APFM/ADFP/MCFM CONFERENCE

ESTATE PLANNING AND DIVORCE MEDIATION

November 8, 2019

Melinda Milberg, Esq.
220 North Main Street, Suite 301
Natick, MA 01760
508-655-6800
milberg@milbergmediation.com

Next Generation of Innovation: Divorce Professionals Partnering for Excellence

APFM/ADFP/MCFM Conference (November 7-9, 2019) Boston, MA

Workshop: Estate Planning and Divorce Mediation

Presenter: Melinda Milberg, Esq.

AGENDA

I. INTRODUCTION (10 minutes)

GOALS -

- Issue spotting
- Mediation tips

CAVEATS -

- As with tax issues – refer to professionals

II ESTATE PLANNING TOPICS

A. Estate planning issues regarding marital assets (40 minutes)

- Inheritances
- Trust beneficiaries or expectancies

B. Estate planning issues regarding estate plans of parties (20 minutes)

- At outset of mediation
- Guardianship of children if both parents die
- Provisions to leave assets to the children, etc.

C. Effect of divorce on estate plans (20 minutes)

- Post-divorce issues

APFM/ADFP/MCFM Conference Workshop: Estate Planning and Divorce Mediation

Presenter: Melinda Milberg, Esq.

FIRST TOPIC: ESTATE PLANNING ISSUES REGARDING MARITAL ASSETS

HYPOTHETICAL #1

Wife is beneficiary of a discretionary family trust set up by her father, which contains a spendthrift provision.

Trust Terms:

1) Wife has ability to withdraw 5% of the trust assets per year, subject to the spendthrift provision.
2) Wife's share of the trust will be held in trust for her lifetime, with the remainder distributed to her issue.
3) The spendthrift provision prohibits the distribution of wife's share to creditors and other third parties (including a spouse). It authorizes the independent trustee "to withhold any payment or distribution of income or principal (even though such payment or distribution is otherwise required hereunder) if the independent trustee in his sole discretion deems that such payment or distribution would not be subject to full enjoyment by wife."

Wife successfully exercised her right of withdrawal in the four years prior to the divorce action.

QUESTION: Is wife's trust share includable in the marital estate for purposes of equitable distribution under G.L. ch. 208 § 34 (or comparable statute in other states)?

NOTES:

ISSUES TO DISCUSS:

Inheritances –

- Expectancies vs. currently receiving benefits from inheritance.
- Information from parents of parties – copies of documents (e.g. account statements).
- Balancing intrusion on parents of parties vs. need for information.
- Prenuptial and postnuptial agreements – effect on divorce.

Trust issues –

- Currently a beneficiary? Powers of appointment?
- How to read/interpret trust terms (e.g. closed class vs. open class, discretion of trustee, power of appointment, etc.).
- Different types of trusts (e.g. revocable/irrevocable, self-settled, third party-settled, etc.)
- Spendthrift clauses
- Decanting issue.
  (Statutory provisions in some states, common law in other states).

Valuation issues –

- Value of future assets
- Division "if, as and when" vs. set off
- Retirement accounts – defined contribution and defined benefit.

NOTES:

CASES (Massachusetts cases with issues similar to other states):

