



TRUSTS & ESTATES

The newsletter of the Illinois State Bar Association's Section on Trusts & Estates

Note from the Editor

By Katarinna McBride

The Tax Fantasy Pool

Legislative Forecasting has become the fantasy sport at my office. No one seems to know where the estate tax laws are headed. Rather than lament, we have decided to make the uncertainty an office sport.

To facilitate the game, we have reviewed proposed legislation and have taken positions on which bills will succeed. Another position is that no bill will succeed and the legislation will return to the 2001 law with a \$1 million exemption.

The Obama administration has proposed returning the estate tax to its 2009 level, with a \$3.5 million exemption and a 45 percent rate on assets that exceed that amount. The House approved the administration's proposal last year, but Republican opponents blocked action in the Senate.

In late July 2010, Senators Jon Kyl and Blanche Lincoln re-introduced legislation that would exempt up to \$5 million from estate tax and impose a 35 percent tax rate on assets that exceeded that amount.

The fact that we are in an election year does not help. There does not seem to be enough initiative to change the law. And the collaboration required for Congress to digest and modify the proposed legislation doesn't seem to be present.

I urge you to join our office pool. E-mail me your thoughts and inclinations on where the estate tax law will be in 2010. It will be published only with your permission, and will be anonymous at your request. There will be no prizes. There will be no ridiculing.

Let the games begin! kmcbride@beermann-law.com. ■

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(Notice to librarians: The following issues were published in Volume 56 of this newsletter during the fiscal year ending June 30, 2009: July, No. 1; August, No. 2; September, No. 3; November, No. 4; January, No. 5; February, No. 6; March, No. 7; April, No. 8; May, No. 9; June, No. 10).

Life insurance litigation post-divorce: Easy to avoid, commonly neglected

By Lauren J. Wolven¹ and Ashley E. Cretto²

Under Illinois law, a former spouse's designation as a beneficiary to a life insurance policy is not automatically terminated upon divorce. Unfortunately, it is also a common occurrence that the named beneficiary is never changed following divorce. As a result of these two factors, litigation is common in this area as a result of competing claims for the proceeds of life insurance policies—ex-spouses who remain the designated beneficiary claim that they are entitled to the proceeds while other family members or subsequent spouses assert that they are the intended beneficiary. This issue arises so frequently in the aftermath of divorce and death that most estate planners we queried had dealt with at least one case. With so much

emotional turmoil and a directed focus on the court proceedings, the insured and his advisors frequently neglect to follow up on beneficiary changes during or after a divorce. We have also had several situations where insurance companies have "lost" the change of beneficiary documentation, even after sending us a confirmation. So, it is critical to ensure that a written confirmation of the change is received and maintained with the insured's important legal and financial documents.

On June 14, 2010, the Northern District of Illinois held that a divorce decree which waived a spouse's beneficial interest to a life insurance



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Life insurance litigation post-divorce: Easy to avoid, commonly neglected

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policy trumped any subsequent inference that the spouse remained the intended beneficiary. *Richard v. Martindale*, No. 09 CV 4159, slip op. (N.D. Ill. June 14, 2010). In the case at hand, the husband, Robert, obtained a life insurance policy in which he designated his wife, Patricia as the primary beneficiary, and his sons the successor beneficiaries. In 2001, Patricia and Richard divorced, but Robert never changed his beneficiary designation. As a result, after Robert's death his ex-wife Patricia and his sons fought over who should be the intended beneficiary. The *Richard v. Martindale* case not only brings to light the prevalence and importance of the issue, but it also confirms Illinois' current law regarding the issue.

