

ESTATE PLANNING AND DIVORCE

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INTRODUCTION

Often divorce attorneys neglect to ask their clients if they have estate planning documents, or they do not understand the significance of estate planning documents to the divorce process. For example, if a potential client comes into your office for a divorce consultation, do you ask if they have executed estate planning documents? If you discover that the client has executed estate planning documents and the soon-to-be Defendant involved in the divorce case is the primary beneficiary, power of attorney, personal representative and trustee, what do you do? Estate planning documents may have a significant effect on the divorce. In order to protect yourself and your client, certain estate planning questions should be asked, answered and acted upon in every divorce case. The following paragraphs provide specific questions for you and your client with practical solutions. The questions you should ask yourself are:

1. Can you represent the potential client in the divorce action if your law firm prepared the estate planning documents for the couple?
2. Subsequent to the Judgment of Divorce, can you represent the ex-husband in a non-divorce matter, when you represented the ex-wife during the divorce?
3. What should you ask the client during the initial intake regarding estate planning?
4. When can you revoke powers of attorney given to a spouse?
5. To what extent can estate planning documents be modified during the divorce proceedings?
6. To what extent can beneficiary designations be modified during the divorce proceedings?
7. How do you protect your client and yourself after the divorce?

CONFLICT OF INTEREST

Conflict of interest questions address: (1) whether any confidential information received from one client could be used to the detriment of that client or for the benefit of the other client, and (2) whether the attorney's professional judgment and the quality of the representation of either client would be adversely affected.

By way of example, imagine you are in a meeting with a new divorce client, and you discover that an attorney in your office prepared estate planning documents for the couple. You are contemplating accepting the divorce case as a new matter but your representation will require you to file a Complaint of Divorce against one of the firm's former clients. Do you have a conflict? Can you proceed with the representation if you obtain a Conflict Waiver?

The answer to both of these questions is potentially "yes." The analysis for this particular situation begins first with a determination of whether the potential opposing party in the anticipated divorce action is a former client (MRPC 1.9) or a current client (MRPC 1.7). The answer to this question is fact determinative and you must consider when the estate planning was completed and what type of contact your firm has had with the potential opposing party since the estate planning was completed. Assuming that you determine that the potential opposing party is a former client, then MRPC 1.9(a) controls, which provides as follows:

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

It has been stated that where the subject matter of the representation is the same, the matters are substantially related. Also, where the factual or legal issues overlap, the matters are substantially related. Where there is a likelihood that information obtained in the former representation will have relevance to the subsequent representation, the matters are substantially related. RI-46.

If you determine that the matters are directly adverse, and if a disinterested attorney would conclude that the client should not agree to the representation under the circumstances, the attorney involved cannot properly ask for such an agreement or provide representation on the basis of the client's consent. (See Comments.) Assuming you pass the disinterested attorney standard and you deem a Conflict Waiver to be appropriate, we recommend that you obtain a Conflict Waiver which reads similar to the following:

I, Jane Doe, state the following under oath:

I, Jane Doe, am the Plaintiff in a divorce action in which her husband is the defendant.

I, Jane Doe, acknowledge that prior to the filing of divorce action, the law firm of Rhoades McKee prepared estate planning documents for Jane Doe and her husband.

I, Jane Doe, understand that her husband, the defendant in the divorce case, has now requested that Rhoades McKee represent him in the divorce action.

I, Jane Doe, waive any and all objections to said representation that could possibly exist or do exist as a result of Rhoades McKee having prepared estate planning documents for Jane Doe and her husband.

I, Jane Doe, consent to allow Rhoades McKee to represent John Doe in the divorce action, of which I am a party.

I, Jane Doe, sign this Conflict Waiver knowingly and voluntarily, based upon my own personal knowledge.