1. Samuel Vaughan and another v. Elizabeth Vaughan, SJC (1991) - regarding the balancing of privacy interests of parents of divorcing couple with need to assess what is in the divisible marital assets. Court allowed affidavit from parents describing approximate net worth, general estate plan and when last amended. This was in lieu of formal discovery including providing detailed documents and depositions.
2. D.L. v. G.L., 61 Mass. App. Ct. 488 (2004) - Interest in seven trusts was too remote/speculative to be considered part of marital estate. The parties were in their 40's, had been married 10 years, and there were substantial assets on both sides.
3. Williams v. Massa, 431 Mass. 619 (2000) - even if mere speculative expectancy is not part of marital estate to be divided, the asset can still be considered under "future acquisition of capital assets and income" under G.L. ch. 208 § 34.
4. Lauricella v. Lauricella, 409 Mass. 211 (1991) - Husband had a present and enforceable interest in the trust, and it was included in marital estate.
5. Comins v. Comins, 33 Mass.App.Ct. 28 (1992) - 48 year marriage, wife had present, enforceable right to use the trust for her benefit (trust language had ascertainable standard vs. complete discretion of trustee).
6. Morse v. Kraft, 466 Mass. 92 (2013) (not a divorce case) - Trustee had authority to "decant" irrevocable trust into new irrevocable trust. Trustee had authority to distribute trust assets "to, or applied for the benefit of, the trust beneficiaries."
7. Pfannenstiehl v. Pfannenstiehl, 475 Mass. 105 (2016) - Husband's remainder interest in trust created by husband's father for benefit of open class of beneficiaries was so speculative as to constitute nothing more than an expectancy and, thus, was not assignable to marital estate. Trust benefited future generations. There was also a spendthrift clause.
8. Ferri v. Powell-Ferri, 476 Mass. 651 (2017) - Connecticut divorce case in which court certified questions to Massachusetts Supreme Judicial Court. SJC respondedthat a trustee had authority to "decant" assets from a trust that benefitted husband into a new trust that was then not deemed a part of the marital estate. Under prior trust, husband had right to withdraw assets from the trust (up to 75% at time of divorce). Under new trust, husband had no right to withdrawal and distributions to husband were totally discretionary with Trustee. Affidavit of trust settlor supported decanting. Concurring opinion of SJC stated that SJC was not asked if what happened would be deemed against public policy in Massachusetts. Also noted that many states had decanting statutes, and

invited Massachusetts legislature to do so. Note: Senate Bill 896 regarding Massachusetts Uniform Trust Decanting Act is pending.

9. Levitan v. Rosen, 95 Mass.App.Ct. 248 (2019) - Issue of spendthrift clause (restricting access to trust in divorce) vs. right of wife to withdraw funds from trust (5% per year). Wife was sole beneficiary (class was closed), and primary intent of trust was to benefit wife, not future generations. Held that entire trust was part of marital estate, but had to be assigned to wife because of spendthrift clause. Note: This was a Florida trust, but law is similar to Massachusetts on the issue decided.
10. Calhoun v. Rawlins, 93 App. Ct. 458 (2018) - Wife set up "irrevocable trust" for disabled husband, and husband and wife both transferred assets to the trust. Trust had spendthrift clause. Ruled that husband was "de facto" grantor of the trust (self-settled trust) and personal injury plaintiff against husband could reach assets in trust.

NOTES:

APFM/ADFP/MCFM Conference Workshop: Estate Planning and Divorce Mediation

Presenter: Melinda Milberg, Esq.

SECOND TOPIC:

ESTATE PLANNING ISSUES REGARDING ESTATE PLAN OF PARTIES

HYPOTHETICAL #2

During mediation, wife raises an issue about who will be guardian for the children if both parents die. Wife felt her sister and brother-in-law should be named and wanted to bind husband to state in his Will that those would be guardians. Also, wife wanted husband to agree that any assets each of them had at the time of divorce would only be left to the children, and not to any subsequent spouse.

QUESTION: How would you handle this?

NOTES:

ISSUES TO DISCUSS

Guardianship –

- Choosing alternate guardians if both parents die (agree on someone or leave it to each to pick).
- Question about whether it is legally binding or aspirational.
- Clarifying that other parent will be named as guardian in first instance.

Estate plan –

- Leaving assets in estate plan to children?
- Who enforces? How to enforce?

NOTES:

APFM/ADFP/MCFM Conference Workshop: Estate Planning and Divorce Mediation

Presenter: Melinda Milberg, Esq.

THIRD TOPIC - EFFECT OF DIVORCE ON ESTATE PLANS OF PARTIES/BENEFICIARY DESIGNATIONS

HYPOTHETICAL #3

Parties were divorced in 2013. Former wife died in 2015, not having changed the beneficiary of her 401(k) so that her former husband was still listed as beneficiary. Parties' separation agreement had provided that former husband waived all right, title and interest in the 401(k).

QUESTIONS:

(1) What is the disposition of the 401(k)?

(2) What steps, if any, could mediator take at time of mediation to address this issue?

NOTES:

ISSUES TO DISCUSS

Uniform Probate Code –

- Section 2-804 – comprehensive treatment of effect of divorce on provisions for the spouse in Wills, Revocable Trusts, etc. Also converts jointly held property into tenancy in common. (Copy attached).

