Recent Statutory Changes Compel Divorcing Couples to Review Estate Planning

By Carolyn Conway Duff and Eugene Huang

After your initial consultation with a client, you likely have a good sense of whether the differences between the spouses are reconcilable. If you don't think they are, suggest that their next appointment be with an estate planning attorney. This article explains why.

First, their estate planning was probably prepared with their spouse when they were happily married. Their current wishes as to the disposition of their assets upon their death and who will control those dispositions are probably wildly different than their existing plan or what the intestacy statutes will require if they don't have a plan in place. Second, they may need you to encourage them to consider changing their documents because their estate planning attorney likely represented both spouses and is conflicted from giving them any advice or preparing documents that could be adverse to the other spouse. Finally, recent revisions to key New Jersey statutes affecting divorce only addressed some of the possible pitfalls that can occur when a married person passes away during divorce proceedings.

The Laws

Three key concepts control the flow of assets of a spouse that passes away during a divorce proceeding: (1) equitable distribution and (2) elective share, both of which were recently amended to reflect the change in a marital relationship once a divorce proceeding has started, and (3) revocation, which continues only to come into play upon a judgment of divorce or annulment. Most familiar to matrimonial attorneys are the laws about equitable distribution.[1] Until the recent changes to the law, equitable distribution was difficult if not impossible to achieve if one spouse died during a divorce proceeding.

Also familiar to most matrimonial attorneys is New Jersey's elective share law, a statutory remedy that prohibits a spouse from disinheriting the other by providing that a surviving spouse is entitled to at least ⅓ of the augmented estate of their deceased spouse.[2] Under the prior elective share law, the pre-condition of claiming an elective share was that "at the time of death the decedent and the surviving spouse or domestic partner had not been living separate and apart in different habitations or had not ceased to cohabit as man and wife."

Finally, New Jersey's revocation statute has long provided that a judgment of divorce or annulment automatically revokes gifts of property, grants of powers of appointment, nominations to serve in fiduciary or representative capacities, and transfers by way of jointly held property to a former spouse or a relative of the former spouse.[3] This statute has not been amended and it continues to come into operation only after a divorce judgment has been entered. The mere filing of a divorce action does not invoke this statute.

Problems Before Recent Amendments

The New Jersey Supreme Court's 1990 decision in Carr v. Carr[4] highlighted some problems that arose if a spouse passed away during a pending divorce. The divorce action was effectively terminated upon the death of one spouse – without a divorce judgment. The premature termination of the divorce proceeding left the marriage undisturbed and the marital assets undivided and not subject to the equitable distribution statute.[5] At the same time, the surviving spouse was ineligible for an elective share because the couple had stopped cohabitating as "man and wife" during the pendency of divorce action.[6] This scenario created a "black hole" for divorcing spouses – eligible for neither the equitable distribution typically available to divorced spouses, nor an elective share, typically available to married spouses. The revocation statute was not triggered because there was no final judgment of divorce.

One consequence was that for a divorcing spouse who died intestate, or with a typical will that left pretty much all assets and control over those assets to their surviving spouse, their almost-former spouse would likely receive both the benefit of all their assets and control over those assets, a result that is almost absurd.

A second consequence highlighted by Carr was that a disinherited spouse could be ineligible for both equitable distribution and an elective share if their spouse passes away during the divorce and the couple was separated at the time of death – the "black hole" scenario. For example, Spouse A omits Spouse B in their estate planning. If Spouse A died during the divorce proceeding, the termination of the divorce action would mean that Spouse B was not eligible for equitable distribution. Normally the elective share statute would protect a spouse from being disinherited, but under the terms of the statute, if Spouse A and Spouse B were separated, Spouse B most likely would not be eligible for an elective share. The only recourse in that situation was for Spouse B to argue around the language of statute and seek an equitable remedy, such as a constructive trust.

As the Carr court noted, "[c]onstructive trusts are invoked to prevent unjust enrichment or fraud."[7] In that case, the court allowed a constructive trust over assets controlled by the executor of the deceased spouse's estate, finding that the disinherited spouse who was also not eligible for an elective share could avail herself of this equitable remedy.[8] However, showing entitlement for a constructive trust is difficult and not available in every instance where a spouse died during a divorce proceeding.[9]

Depending on the scenario, spouses could be unfairly denied assets they would have been entitled to if the divorce reached final judgment. Recent statutory updates have addressed these unfortunate scenarios and reflect that the start of divorce proceedings is a significant step that changes the marital relationship and what a surviving spouse should receive.

Recent Statutory Updates

Thanks to statutory changes effective Jan. 8, 2024,[10] courts are expressly allowed to make an equitable distribution of the deceased spouse's assets even if they pass away during the pendency of a divorce action.[11] No longer is a spouse blocked from the equitable distribution they would have received but for their spouse passing away before the divorce was finalized.