The second potential conflict situation arises when, after the divorce, the party that you did not represent in the divorce now wants you or someone in your firm to represent him/her in an unrelated non-divorce matter. Do you have a conflict? Can you proceed with the representation if you obtain a Conflict Waiver? The answer to both of these questions, again, is potentially “yes.” Again, your analysis of what to do in this situation begins with a determination of whether the potential conflict involves a former client or a current client. The answer to this question is also fact determinative and you need to consider whether there have been ongoing custody, child support and/or parenting time issues. Assuming that you determine that the situation involves a current client, then MRPC 1.7(a) controls, which provides as follows:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

Assuming you pass the disinterested attorney standard and you deem a Conflict Waiver to be appropriate, we recommend that you obtain a Conflict Waiver which reads similar to the following:

I, Jane Doe, state the following under oath:

I, Jane Doe, was the Plaintiff in a divorce action in which John Doe was the defendant.

I, Jane Doe, acknowledge that Rhoades McKee represented me as the Plaintiff in the divorce matter against John Doe.

I, Jane Doe, now understand that Rhoades McKee has been asked by the Defendant in the divorce action, my ex-husband, to represent him in a real estate matter.

I, Jane Doe, waive any and all objections to said representation that could possibly exist or do exist as a result of Rhoades McKee now representing my ex-husband in a real estate matter.

I, Jane Doe, consent to allow Rhoades McKee to represent my ex-husband in his current real estate matter.

I, Jane Doe, sign this Conflict Waiver knowingly and voluntarily, based upon my own personal knowledge.

INTAKE QUESTIONS:

If you decide that you are going to represent a client in the divorce action, how do you determine what estate planning documents have been executed and what the documents mean? You must simply ask the client. The question then becomes when to ask and what to ask. We recommend that you add the following questions to your intake questionnaire:

Have you or your spouse executed any estate planning documents?

- Yes
- No

If yes, when did you sign the documents and who drafted the documents?

Do the documents include any of the following:

	Yes	No
Power of Attorney – Financial	_____	_____
Power of Attorney – Medical	_____	_____
Will	_____	_____
Trust	_____	_____

If your answer is yes to any of the above questions, please provide a complete copy of the documents.

After you have determined what estate planning documents the client has, then question what the documents mean. Typical estate planning documents include the following: 1) **Power of Attorney (Financial)**, which allows you to appoint an individual to handle your financial affairs in your absence and/or upon your disability; 2) **Power of Attorney (Medical)**, which allows you to appoint an individual to make medical decisions for you if you are unable to make those decisions on your own behalf; 3) **Will**, valid at death, which transfers assets, nominates a personal representative, and appoints a guardian for minor children; and 4) **Trust**, which is valid during a lifetime, and which can reduce (if not eliminate) estate taxes, avoid the expense of probate, hold assets for management for the benefit of minor children, adults, and individuals with special needs. It is important to have a basic understanding of these documents and how they work together.

REVOCATIONS

Once you have reviewed the estate planning documents and determined their substance, question what effect the documents will have in the divorce proceedings. Often clients will inquire whether or not they can revoke or modify estate planning documents during the divorce. If your client has executed a financial power of attorney

effective upon signing (read the document to determine whether or not it is effective upon signing or effective upon disability), we advise that you immediately revoke the financial power of attorney. Allowing a financial power of attorney effective upon signature to continue in existence may result in a substantial financial hardship to your client. With a financial power of attorney effective upon signature, either party may remove funds from the other's accounts. Often, the language contained within the financial power of attorney will provide a method for revocation of the power, and generally the power must be in writing. The family law practitioner should be aware that statutes relating to the Power of Attorney and Patient Advocate are codified at MCLA 700.5501 through 700.5520. Unlike the Power of Attorney for financial purposes, MCLA 700.5510 provides that a Patient Advocate can be revoked by any of the following:

1. Patient's death;
2. Order of removal by the probate court;
3. Patient Advocate's resignation or removal;
4. Patient's revocation of the designation;
5. Subsequent designation that revokes the prior designation;
6. Occurrence of a provision for revocation contained in the designation; and/or,
7. If a designation is executed during a patient's marriage naming the patient's spouse as the patient advocate, the designation is suspended during the pendency of an action for separate maintenance, annulment, or divorce and is revoked upon entry of judgment. (Emphasis added)

The Estates and Protected Individuals Code (EPIC) does not contain similar language for a Power of Attorney for financial purposes and therefore, in order to effectuate the revocation, we recommend that you send written notice to the attorney for the opposing party, or the opposing party directly, if unrepresented, that provides as follows:

I, Jane Doe, of Kent County, Michigan, revoke any and all Financial Powers of Attorney effective upon execution or otherwise which I have executed naming my spouse, John Doe, as my Attorney in Fact, including, but not limited to, the Power of Attorney for Financial Purposes which I executed on or about February 12, 2003.