Illinois Law

The general rule in Illinois is that contractual rights created independently of marriage survive divorce and are not automatically revoked. *Seuss v. Schukat*, 358 Ill. 27, 35-36, 192 N.E. 668 (1934). Such rights will be affected, however, if a divorce decree or property settlement agreement includes a waiver of the beneficiary's interest. *In re Marriage of Myers*, 257 Ill. App. 3d 560, 564, 628 N.E.2d 1088, 1090 (1st Dist. 1993). The waiver must include a clear [emphasis added] expression of the spouses' surrender of their beneficial interests. *In re Marriage of Myers*, 257 Ill. App. 3d at 564, 628 N.E.2d at 1090. Broadly worded waivers are not sufficient to defeat a designated beneficiary's interest. *Williams v. Gatling*, 186 Ill. App. 3d 21, 23, 542 N.E.2d 121, 123-124 (1st Dist. 1989). In *Williams*, for example, the divorce decree stated that,

Each of the parties does hereby forever relinquish, release, waive and forever quitclaim and grant to the other *** all rights of maintenance, dower, inheritance, descent, distribution, community interest and all other right, title, claim, interest and estate as Husband and Wife, widow or widower, or otherwise, by reason of the marital relations existing between said parties hereto *** or which he or she otherwise has or might have to be entitled to claim in, to or against the property and assets of the other, real personal or mixed, or his or her estate whether now owned or hereafter in any manner acquired by the other party, or whether in pos-

session or in expectancy, and whether vested or contingent.

186 Ill. App. 3d at 23, 542 N.E.2d at 122-123.

The *Williams* court held that the decree would not defeat the designated beneficiary's interest because the waiver was broadly worded and made no mention of the decedent's life insurance policy. *Williams*, 186 Ill. App. 3d at 24, 542 N.E.2d at 124.

When determining whether a waiver is sufficient to defeat a designated beneficiary's claim, courts will consider two factors. *In re Marriage of Velazquez*, 295 Ill. App. 3d 350, 353, 692 N.E.2d 841, 844 (1998). One factor is "whether the asset in dispute was specifically listed as a marital asset and awarded to a spouse." *In re Marriage of Velazquez*, Ill. App. 3d at 353, 692 N.E.2d at 844. The other factor is "whether the waiver provision contained in the settlement agreement specifically states that the parties are waiving any expectancy or beneficial interest in that asset." *In re Marriage of Velazquez*, Ill. App. 3d at 353, 692 N.E.2d at 844.

A waiver is more likely to be sufficient if, using straightforward language, it bars any interest each spouse had in the other's policy and bars each spouse from attempting to claim any of the proceeds. *Principal Mutual Life Insurance Company v. Juntunen*, 189 Ill. App. 3d 224, 227, 545 N.E.2d 224, 225 (1989). For instance in *Principal Mutual Life Insurance Company*, the waiver in the settlement agreement stated that, "Each of the parties hereby releases and/or waives any interest, beneficial or otherwise, which he or she may have acquired in or to life insurance policy(ies) owned by the other." *Principal Mutual Life Insurance Company*, 189 Ill. App. 3d at 226, 445 N.E.2d at 225. Although Illinois courts require that the parties specifically waive their future contingent interest, there is no requirement that the waiver include any magic wording. *John Hancock Life Insurance Company v. Cooley*, No. 01-CV-4105-JPG, slip op., at *3 (S.D. Ill. Oct. 30, 2001). Even the parties' failure to use the word 'beneficial' in the waiver has not been found to be determinative. *John Hancock Life Insurance Company*, No. 01-CV-4105-JPG, slip op., at *4.

A waiver is not the only way to defeat a designated beneficiary's claim. Illinois courts have found that claims by named beneficiaries can also be overcome by showing that

the decedent intended to change the designation and took a positive step towards doing so. *In re Marriage of Velazquez*, Ill. App. 3d at 355, 692 N.E.2d at 846. To determine whether a decedent took sufficient steps to change the beneficiary, Illinois courts use a "substantial compliance" test. *In re Marriage of Velazquez*, Ill. App. 3d at 356, 692 N.E.2d at 846. The substantial compliance test requires evidence establishing a clear expression of the decedent's intent to change the beneficiary and actions that were taken to achieve the change, such that it can be said that the decedent substantially complied with the insurance company's guidelines for changing the beneficiary. *In re Marriage of Velazquez*, Ill. App. 3d at 356, 692 N.E.2d at 846. Ultimately, the overriding concern is "the firmness of decedent's intent." *Dooley v. James A. Dooley Associates Employees Retirement Plan*, 92 Ill. 2d 476, 422 N.E.2d 222 (Ill. 1982). For example, when a former Justice of the Illinois Supreme Court made notations on a letter, the Illinois Supreme Court held that the letter was not sufficient to change the beneficiary. The court found that the former Justice knew that such notations, on their own, would not change the beneficiary and therefore he could not have believed that a change had taken effect. *Dooley*, 92 Ill. 2d at 483, 422 N.E.2d at 225. The concern in this case was that the evidence of the decedent's intent was not unequivocal. *Dooley*, 92 Ill. 2d at 488, 422 N.E.2d at 228. Requiring evidence that establishes an unequivocal intent and a positive step to make the change ensures that there is concrete evidence of the intent and that any doubt regarding the intent is eliminated. *Dooley*, 92 Ill. 2d at 486-87, 422 N.E.2d at 227.