Another major change is that once a divorce action has been started, divorcing spouses are prohibited from taking an elective share, even if they continue to cohabit as a married couple. This created a much clearer line. The prior statute created uncertainty and made the elective share possibly available to divorcing spouses who, because of economic reasons, may not have the option to live "separate and apart in different habitations" or "cease to cohabit as man and wife."[12] Once an action for divorce is filed, if one of the parties passes away, the proper remedy for the surviving spouse to pursue is equitable distribution, and not the elective share.

The Appellate Division in Roik v. Roik has ruled these statutes will have retroactive application and apply to divorce cases pending as of Jan. 8, 2024.[13]

Practical Advice

1. Get a New Estate Planning Attorney

Given the new statutory landscape, what is the right advice for a married person facing a divorce proceeding? The first piece of advice is that they should get an estate planning attorney. Had a couple engaged an attorney to prepare their current estate planning documents, it may seem natural for one spouse to turn to that attorney to revise the documents. However, this likely presents a conflict of interest for the estate planning attorney because the New Jersey Rules of Professional Conduct prohibit an attorney's representation of one client if it is materially adverse to another client.[14]

Before an attorney can represent both spouses in estate planning, the clients must execute a conflict waiver.[15] While maybe post-divorce there is no conflict (since by operation of the revocation statute a spouse would automatically be revoked from certain bequests), during a divorce proceeding the law does not provide such automatic revocation.[16] Thus, in most instances, considering changes in one spouse's estate planning to disinherit or remove their spouse from positions of authority in their documents presents a conflict and it is likely best to retain a new estate planning attorney.[17]

2. New Estate Planning Documents

Once an attorney is selected, they should move quickly to change the divorcing client's estate planning documents. The new statutory change prohibiting a divorcing spouse from taking an elective share makes it even more important that estate documents and beneficiary designations are updated to reflect the current wishes of the testator since those wishes are more likely than ever to be honored.

Because the revocation statute continues to be triggered only upon a judgment of divorce or annulment, a divorcing spouse should seriously consider making or

revising their existing estate planning. Not only should the testator consider disinheriting their soon-to-be ex-spouse,[18] but also the spouse's relatives and friends. The right fiduciaries must be named so the testator's wishes are implemented. For instance, the executor has significant discretionary authority (likely broadened by the language of the will) over the timing and manner of distribution. Having the wrong person named as executor, including a divorcing spouse, could thwart the testator's intent. Likewise, having a spouse or a spouse's relative named as the trustee of a trust set up for a couple's children may have been logical when the marriage was strong but could be disastrous in the event of a premature death during a divorce proceeding.

Additionally, while a divorce judgment means that the revocation statute automatically excludes a former spouse and those related to the spouse, people who may be loyal to the spouse, such as their friends or advisers, would not be barred under the revocation statute even after a divorce is finalized. A new will can address all those issues. In addition, living wills, health care proxies, powers of attorney, and funeral and disposition agent forms should be reviewed and revised if the soon-to-be ex, or other related individual, has been designated to decide on behalf of your client.

3. Review Beneficiary Designations

Finally, careful consideration needs to be paid to non-probate assets such as life insurance policies and any assets with a beneficiary designation attached to them. Where possible, to avoid doubt, beneficiary designations should be changed to remove the spouse and related individuals.

Regarding life insurance, the New Jersey Appellate Division held that once the divorce judgment is issued, the revocation statute is effective regarding a life insurance policy and removes a spousal beneficiary designation that had not been changed following a divorce proceeding.[19] Likewise, the Third Circuit also found that the revocation statute automatically removed a divorced spouse as beneficiary on a life insurance policy.[20]

However, federal law may preempt, or at the very least, render ineffective, the revocation statute in regard to certain assets. For example, in the recent New Jersey Supreme Court case of Estate of Jones, the Court held that the revocation statute did not apply to United States bonds because the federal regulations governing the bonds, and the language of the bonds themselves, controlled over New Jersey law.[21]

Given the legal uncertainties, there is no reason your client should be subject to the whims of the court system. Encourage them to clarify their new intentions in their estate planning and beneficiary designations (to the extent possible), so they need not rely on surviving through a divorce judgment or the revocation statute. Many non-probate assets will require a change in beneficiary designation. This is not something your client should try to change on their own. Each asset must be reviewed to determine whether the beneficiary can be changed without spousal consent. For example, to remove a spouse as a beneficiary from a 401(k) or 403(b) account, spousal consent is required.[22] However, Individual Retirement Accounts are not subject to such a requirement. Jointly held assets such as accounts and/or real estate need the cooperation of the other joint owner. Any beneficiary changes that implicate a client's soon-to-be ex-spouse should be done only after consultation with the client's matrimonial attorney.

