse contemplating a divorce or evaluating their rights after a divorce is filed. As noted above, a spouse's inheritance rights under a will after a divorce are pretty straight-forward. But, divorce lawyers (and their clients) rarely review (or understand) beneficiary designations and beneficial rights under existing trusts.

For example, a couple may have purchased term or whole life insurance policies with each other as beneficiaries and children or other family members as contingent or partial beneficiaries. The policies frequently have different death benefits based on which spouse was the primary earner or care-giver. But the divorce may change the paradigm. As a practical matter, many divorce agreements merely divide up the insurance policies based on ownership or cash value. This approach may be appropriate in many circumstances. However, when the policies were intended to provide for children or fund other events (e.g., business buy-outs), it may be important to the spouse to understand there are other ways to deal with insurance policies.

Ownership or beneficial interests in family partnerships or limited liability companies also should be evaluated. Many partnership/operating agreements include default provisions relating to the divorce of owners.[5] These will impact the spouse significantly when negotiating a settlement. And, of course, many family businesses are the primary asset of the family, which underscores why the spouse needs to understand his or her rights.

Trusts are another area that divorcing spouses (and their lawyers) often do not understand. This includes grantor trusts created by one or more of the spouses, many times for tax-planning or asset protection purposes, and sometimes because one spouse wanted to take advantage of the other spouse. This also includes third-party trusts, whether created by family members for the benefit of one of the spouses and their descendants, or grantor trusts for the same reasons just mentioned.

Not all trusts are created equal, and not all trusts are drafted well. For example, many trusts include a "disappearing spouse clause" that removes a spouse as a beneficiary if there is a divorce. (Some say just the opposite).[6] Interestingly, in some of the popular drafting software (and in many published forms), this provision is at the end of the trust or buried in definitions, making it difficult for the unsophisticated reader to find the provision (if they were even looking) much less understand it.

Where there are significant assets outside of the trust, or where there are several trusts that own comparably valued assets and that essentially treat the divorcing spouses the same, there may be no real issue. But, where a trust owns a significant portion of the couple's assets, or the family business is in the trust, or the remaining beneficiaries are not the same in multiple trusts, there may be significant problems. Typical provisions used to create grantor trusts – such as substitution powers and the power to name charities as

[5] It is important to look for and evaluate what state's laws apply.

[6] The Tax Cuts and Jobs Act of 2017 repealed I.R.C. § 682. Therefore, unless Congress amends the Act, a grantor spouse will remain liable for the income taxes on an intentionally defective grantor trust even after divorce. This is true even if the non-grantor spouse remains a beneficiary upon divorce.

additional beneficiaries – also create potential problems that need to be understood, particularly where one spouse has the right to remove and replace trustees or otherwise controls (as a practical matter) the trustee. An angry or manipulative spouse – which is far from atypical in a divorce – may try to use these provisions either as leverage during divorce settlement negotiations or to punish the ex-spouse after the divorce. These potential problems are exacerbated when the trustee is a family member or close friend of one of the spouses or, as is often the case, the other spouse.

A critical first step for any divorcing spouse is to understand his/her rights under the trust(s).[7] This is particularly important where one spouse created (or is using the trust) to exclude assets from the marital estate. In Georgia, "marital property" does not actually exist until a divorce petition has been filed; it is at that point that a court will decide what is or is not marital property subject to equitable division.[8] Georgia allows spouses to gift, sell, or transfer assets during the marriage that, absent a "claw-back" of some sort, will not be part of the marital property after a divorce petition is filed.

If a spouse ceases to be a beneficiary of a trust after divorce – or, more likely, the other spouse argues (or potentially may argue) that their soon-to-be-ex-spouse loses his/her beneficial interests after divorce – the next step is to evaluate whether there are any potential claims that could invalidate the trust or "claw back" some of the trust assets. For example, if a spouse fraudulently induced the other spouse to execute a trust, or if the drafting attorney did not adequately disclose the potential conflict between spouses, there may be a legal claim for setting aside the trust or for breach of fiduciary duties. And, most states have concluded that the Uniform Voidable Transfers Act (or its predecessor Uniform Fraudulent Transfers Act) applies to spouses as "potential" creditors.

Careful review of distribution standards in a trust also is important because distributions from a trust may be relevant to property division, alimony, and child support. The key question is whether a spouse's rights to distributions have vested. In other words, does the trust require income distributions? Does the trust authorize the spouse/beneficiary to require discretionary distributions of principal and interest? Although few North Dakota appellate decisions have addressed the legal import of historical discretionary distributions to a spouse in the context of equitable distribution, this is an expanding area of law.

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[7] It is important to look for and evaluate which state's law applies and whether there is a forum selection clause (i.e., you must file lawsuit in that state). It also is important to evaluate whether North Dakota's public policy would override another state's law (e.g., North Dakota may not recognize self-settled trusts even if authorized in another state).

[8] North Dakota is an "equitable division" state, not a "community property" state. What this means is that, unless the divorcing spouses agree otherwise, a court will decide how to divide the marital assets.

The bottom line is that divorce attorneys often do not understand their clients' rights under estate-planning documents, which the "educated" divorce attorney can use to his client's advantage during settlement negotiations, trial preparation, and trial.