Effect of death of party during process –

- Have parties already changed beneficiaries.
- Beneficiary status of accounts.
- Status of agreement if signed but not had hearing yet.
- Should agreement include something like the language in Section 2-804.
- Can party enforce a signed separation agreement against estate of other party.

Post-divorce issues –

- Change of beneficiary for retirement accounts, life insurance, etc. (depending on provisions in agreement)
- Change of fiduciary (power of attorney, health care proxy, etc.)
- What if not changed (unintended consequences).

NOTES:

M.G.L.A. 190B § 2-804

§ 2-804. Revocation of probate and nonprobate transfers by divorce; no revocation by other changes of circumstances

Effective: March 31, 2012

Currentness

[Revocation of Probate and Nonprobate Transfers by Divorce; No Revocation by Other Changes of Circumstances.]

(a) In this section:

(1) "Disposition or appointment of property", includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

(2) "Divorce or annulment", any divorce or annulment, or any dissolution or declaration of invalidity of a marriage, that would exclude the spouse as a surviving spouse within the meaning of section 2-802. A judgment of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section.

(3) "Divorced individual", includes an individual whose marriage has been annulled.

(4) "Governing instrument", a governing instrument executed by the divorced individual before the divorce or annulment of the individual's marriage to the individual's former spouse.

(5) "Relative of the divorced individual's former spouse", an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.

(6) "Revocable", with respect to a disposition, appointment, provision, or nomination, means one under which the

divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of the former spouse or former spouse's relative, whether or not the divorced individual was then empowered to designate himself in place of the former spouse or in place of the former spouse's relative and whether or not the divorced individual then had the capacity to exercise the power.

(b) Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:

(1) revokes any revocable (i) disposition or appointment of property made by a divorced individual to the individual's former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse, (ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse, and (iii) nomination in a governing instrument, nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent, or guardian; and

(2) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship, transforming the interests of the former spouses into tenancies in common.

(c) A severance under subsection (b)(2) shall not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

(d) Provisions of a governing instrument that are not revoked by this section are given effect as if the former spouse and relatives of the former spouse disclaimed the revoked provisions or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment.

(e) Provisions revoked solely by this section are revived by the divorced individual's remarriage to the former spouse or by a nullification of the divorce or annulment.

(f) No change of circumstances other than as described in this section and in section 2-803 effects a revocation.

(g)(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by a divorce, annulment, or remarriage, or for having taken any other action in good faith reliance on the validity of the governing instrument, before the payor or other third party received written notice of the divorce, annulment, or remarriage. A payor or other third party is

liable for a payment made or other action taken after the payor or other third party received written notice of a claimed forfeiture or revocation under this section.

(2) Written notice of the divorce, annulment, or remarriage under subsection (g)(2) shall be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of the divorce, annulment, or remarriage, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement or transfer in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(h)(1) A person who purchases property from a former spouse, relative of a former spouse, or any other person for value and without notice, or who receives from a former spouse, relative of a former spouse, or any other person a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a former spouse, relative of a former spouse, or other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a former spouse, relative of the former spouse, or any other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

Credits

Added by St.2008, c. 521, § 9, eff. Mar. 31, 2012.

Editors' Notes

UNIFORM PROBATE CODE COMMENT

Purpose and Scope of Revision. The revisions of this section, pre-1990 Section 2-508, intend to unify the law of probate and nonprobate transfers. As originally promulgated, pre-1990 Section 2-508 revoked a predivorce devise to the testator's former spouse. The revisions expand the section to cover "will substitutes" such as revocable inter-vivos trusts, life-insurance and retirement-plan beneficiary designations, transfer-on-death accounts, and other revocable dispositions to the former spouse that the divorced individual established before the divorce (or annulment). As revised, this section also effects a severance of the interests of the former spouses in property that they held at the time of the divorce (or annulment) as joint tenants with the right of survivorship; their co-ownership interests become tenancies in common.

