ESTATE PLANNING AND WHAT A FAMILY LAW ATTORNEY SHOULD KNOW IN THE EVENT OF A CLIENT'S DEATH

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Essential Takeaway: Significant Estate Planning Issues are Implicated in Most Divorces.

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For Purposes of Probate and Trusts and Estates Law, Couple Remains Married Until Final Decree

Estate Planning Issues Implicated by Divorce are exacerbated:

- By multiple marriages with children from prior marriage
- When one spouse dies prior to entry of divorce decree
  - All rights revert to what they were prior to divorce action.

Estate Planning Issues are Less Significant if a Spouse Dies after Entry of a Final Decree

- Utah Code § 75-2-802: Provides that an individual who is divorced from the decedent is not a surviving spouse (with certain limited exceptions).
- Utah Code § 75-2-804(2): Revokes most benefits to a former spouse.
  - The intent of these provisions is to approximate what the highest percentage of persons that did not plan for divorce would want.
  - Sometimes the baseline rule gets it wrong. It is important to think through these issues with your clients or direct them to appropriate advisors.

Final Decree Generally Needed to Exclude Ex-Spouse

Limited Exception to Final Decree Requirement:

- Remarried former Ex-Spouse
- Valid Decree not Recognized in Utah (foreign divorce)
- Invalid Decree followed by entry into marriage ceremony with third party (Reliance)
- **Entry into a Complete Property Settlement or Enforceable Waiver.** (More to Come)
  - Significance is that this provision presents planning opportunities to effect what your clients want rather than the statutory scheme divesting the estate in accordance with what the majority of persons would want.

After Divorce: Updating Estate Plan

- Utah Code § 75-2-804:
  - Revokes POD Designations
  - Severs Joint Tenancy
  - Revokes Powers of Appointment
  - Revokes Fiduciary Nominations
  - Revokes (generally) Disposition of Property to Former Spouse

Limitations on 75-2-804(2) – Federal Preemption

- Utah Code § 75-2-804(2)(b): Attempts to resolve federal pre-emption issues by requiring return of benefits received by ex-spouse.
- Does ERISA Preempt? Unclear.
- In *Hillman v. Maretta* the U.S. Supreme Court found that the Federal Employees Group Life Insurance Act Preempts regardless of language similar to Utah Code § 75-2-804(2)(b).
  - Significance: Former spouse may inherit under ERISA plans or federally governed benefits if beneficiary designations are not changed.

It Remains Advisable to Update Estate Planning Documents to:

- Change references to former spouse (including fiduciary capacities, unless still desirable).
- Change beneficiary designations on, among other things, financial accounts and life insurance.
- Revise Powers of Attorneys and Advanced Directives.
- Address issues with joint tenant property (not already resolved in property settlement).

*While most of these issues are addressed by statute, advance planning can save significant costs in the future by avoiding needless conflict.

Death Prior To Entry of Final Decree – Results:

- Unintended litigation over estate disposition.
- Remain beneficiary under any will or trust.
  - Possibly inherit up to 100%.
- Trigger intestate succession:
  - 100% if decedent did not have other children.
  - Otherwise 1st $75,000 plus 1/2 of balance of estate.
- Result if updated will or trust to disinherit soon-to-be ex:
  - Right to elective/forced share under Utah Code § 75-2-202.
- 1/3 of the "Augmented Estate".

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Exceptions: Waiver or Complete Property Settlement

- Utah Code § 75-2-213(4) essentially provides that a waiver of "all rights" or equivalent language of a present spouse or complete property settlement entered into after or in anticipation of settlement is a waiver of elective share, allowances and intestate rights or by will.

*Note that a trust is not included in this language, nor are rights of survivorship or POD designations.

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Solutions

- Waiver Agreement:
  - Contract concerning succession planning: Utah Code §75-2-514 provides that contracts to make a will or devise or not to revoke a will or devise or to die intestate is enforceable so long as certain requirements are met.
- Complete Property Settlement:
  - For example: a written stipulation or agreement on how to divide the marital estate prior to entry of a final decree.
  - No case law or other guidance interpreting the meaning of the term "Complete Property Settlement" or how to satisfy this requirement.

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"Complete Property Settlement"

- *Matter of Estate of Morrell*, 687 P.2d 1319, 1323 (Colo. Ct. App. 1984): Must dispose of every item of property to be complete.
- *Matter of Estate of Zimmerman*, 579 N.W.2d 591, 597 (N.D. 1998): Can't agree to agree as to the disposition of certain property in the future.

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Suggestions

- Work through and resolve estate planning issues in connection with the divorce.
- Plan for pre-decree and post-decree issues.
- Recommend client get estate planning advice.
  - Document this advice.

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Suggestions (cont.)

- Absent that, in connection with a property settlement:
  - Take steps to make it more likely interpreted as complete:
    - Cite Utah Code § 75-2-213(4) and state, for example: this agreement is intended be and shall be interpreted in all respects as a "complete property settlement" entered into after or in anticipation of separation or divorce and is a waiver of a waiver of all rights of elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to him from the other by intestate succession or by virtue of any will, devise, trust instrument, beneficiary designation or any other succession benefit, whether executed before the waiver or property settlement.

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Suggestions (cont.)

- Ensure that you and the client know the full nature and extent of the marital estate and that it is reflected in the property settlement.
- Insert a residuary clause to the effect that any and all other property, whether real or personal, shall be divided 50/50 or in an agreed upon proportion.
- Avoid agreements to agree:
  - The parties will meet at the former marital residence within two weeks of executing this Property Settlement Agreement/Stipulation to agree upon how the silverware will be divided.

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Conclusion

- Estate planning issues arise during and after divorce.
- Advise clients of these issues or recommend that they seek appropriate guidance from a qualified advisor.

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Thank You

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