While a marital settlement agreement may ultimately undo some of the planning done in contemplation of divorce, it is still worthwhile to make sure the client's wishes are protected before the divorce agreement is finalized.

Conclusion

The law now recognizes that a marriage is more properly treated as having ended with the start of a divorce proceeding, rather than the prior view, which treated a marriage as fully intact if a spouse died during the divorce proceedings. However, despite the recent statutory changes, clients should be advised not to rely on the law alone, but to revisit prior estate planning when it becomes likely that reconciliation is no longer possible. Not all financial assets and beneficiary designations will be affected by the recent statutory updates, and others will not be affected even by a divorce judgment. Your divorcing clients should get the benefit of wise counsel from both you and an estate planning attorney. ■

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Endnotes

1. N.J.S.A. 2A:34-23.1.
2. N.J.S.A. 3B:8-1.
3. N.J.S.A. 3B:3-14.
4. 120 N.J. 336 (1990).
5. *Id.* at 342.
6. *Id.* at 344.
7. *Id.* at 351.
8. *Id.* at 352.
9. *Roik v. Roik,* 477 N.J. Super. 556, 569 (2024).
10. *Id.* at 562.
11. N.J.S.A. 2A:34-23(h)(2). The court's power is not absolute; if one spouse commits an intentional killing against the other spouse, then a court is barred from making an equitable distribution. N.J.S.A. 2A:34-23(h)(3).
12. There is a growing trend of couples continuing to live together while divorcing for financial reasons. *See*, *e.g.*, Suzanne Blake, *Divorced Couples Stuck Living Together After They Can't Afford to Move*, Newsweek (Nov. 30, 2023), newsweek.com/divorced-couples-living-together-housing-market-1848489.
13. *Roik*, 477 N.J. Super. at 562.
14. R.P.C. 1.7(a)(1) states, "a lawyer shall not represent a client if the representation... will be directly adverse to another client." R.P.C. 1.9(a) states, "[a] lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing."
15. A standard conflict waiver for a married couple using the same attorney for estate planning should include the following caveats: (1) the attorney cannot keep information obtained from one spouse private from the other; (2) the attorney can discuss pros and cons of differing plans between the spouses but not take sides with one spouse over the other; and (3) if an unavoidable conflict arises between the spouses, then the attorney will have to withdraw from the representation.
16. ABA Formal Ethics Opinion 05-434, analyzing the Model Rules, suggests that a lawyer may represent a testator who is disinheriting the lawyer's client, but only where the client is represented on an unrelated matter and the testator has no legal duty to make a bequest to the client. The opinion notes that where the prior representation involved family estate planning issues, assisting the testator in changing their estate planning in contravention to prior estate planning may present a conflict. Further, the opinion also notes that representation may become improper where the lawyer's advice is sought as to whether to disinherit the client. The opinion does not squarely address whether one spouse may retain the lawyer to disinherit the other spouse where the lawyer had prepared wills for both.
17. If your client was separately represented during their estate planning, then there is no issue with them returning to that same attorney.
18. Prenuptial or other contractual agreements may make it impossible to completely disinherit an ex-spouse. Additionally, N.J.S.A. 2A:34-23(h)(2) permits a court to equitably distribute a decedent's estate regardless of the decedent's will and any recent revisions. But revising estate planning is still prudent as it provides the court with the decedent's intent.
19. *Hadfield v. Prudential Ins. Co.*, 408 N.J. Super. 48 (App. Div.), *certif. denied*, 200 N.J. 472 (2009). The court applied its ruling to divorces that occurred prior to the 2005 amendment to the revocation statute. That amendment included, for the first time, that in addition to will bequests, designations in governing instruments (like a life insurance policy) were also revoked.
20. *Guardian Life Ins. Co. of Am. v. Gonnella*, 806 Fed. Appx. 79 (3d Cir. 2020).
21. *Estate of Jones,* 259 N.J. 584, 597-99 (2025). In finding that a divorced spouse was entitled to her former husband's bonds after his death, the Supreme Court arrived at the same outcome as the Appellate Division, but with different reasoning: whereas the appellate court found N.J.S.A. 3B:3-14 was preempted because it conflicted with federal law, the Supreme Court found no conflict, but instead held that the revocation statute's own language does not provide for automatic revocation where "the express terms of a governing instrument" provide otherwise. *Id.*; *see also* N.J.S.A. 3B:3-14(a).
22. 26 U.S.C. 417. Consent is not needed to remove an ex-spouse, assuming there is no other legal obligation to maintain the spouse on the account.