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Tips for the practitioner handling 'grey divorce'

By Jonathan E. Fields

Here's a sobering fact for divorce practitioners: Divorce involving people 65 and over has tripled since 1990. *Tripled*. The "Grey Divorce Revolution" is real, and it is changing our practices.

As a result, it behooves us to examine the issues specific to this demographic so that we can help our clients — and avoid malpractice.

Joint checking and brokerage accounts

Imagine a predicament in which the divorce agreement provides that the husband gets 50 percent of the joint checking and brokerage accounts, and he dies before the parties divide those accounts.

The ex-wife, who waived her right to 50 percent of those assets in the divorce, may have a right to 100 percent of that property. In most states, there is no statute that revokes joint accounts upon divorce. While there may be relief in an equitable action, the situation just became a whole lot more expensive.

What's the takeaway here? Lawyers should draft follow-up letters to clients reminding them to close all accounts.

Life insurance

Another situation that can arise is one in which the husband is obliged to provide $1 million of private (non-ERISA) life insurance to the ex-wife and dies having reduced the coverage to $700,000 and having taken out another policy for $300,000 covering his second wife. In most states, divorce, per se, does not affect a beneficiary designation in a life insurance policy. The second wife, then, may get to keep the $300,000.

What should have been done? The divorce agreement should have contained a clause to the effect that such policies are "deemed to have been intended by the husband to secure the obligations set forth in the agreement regardless of the beneficiary designation" — and that such policy should be payable to the first wife to the extent of the obligation. While it is unclear whether such a provision would work in other states, the Supreme Judicial Court has made clear that it will in *Foster v. Hurley*, 444 Mass. 157 (2004).

Retirement accounts

Here's another common scenario. In a divorce agreement, the wife waives all rights to the husband's 401(k). He dies shortly after the divorce, forgetting to change the beneficiary designation from his wife.

Even in a state like Massachusetts with a revocation-upon-divorce statute relative to retirement accounts, the first wife has a legal right to the proceeds. That's because the federal retirement law, ERISA, preempts any state revocation-upon-divorce statutes.

Practitioners, therefore, should make clear in their agreement that the waivers are ineffective unless beneficiary designations are changed. And they should follow up with clients in writing reminding them to do so.

Certainly, this one is familiar to many of us. The agreement is approved under which the husband's 401(k) is to be divided equally with the wife, and she waives rights to the husband's share. The husband dies after the divorce is final but before the QDRO has been entered by the court.

Since the husband never changed the beneficiary designation, pursuant to the "plan document rule," the purported waiver in the agreement is ineffective, and the ex-wife receives the entire asset. Whether a state law equitable remedy would be effective here is an open question.

In any event, practitioners here have a simple lesson: Ensure the draft QDRO is presented to the judge as soon as possible.

Waiver of statutory share

Practitioners always need to be concerned about a spouse dying before the divorce is final. The fix here is simple, and most of us do it. Put a clause in agreements waiving any rights the other may have in a statutory share. That is effective in most states, including Massachusetts.

Similarly, in most states, including Massachusetts, divorce revokes revocable dispositions to former spouses in wills and revocable trusts.

Durable power of attorney

Once parties are divorced, powers of attorney in which the ex-spouse is the agent are revoked in most states, including Massachusetts. An area of concern, however, can be a divorcing spouse abusing durable powers of attorney while a divorce is pending.

The best advice here is to inquire of clients whether they have revoked all powers of attorney, or at least make them aware of the consequences if they do not do so.

Medical directives

As with powers of attorney, once parties are divorced, medical directives in which the ex-spouse is the named agent are revoked in most states, including Massachusetts. During the pendency of the divorce, however, there is no automatic revocation. Therefore, attorneys must determine whether clients have medical directives, obtain copies of them if they do, and determine with them if they need to be revoked.

Guardian-initiated divorces

Attorneys representing elders in divorce are likely to encounter a client who needs or has in place a guardian.

In Massachusetts, G.L.c. 208, §15 allows a guardian to defend a divorce. Massachusetts case law empowers a guardian to initiate a divorce action on behalf of the protected person. The cases, though, many over a century old and decided prior to our no-fault statute, offer scant guidance as to how to determine whether a marriage has suffered an irretrievable breakdown, particularly if one party denies such has occurred. So, although the guardian may initiate the action, absent evidence of an irretrievable breakdown, the case could be dismissed.

Looking to other states may be instructive for the Massachusetts practitioner facing these issues in a local court. In an Arizona case, the court held that a guardian-initiated divorce could proceed if there were clear and convincing evidence that the ward, while competent, wanted to end the marriage. The guardian, who was the mother of the protected person, was allowed to testify about statements her daughter made to her while the daughter was competent.

Practitioners may consider borrowing from Illinois where, by statute, a guardian has the authority to seek permission from the court to file a complaint for divorce. The court will conduct a "best interests" hearing to determine whether the complaint for divorce can be filed. The court must find, by clear and convincing evidence, that it would be in the best interests of the ward for the divorce action to be initiated.

The statute attempts to balance the best interests of the ward while ensuring that the guardian is not pursuing the divorce for his or her own financial benefit or because of the guardian's personal dislike of the protected person's spouse.

The predatory marriage

Nothing can unsettle adult children more than when an elderly parent remarries — especially to a much younger person who, the adult children are convinced, only wants their parent's money. Bottom line: There's no good news for the kids here.

First, the U.S. Supreme Court has made explicit that the due process clause includes a fundamental right to marry. Second, in most states, the only one with standing to challenge the validity of this marriage would be the new spouse, who, of course, has no incentive to do so. Third, in most states, the marriage cannot be challenged in any event after the death of either of the parties.

The practical solution here is simple: If possible, have the parties sign a prenuptial agreement.

The Medicaid divorce

Finally, with the elder population, a practitioner will eventually confront the "Medicaid divorce," in which the parties may consider divorce so that the spouse on his/her way to a nursing home can qualify for Medicaid. That way, the thinking goes, the assets of the non-institutionalized spouse don't have to be directed toward long-term-care costs.

First, divorce attorneys should work with experienced elder counsel in cases involving Medicaid. The area is too complex and dynamic to navigate without such assistance. Often, at the outset, the lawyer may find that there are options other than a divorce that may accomplish the parties' goals.

Second, consider the statutory requirement that the marriage is "irretrievably broken." Is this true in the divorce at issue? If the sole purpose of the divorce is Medicaid planning, that would suggest fraud. Or could you argue that the financial consequences of looming long-term care expenses have made the marriage untenable — and, therefore, the marriage is "irretrievably broken"?

Third, although the agreement may incorporate an ostensibly imbalanced financial settlement, it must be framed in accordance with our alimony and property division laws. To the parties, it may be Medicaid planning; to the court, it's a divorce.

Fourth, in drafting any agreement that seeks to accomplish Medicaid planning goals, practitioners must consider the public policy of many states, including Massachusetts, that to the extent possible, neither spouse should become a public charge as a result of the divorce.

> Although the area is a challenging one, it is also not fully developed — and, therefore, ripe with creative legal possibilities for the enterprising attorney.

Conclusion

The demographics foretell an increasing number of elderly people divorcing, and attorneys need to be well-versed in issues related to this group.

Moreover, although the area is a challenging one, it is also not fully developed — and, therefore, ripe with creative legal possibilities for the enterprising attorney. MLW

Jonathan E. Fields is a family law attorney and partner at Fields & Dennis in Wellesley Hills. He can be contacted at jfields@fieldsdennis.com.