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DIVORCE AND THE UNEXPECTED – DO NOT WAIT TO CHANGE YOUR WILL

By Joann T. Palumbo

When going through a divorce, there are almost no limits to the number of personal, financial and logistical issues the soon-to-be former spouses must confront. One issue that sometimes falls through the cracks is the need to create and execute a new will to reflect post-divorce realities. Too often, though, the task of changing a will is put on the back burner; sometimes, until too late. The governing state law in New York includes provisions that have the effect of amending a will and certain beneficiary designations in the event of a divorce. These provisions provide a commonsense approach to the issues raised by divorce, although they do not function as a completely satisfactory substitute for careful estate planning.

New York's Estates Powers and Trusts Law (EPTL) Section 5-1.4 which provides for revocation of any bequest to a spouse after a divorce or annulment, has existed in various forms since 1966. Thus, if a person neglected to execute a new will after a divorce and then died, the pre-divorce will would still be effective as written, and a former spouse could end up inheriting everything under the will.

With the growing use of living trusts and the recognition that assets such as life insurance policies and retirement savings accounts which may pass outside a will often constitute the bulk of a person's wealth, the New York Legislature repealed EPTL 5-1.4 in July, 2008, and enacted a new Section 5-1.4 which included the substantive provisions of the earlier versions of the law, but expanded the scope of the revocatory effect of divorce. Under the new version of the statute, unless otherwise expressly provided in the terms of the "governing instrument," a divorce or annulment of a marriage now revokes any disposition of property made in wills, as well as in instruments such as revocable trust agreements, "payable on death" bank accounts, and designations of beneficiaries in life insurance policies, pension or retirement plans. The statute also provides that the nomination of the former spouse in a fiduciary capacity such as executor, trustee, guardian, agent or attorney-in-fact (under a power of attorney) is also revoked.

The statute does not apply to irrevocable dispositions of property or irrevocable nomination of spouses as fiduciaries. Thus, if a divorced person named a former spouse in an irrevocable trust instrument as trustee or beneficiary, the divorce would have no effect on that disposition unless the trust instrument had expressly provided otherwise.

The operation of the law is best understood by means of an extended example. Assume that Mr. and Mrs. Young have been separated for two years, at which point they decide it is finally time for divorce. Hoping to keep things amicable, they seek the advice of separate counsel. Then, one night after meeting with his attorney, Mr. Young receives a call from his office telling him he has to be in London the next day. As he is packing for his trip, Mr. Young – who is afraid of flying – remembers that he has not yet changed his will, which leaves everything to Mrs. Young. Although the two are not yet divorced, and are in the process of negotiating a settlement, Mr. Young does not want to leave for his flight without dealing with his will.

He understands that the house he and his wife had lived in during the marriage, which is held jointly in both their names, would pass to his wife by operation of law upon his death, but he does not want his wife to inherit his multi-million dollar securities account, which he had inherited upon the death of his mother only months earlier. Mr. Young wants that account to pass to his children if his plane crashes over the Atlantic. So, Mr. Young digs up his will, runs to a neighbors' home, and rips up the will in the presence of two witnesses declaring, "I revoke my will!"

As it turned out, Mr. Young returned a week later safe and sound. Mrs. Young was not so lucky. Soon after Mr. Young returned from London, Mrs. Young went on a ski trip with her former sorority sisters and died in an accident on the slopes

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near Chamonix, never having changed her will. Mrs. Young's will left everything to Mr. Young, including a summer home in Woodstock she had inherited from a great aunt.

If Mr. and Mrs. Young had divorced before Mrs. Young's untimely death, Mrs. Young's property (meaning whatever she was left with after the divorce) would have passed under her will to her children, who were named as contingent beneficiaries in the will. EPTL 5-1.4 would have treated Mr. Young, the former spouse, as having predeceased Mrs. Young. By operation of law, the bequests in Mrs. Young's will to Mr. Young would have been revoked by the divorce, and the property that would have passed to Mr. Young would have gone, instead, to the contingent beneficiaries. EPTL 5-1.4 would also have ensured that Mrs. Young's life insurance would pass to her children after the divorce, even if she had forgotten to change the designation of Mr. Young as the primary beneficiary. The divorce would also have had the effect of creating a tenancy-in-common in the jointly owned primary residence, such that the interest of each spouse in the primary residence would pass, via will, to the children.

However, in our example, Mr. and Mrs. Young were actually still married, although separated, when Mrs. Young died. What effect, if any, would EPTL Section 5-1.4 have on Mrs. Young's will in that case? The answer is none. The statute applies only in the event of a divorce, annulment, or in the rare case of a "judicial" separation (which did not apply to the Youngs and does not apply to most separated couples seeking divorce.)

The moral of the story is that Mrs. Young should have changed her will immediately after she and her husband decided to divorce. If she had executed a new will which left Mr. Young out altogether, and she and Mr. Young had not yet entered into a separation agreement at the time of her death, Mr. Young would still have had a "right of election," which would have permitted him to claim a portion of Mrs. Young's estate. However, depending upon the value of the primary residence, the value of the Woodstock summer residence and other assets Mrs. Young owned, Mrs. Young might have been able to provide that a large portion of her assets passed to her children instead of all of her assets passing to Mr. Young. On the other hand, if Mr. Young had died on his trip to London – after he revoked his will, but before he had made a new will, and prior to the death of Mrs. Young – he would have died "intestate," meaning without a will, and the provisions of EPTL 4-1.1 would have applied. Under those provisions, the sum of $50,000, plus onehalf of Mr. Young's estate, would have passed to Mrs. Young and the balance would have passed to his children. And, in case you are wondering whether the multimillion dollar securities account Mr. Young inherited from his mother would have been part of his "estate," the answer is yes. The concept of "separate property" is a concept of matrimonial law, not estate law. Thus, had Mr. Young died intestate on his trip to London, Mr. Young's children would have inherited at least some of the multi-million dollar securities account; whereas, had Mr. Young not revoked his will, the entire account would have passed to Mrs. Young.

Although the new EPTL Section 5-1.4 did accomplish great changes in the law, it is still no substitute for a carefully designed estate plan which includes changes to reflect post-divorce realities and wishes. In sum, a visit to your trusts and estate attorney is a "must do" item when you have reached the difficult decision to divorce.

Joann T. Palumbo serves as Counsel at Tarter Krinsky & Drogin LLP. She focuses on estate planning and estate and trust administration, including representation of individuals and institutions. Ms. Palumbo is a fellow of the American College of Trust & Estate Counsel and an adjunct associate professor at Fordham University School of Law. She is also a member of the Trusts and Estates Law Section of the New York State Bar Association. Ms. Palumbo has been recognized for her work in estate planning and probate law in the 2008 New York Metro edition of Super Lawyers. This is the third straight year that she has earned this distinction.

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