However, it is recommended that you have your client nominate another individual as Attorney in Fact, (financial and medical) because without this nomination, a non-client spouse may have priority to serve as your client's conservator pursuant to MCLA 700.5109 or guardian pursuant to MCLA 700.5313.

CHANGING DOCUMENTS

Before you change any documents or if you do not want any documents changed during the divorce proceedings, you must first determine if a restraining order has been issued regarding the modification of any estate planning documents. If a restraining order has not been issued relating to estate planning documents and if you do not want any estate planning documents modified during the divorce, you should obtain a

restraining order that provides as follows: **both parties must cease, desist, and refrain from revoking and/or modifying any previously executed estate planning documents and/or modifying the beneficiary designations in said documents.**

If you determine that a restraining order does not exist regarding estate planning documents, and you change or modify the estate planning documents, including modification of the beneficiaries, changing those documents does not guarantee that the spouse will be excluded from receiving some of your client's assets. For example, regardless of the language contained in the Will, the surviving spouse has the right to elect between certain property interests in the estate. These interests depend on whether the deceased spouse died testate (with a will) or intestate (without a will) and whether the deceased spouse is the husband or the wife at the time of death. (See MCLA 700.2201).

If the deceased spouse was domiciled in the State of Michigan and had a Will (testate), the surviving spouse may elect one of the following:

1. Regardless of whether the surviving spouse is the husband or wife, the surviving spouse may elect to abide by the terms of the Will.
2. Regardless of whether the surviving spouse is the husband or wife, the surviving spouse may elect to take half of the share that would have passed to the surviving spouse had the deceased spouse died without a will, reduced by half of the value of all property derived from the deceased spouse by any other means other than testate or intestate succession upon his/her death. For the calculation provision of intestate statute see MCLA 700.2102.
3. A surviving wife may elect to take her dower right. See MCLA 558.1 to 558.29.

If the deceased spouse is the husband who was domiciled in the State of Michigan and did not have a Will (intestate), the surviving wife may elect one of the following:

1. Her intestate share, pursuant to MCLA 700.2102.
2. Her dower right pursuant to MCLA 558.1 through 558.29.

The surviving spouse also may have the right of priority to homestead (distribution to spouse and minor and dependent children), certain property (personal property of the decedent), and a family allowance (maintenance during administration). See MCLA 700.2402 through MCLA 700.2404.

AFTER THE JUDGMENT

After the Judgment of Divorce has been entered, Section 2807 of EPIC provides for the revocation of many dispositions or appointments of property between former spouses and their relatives. See MCLA 700.2807. This section also revokes certain nominations of former spouses and their relatives to act in a fiduciary capacity for their ex-spouse, such as personal representative, executor, trustee, conservator, agent or guardian.

Even though EPIC provides for these revocations, it is recommended that in order to protect yourself and your client, your closing letter contain the following language:

Now that your divorce has been finalized and you have received a copy of your Judgment of Divorce, it is important for you to now revise or change your estate planning documents so that they can carry out your wishes in the event of your death. Particularly important in that regard is the distribution of your assets. Revising or creating estate planning documents such as power of attorneys, a will and/or trust will help insure that the individuals you specify will receive your assets. If you need any assistance preparing your estate planning documents, please do not hesitate to contact me as we have a designated estate planning department within our law firm, which will be happy to assist.

CONCLUSION

Practicing family law can be simultaneously very stressful and very rewarding. It is one of the few areas of law that requires the practitioner to be knowledgeable not only in the area of practice, but also in the areas of tax, psychology, real estate, corporations and estate planning. We encourage you to protect yourselves and your clients by understanding the effects of estate planning on the divorce proceedings before you file, during the filing, and after the filing.