As indicated by the Illinois case law, there are ways to address and remedy the issue of an ex-spouse as a designated beneficiary; however, it is not as easy as throwing in a general waiver or saying that the decedent intended to make a change. Courts will be looking for concrete evidence and specific language that illustrates the parties' intent.

Automatic Revocation

Not every state requires that parties jump through hoops of waivers and substantial compliance to defeat an ex-spouse's claim. In fact, some states have enacted statutes that automatically revoke beneficiary designations upon divorce. Under Illinois law, disso-

lution of marriage will automatically revoke the provisions of wills, revocable trusts, and powers of attorney that pertain to a former spouse. 755 ILCS 5/4-7(b); 755 ILCS 45/2-6(b); 760 ILCS 35/0.01. Other states have extended this automatic revocation to include nonprobate matters as well. A number of states have adopted provisions similar to § 2-804 of the Uniform Probate Code, which automatically revokes beneficiary designations upon divorce. UNIF. PROBATE CODE § 2-804 (amended 2006). California's Probate Code clearly extends the automatic revocation, stating that "Except as provided in subdivision (b), a nonprobate transfer to the transferor's former spouse, in an instrument executed by the transferor before or during the marriage, fails if, at the time of the transferor's death, the former spouse is not the transferor's surviving spouse as defined in Section 78, as a result of the dissolution or annulment of the marriage." CAL. PROB. CODE § 5600(a). Under this statute, a non-probate transfer will not fail if there is clear and convincing evidence that the decedent intended to preserve the beneficiary designation. CAL. PROB. CODE § 5600(b) (2). Although these statutory approaches may be a more straightforward and easier way to address the issue, until the legislature takes action, it is the responsibility of practitioners to protect their clients' interests.

Suggestions for Practitioners

Until Illinois extends its statutes to include automatic revocation of non-probate matters, practitioners in both the family law and estate planning fields must work proactively to address the issues that continue to arise in order to protect their clients' true intent. The *Richard v. Martindale* case provides an excellent example of some of the steps that should be taken to protect clients. Had the divorce decree not included an appropriate waiver, Robert Martindale's ex-wife would have received the proceeds from his life insurance policy rather than his sons. As indicated by this case, one essential step in addressing the issue is to include specific language in a prenuptial agreement or in the divorce decree indicating that any beneficiary designations (excluding ERISA) will be deemed revoked with respect to that spouse. Such provisions should also include a requirement that the spouses cooperate with any subsequent paperwork necessary to perfect the waiver. Ideally, the provision should also reference the specific policy numbers, so as to avoid any claims that the waiver is broadly worded.

Although Illinois case law indicates that no particular language is required in a waiver, practitioners should also stay updated on the specific language that courts find does meet the waiver requirements. For example, the waiver language in *Richard v. Martindale* was found to be unambiguous and to clearly establish that the parties intended to relinquish their beneficial rights. The language in the judgment for the dissolution of marriage stated,

Except as otherwise provided, each of the parties shall and hereby does waive and relinquish: ... all rights, interests, expectancies, and beneficial interests that he or she now has or would have upon the death of the other party under any ... life insurance policy ... or any other instrument executed prior to the effective date of this Judgment ... each of the parties ... shall reserve the right to dispose of his or her property in any way that he or she may see fit without restriction or limitation whatsoever. The foregoing provisions shall override any contrary provision in any will, trust agreement, beneficiary designation, or other instrument executed prior to the effective date of this Judgment.