2. Revising Existing Estate-Planning Documents and Beneficiary Designations.

As part of settlement negotiations (and trial strategy), divorce attorneys should evaluate whether existing documents need to be revised.[9] Settlement agreements and divorce decrees may include directions to parties to revise wills, beneficiary designations, and other estate-planning documents. Depending on the amendment provisions in a partnership/operating agreement, a party also could be directed to revise or implement changes to the partnership/company. North Dakota also recently adopted the Uniform Trust Code, which makes it much easier to modify or terminate an irrevocable trust.[10]

Divorce lawyers need to remember that, as part of a voluntary settlement, even assets that otherwise would not be treated as marital property can be utilized to fund obligations. For example, even if a trust has a non-mandatory, discretionary distribution standard, a trust could be modified to authorize a one-time distribution or require payment of expenses otherwise the obligation of a parent – such as private school or college expenses, medical expenses, housing expenses, etc. In other words, trusts could be used as a "funding source" that frees up other assets of the divorcing spouses for equitable division of property or financial obligations.[11]

Agreements to change beneficiaries or joint account survivorship rights also might be used to equalize or fund commitments on which the divorcing spouses agree. For example, requiring life insurance for children is often a shared goal. The same is true for

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[9] As a general rule, many trial courts have a standing order (or policy) that, other than ordinary expenses, spouses may not transfer or change ownership of assets while the divorce is pending. That said, divorce attorneys, with the assistance of an estate planner, may nevertheless want to change beneficiary designations or revise estate-planning documents while the divorce is pending to try to ensure that, if the client dies while the divorce is pending, the client's intended beneficiaries (rather than the spouse, who remains an heir-at-law until the divorce decree is entered) get what the client wanted. There may be a dispute relating to the standing order, but the surviving beneficiaries likely will be in better position when and if the surviving spouses chooses to contest the new estate plan.

[10] See N.D.C.C. §§ 59-123-10, -11, and -12. Note that it is significantly easier to modify a trust if the grantor is still living.

[11] If the grantor is still living but not one of the spouses (such as a parent or third-party), he or she will have to consent to the modification. There will be circumstances where a parent or other third-party grantor may have legitimate (or non-legitimate) reasons for declining to consent. In that event, any modification would require court approval and changed circumstances justifying the modification.

inheritances. Note, however, that divorce attorneys frequently fail to document these obligations well or, equally as often, fail to provide a sufficient enforcement mechanism.

For example, divorce agreements often provide that a spouse will give half (or another percentage) of their "estate" to their children or step-children. What does "estate" mean in this context? Probate estate? Taxable estate? And, how does the surviving spouse (or children) enforce this obligation when the other spouse dies many years after the divorce, often after remarrying? What happens if the spouse gifts some or all of the "estate" assets prior to his or her death? Does the surviving spouse (or children) have a remedy other than a breach of contract claim against the decedent's estate (which may or may not have sufficient assets to satisfy the obligation).

The initial answer is for the divorce attorney, with the assistance of an estate planner, to be very careful (and complete) when defining "estate," including in particular assets that pass outside the estate pursuant to beneficiary designations and survivorship rights. The agreement also should include an express "contract to make a will" (or trust, beneficiary designation, etc.) and a broad waiver and release of authority to change existing beneficiaries or agreed-upon revised documents. A more proactive solution would be to include in any agreement a limited power of attorney given to the other spouse (or children or third-party) empowering that person to enforce the obligation, including the right to change beneficiary designations while the other spouse is still living.

Life insurance obligations frequently are not protected adequately. For example, although divorce settlements often require annual confirmation that the policy is in force, what happens if the spouse (or trustee with an insurance trust) fails to pay a premium when due and fails to cure the default timely? An easy solution is for the settlement agreement to require the spouse to include the other spouse (or adult children) as an "additional insured" entitled to notice of default. Then, if there is a default, the non-defaulting spouse can cure the default by paying the minimum premium and file a contempt action against the defaulting spouse to get reimbursed – but the insurance will not lapse.[12]

Another solution would be to create an insurance trust where the trustee would have a fiduciary duty to maintain the policy in force. This would have the added benefit of creating flexibility to decrease the insurance (or beneficial interest in the insurance) as the children/beneficiaries age and the usual reasons for insurance (e.g., fund education, child support, etc.) diminish.

The best solution for all future financial obligations is to pre-fund the obligation, whether that be through a trust, a "paid-up" insurance policy, an annuity, a perfected security interest in a family partnership/company or asset owned by the entity, or some other financial or estate-planning vehicle.

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[12] As noted above relating to beneficiary designations, if the insurance lapses, the only remedy available to the non-defaulting spouse (or children) would be to sue the defaulting spouse or his/her probate estate after-the-fact.

“Divorce” Planning Pre-Divorce

It is very common for couples to hire a single lawyer to draft their estate-planning documents where there is no divorce on the immediate horizon.[13] Most planners, before accepting the joint representation, ask these couples whether their marriage is “strong” or a divorce contemplated. But even when it is appropriate for the lawyer to accept the joint representation, there are inherent conflicts between spouses,[14] especially regarding the provisions in any will or trust relating to what happens if the parties divorce.

The estate planner needs to be very clear to the jointly represented couple (and disclose in writing separately from the draft will or trust) about the options for what happens in the event of divorce, including an explanation of how property is divided upon divorce and the spouses’ respective rights (e.g., creditor under Georgia Voidable Transfer Act, beneficial rights under existing or new trusts).

As noted above, divorces are common, and they are on the rise for older couples. The author of this paper (who admittedly is *not* an estate planner) respectfully suggests that estate planners spend some time thinking about the options for divorce provisions and draft several “default” provisions for consideration in their forms. When drafting these default provisions, the drafter needs to consider the value of other assets passing outside of the will or trust being drafted and what would be “fair” to the parties if they divorced. At a minimum, the drafter should not use and recommend a default “disappearing spouse clause” (or the inverse) without disclosing the financial impact on each of the spouses.

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[13] It goes without saying that estate planners should not jointly represent couples when one of the spouses is contemplating divorce at the time.

[14] There have been numerous presentations estate planning conferences around the country regarding the inherent conflicts between spouses and the disclosures necessary prior to undertaking joint representation. This paper will not address these issues.