As revised, this section is the most comprehensive provision of its kind, but many states have enacted piecemeal legislation tending in the same direction. For example, Michigan and Ohio have statutes transforming spousal joint tenancies in land into tenancies in common upon the spouses' divorce. Mich.Comp.Laws Ann. § 552.102; Ohio Rev.Code Ann. § 5302.20(c)(5). Ohio, Oklahoma, and Tennessee have recently enacted legislation effecting a revocation of provisions for the settlor's former spouse in revocable inter-vivos trusts. Ohio Rev.Code Ann. § 1339.62; Okla.Stat.Ann. tit. 60, § 175; Tenn.Code Ann. § 35-50-5115 (applies to revocable and irrevocable inter-vivos trusts). Statutes in Michigan, Ohio, Oklahoma, and Texas relate to the consequence of divorce on life-insurance and retirement-plan beneficiary designations. Mich.Comp.Laws Ann. § 552.101; Ohio Rev.Code Ann. § 1339.63; Okla.Stat.Ann. tit. 15, § 178; Tex.Fam.Code §§ 3.632-.633.

The courts have also come under increasing pressure to use statutory construction techniques to extend statutes like the pre-1990 version of Section 2-508 to various will substitutes. In Clymer v. Mayo, 473 N.E.2d 1084 (Mass.1985), the Massachusetts court held the statute applicable to a revocable inter-vivos trust, but restricted its "holding to the particular facts of this case-specifically the existence of a revocable pour-over trust funded entirely at the time of the decedent's death." 473 N.E.2d at 1093. The trust in that case was an unfunded life-insurance trust; the life insurance was employer-paid life insurance. In Miller v. First Nat'l Bank & Tr. Co., 637 P.2d 75 (Okla.1981), the court also held such a statute to be applicable to an unfunded life-insurance trust. The testator's will devised the residue of his estate to the trustee of the life-insurance trust. Despite the absence of meaningful evidence of intent to incorporate, the court held that the pour-over devise incorporated the life-insurance trust into the will be reference, and thus was able to apply the revocation-upon-divorce statute. In Equitable Life Assurance Society v. Stitzel, 1 Pa.Fiduc.2d 316 (C.P.1981), however, the court held a statute similar to the pre-1990 version of Section 2 508 to be inapplicable to effect a revocation of a life-insurance beneficiary designation of the former spouse.

Revoking Benefits of the Former Spouse's Relatives. In several cases, including Clymer v. Mayo, 473 N.E.2d 1084 (Mass.1985), and Estate of Coffed, 387 N.E.2d 1209 (N.Y.1979), the result of treating the former spouse as if he or she predeceased the testator was that a gift in the governing instrument was triggered in favor of relatives of the former spouse who, after the divorce, were no longer relatives of the testator. In the Massachusetts case, the former spouse's nieces and nephews ended up with an interest in the property. In the New York case, the winners included the former spouse's child by a prior marriage. For other cases to the same effect, see Porter v. Porter, 286 N.W.2d 649 (Iowa 1979); Bloom v. Selfon, 555 A.2d 75 (Pa.1989); Estate of Graef, 368 N.W.2d 633 (Wis.1985). Given that, during divorce process or in the aftermath of the divorce, the former spouse's relatives are likely to side with the former spouse, breaking down or weakening any former ties that may previously have developed between the transferor and the former spouse's relatives, seldom would the transferor have favored such a result. This section, therefore, also revokes these gifts.

Consequence of Revocation. The effect of revocation by this section is that the provisions of the governing instrument are given effect as if the divorced individual's former spouse (and relatives of the former spouse) disclaimed all provisions revoked by this section (see Section 2-1106 for the effect of a disclaimer). Note that this means that the antilapse statute applies in appropriate cases in which the divorced individual or relative is treated as having disclaimed. In the case of a revoked nomination in a fiduciary or representative capacity, the provisions of the

governing instrument are given effect as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment. If the divorced individual (or relative of the divorced individual) is the donee of an unexercised power of appointment that is revoked by this section, the gift-in-default clause, if any, is to take effect, to the extent that the gift-in-default clause is not itself revoked by this section.

ERISA Preemption of State Law. The Employee Retirement Income Security Act of 1974 (ERISA) federalizes pension and employee benefit law. Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides that the provisions of Titles I and IV of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA.

ERISA's preemption clause is extraordinarily broad. ERISA Section 514(a) does not merely preempt state laws that conflict with specific provisions in ERISA. Section 514(a) preempts "any and all State laws" insofar as they "relate to" any ERISA-governed employee benefit plan.