Richard v. Martindale, No. 09 CV 4159, slip op.*1.

By tracking waiver language that has been found by the courts to be valid, practitioners are more likely to safeguard their client's intent.

Even if a valid waiver is included in the divorce decree, practitioners should also impress upon their clients the importance of changing their beneficiary designations. When the designated beneficiary is changed, issues regarding the decedent's intent disappear. Of course the work is still not over once the clients have been assisted in changing their beneficiaries, because it is an all too common occurrence that forms designating such changes get lost. It is crucial to follow up with the insurance company, confirm the changes, and keep any documentation of the changes with the clients' other important documents. ■

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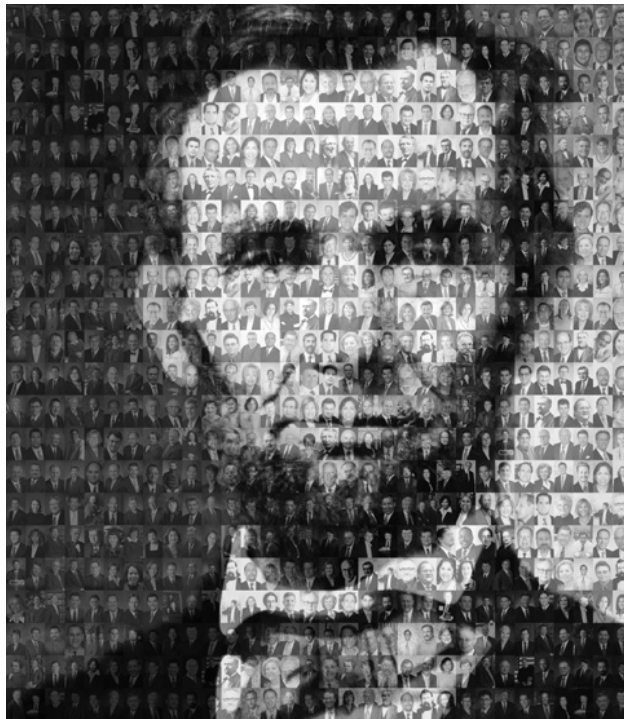
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Upcoming CLE programs

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September

Wednesday, 9/1/10- Teleseminar—Selection and Use of Expert Witnesses. 12-1.

Wednesday, 9/8/10- Teleseminar—Health Care & Estate Planning: Vital Issues at Each Stage of Planning Process. 12-1.

Thursday, 9/9/10- Teleseminar—LIVE REPLAY: Art of the Equity Deal for Startup and Growth Companies. 12-1.

Friday, 9/10/10- Teleseminar—LIVE REPLAY: Art of the Equity Deal for Middle Market Companies. 12-1.

Friday, 9/10/10- Webinar—Advanced Legal Research on Fastcase. *An exclusive member benefit provided by ISBA and ISBA Mutual. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 9/14/10- Teleseminar—Choice of Entity/Form for Nonprofits. 12-1.

Tuesday, 9/14/10- Webinar—Continuing Legal Research on Fastcase. *An exclusive member benefit provided by ISBA and ISBA Mutual. Presented by the Illinois State Bar Association. 12-1.

Thursday, 9/16/10- Chicago, Chicago History Museum—GAIN THE EDGE!® Negotiation Strategies for Lawyers. Master Series Presented by the Illinois State Bar Association. 8:30-4:00.

Thursday, 9/16/10- Live Webcast—GAIN THE EDGE!® Negotiation Strategies for Lawyers. Master Series Presented by the Illinois State Bar Association. 8:30-4:00.

Thursday, 9/16/10- Friday, 9/17/10- Robinson, Lincoln Trail College—Attorney Education in Child Custody and Visitation Matters. Presented by the ISBA Bench and Bar Section; co-sponsored by the ISBA Family Law Section and the ISBA Child Law Section. 8:30-4:30, 8:30-12:30.

Friday, 9/17/10- Live Webcast—The Health Information Technology for Economic & Clinical Health Act: A Brave New HIPAA.

Presented by the ISBA Healthcare Section. 10-12.

Friday, 9/17/10- Chicago, ISBA Regional Office—The Health Information Technology for Economic & Clinical Health Act: A Brave New HIPAA. Presented by the ISBA Healthcare Section. 10-12.

Friday, 9/17/10- Chicago, ISBA Regional Office—Hot Topics in Tort Law- 2010. Presented by the ISBA Tort Law Section. 1-4:15.

Friday, 9/17/10- Teleseminar—LIVE REPLAY: Ethics for Business Lawyers. 12-1.

Tuesday, 9/21/10- Teleseminar—Joint Ventures in Real Estate: Structure and Finance. 12-1.

Wednesday, 9/22/10- Teleseminar—Joint Ventures in Real Estate: Operation and Tax. 12-1.

Thursday, 9/23/10- Chicago, ISBA Regional Office—Experts and Litigators on Issues Impacting Children & Custody in Family Law. Presented by the ISBA Family Law Section. 8-6.

Friday, 9/24/10- Teleseminar—LIVE REPLAY: Fundamentals of Exempt Taxation. 12-1.

Friday, 9/24/10- Springfield, Illinois Primary Healthcare Association—Don't Make My Green Acres Brown: Environmental Issues Affecting Rural Illinois. Presented by the ISBA Environmental Law Section. 9-5.

Tuesday, 9/28/10- Teleseminar—Art of the Debt Deal for Startup and Growth Companies. 12-1.

Wednesday, 9/29/10- Teleseminar—Art of the Debt Deal for Middle Market Companies. 12-1.

Thursday, 9/30/10- Teleseminar—LIVE REPLAY: Restructuring Trusts. 12-1.

Thursday, 9/30/10- Chicago, ISBA Regional Office—Recent Developments in

State and Local Tax- 2010. Presented by the ISBA State and Local Tax Committee. 8:45-12.

October

Friday, 10/1/10 - Chicago, ISBA Regional Office—Countering Litigation Gamesmanship. Presented by the ISBA General Practice Solo & Small Firm Section, Co – Sponsored by the Federal Civil Practice Section. 9-5.

Friday, 10/1/10 - Live Webcast—Countering Litigation Gamesmanship. Presented by the ISBA General Practice Solo & Small Firm Section, Co – Sponsored by the Federal Civil Practice Section. 9-5.

Tuesday, 10/5/10- Teleseminar—Pre-Mortem Estate and Trust Disputes. 12-1.

Wednesday, 10/6/10- Webinar—Continuing Legal Research on Fastcase. *An exclusive member benefit provided by ISBA and ISBA Mutual. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 10/6/10- Webinar—Virtual Magic: Making Great Legal Presentations Over the Phone/Web (invitation only, don't publicize). Presented by the ISBA. 8-5.

Thursday, 10/7/10- Chicago, ISBA Regional Office—Probate/Estate Administration Boot Camp. Presented by the ISBA Trust and Estates Section. 8:30-4:30.

Friday, 10/8/10- Carbondale, Southern Illinois University, Classroom 204—Divorce Basics for Pro Bono Attorneys. Presented by the ISBA Committee on Delivery of Legal Services. 1-4:45. Max 70.

Friday, 10/8/10- Chicago, ISBA Regional Office—Health Care Reform. Presented by the ISBA Employee Benefits Section; co-sponsored by the ISBA Health Care Section. 9-3.

Monday, 10/11/10- Chicago, ISBA Regional Office—Advanced Worker's Compensation- 2010. Presented by the ISBA Workers' Compensation Section. 9-4:30. ■

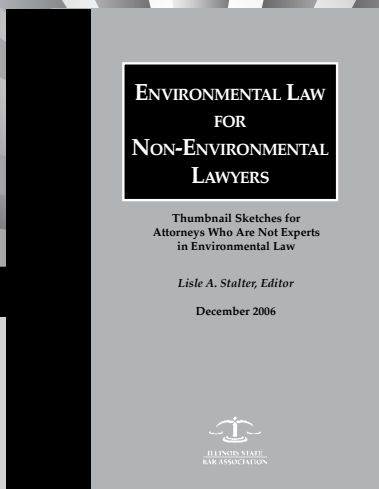


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