A complex case law has arisen concerning the question of whether to apply ERISA Section 514(a) to preempt state law in circumstances in which ERISA supplies no substantive regulation. For example, until 1984, ERISA contained no authorization for the enforcement of state domestic relations decrees against pension accounts, but the federal courts were virtually unanimous in refusing to apply ERISA preemption against such state decrees. See, e.g., American Telephone & Telegraph Co. v. Merry, 592 F.2d 118 (2d Cir.1979). The Retirement Equity Act of 1984 amended ERISA to add Sections 206(d)(3) and 514(b)(7), confirming the judicially created exception for state domestic relations decrees.

The federal courts have been less certain about whether to defer to state probate law. In Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. H.F. Johnson, Inc., 830 F.2d 1009 (9th Cir.1987), the court held that ERISA preempted the Montana nonclaim statute (which is Section 3-803 of the Uniform Probate Code). On the other hand, in Mendez-Bellido v. Board of Trustees, 709 F.Supp. 329 (E.D.N.Y.1989), the court applied the New York "slayer-rule" against an ERISA preemption claim, reasoning that "state laws prohibiting murderers from receiving death benefits are relatively uniform [and therefore] there is little threat of creating a 'patchwork scheme of regulations' "that ERISA sought to avoid.

It is to be hoped that the federal courts will continue to show sensitivity to the primary role of state law in the field of probate and nonprobate transfers. To the extent that the federal courts think themselves unable to craft exceptions to ERISA's preemption language, it is open to them to apply state law concepts as federal common law. Because the Uniform Probate Code contemplates multistate applicability, it is well suited to be the model for federal common law absorption.

Another avenue of reconciliation between ERISA preemption and the primacy of state law in this field is envisioned in subsection (h)(2) of this section. It imposes a personal liability for pension payments that pass to a former spouse or relative of a former spouse. This provision respects ERISA's concern that federal law govern the administration of the plan, while still preventing unjust enrichment that would result if an unintended beneficiary were to receive the pension benefits. Federal law has no interest in working a broader disruption of state probate and nonprobate transfer law than is required in the interest of smooth administration of pension and employee benefit plans.

Cross References. See Section 1-201 for definitions of "beneficiary designated in a governing instrument," "governing instrument," "joint tenants with the right of survivorship," "community property with the right of survivorship," and "payor."

References. The theory of this section is discussed in Waggoner, "Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code," 26 Real Prop. Prob. & Tr. J. 683, 689-701 (1992). See also Langbein, "The Nonprobate Revolution and the Future of the Law of Succession," 97 Harv.L.Rev. 1108 (1984).

Historical Note. This Comment was revised in 1993 and 2002.

2002 Amendment Relating to Disclaimers. In 2002, the Code's former disclaimer provision (§ 2-801) was replaced by the Uniform Disclaimer of Property Interests Act, which is incorporated into the Code as Part 11 of Article 2 (§§ 2-1101 to 2-1117). The statutory references in this Comment to former section 2-801 have been replaced by appropriate references to Part 11. Updating these statutory references has not changed the substance of this Comment.

1997 Technical Amendment. For an explanation of the 1997 technical amendment, which added the word "equal" to subsection (b)(2), see the Comment to Section 2-803.

Notes of Decisions (2)

M.G.L.A. 190B § 2-804, MA ST 190B § 2-804
Current through Chapter 88 of the 2019 1st Annual Session

End of Document

APFM/ADFP/MCFM Conference Workshop: Estate Planning and Divorce Mediation

Presenter: Melinda Milberg, Esq.

DEFINITIONS QUIZ

(Select a, b or c for each)

1. PER STIRPES –
   a. A medical condition.
   b. By right of representation - a stipulation that, should a beneficiary predecease the testator, the beneficiary's share of the inheritance will go to his or her heirs.
   c. An amount of money available to surviving spouse and minor children.

2. DECANTING –
   a. What you do on Friday afternoon.
   b. A rewrite by distributing assets from an old trust into a new trust with new terms, for the benefit of the beneficiaries of the first trust.
   c. Disclaiming a benefit or inheritance by formal written disclaimer within nine months of the date of death of the person who provided the benefit or inheritance.

3. ATTORNEY-IN-FACT –
   a. A person (agent) named in a written power of attorney document to act on behalf of the person who signs the document, called the principal.
   b. Someone who has passed the bar.
   c. Someone appointed by the Probate Court to represent a minor, disabled person, or person not yet in existence.