Thoughts on Estate Planning When The Honeymoon Is Over And After The Divorce

February 10, 2014 | by Patricia M. Barbarito, Gary Botwinick

As difficult as it is to accept (even for divorce lawyers), the reality is that the divorce business is booming - divorce has become an accepted way of life. Despite the fact that we, as matrimonial attorneys, make our living ending people's marriages - there is something inherently disturbing about the thought of a divorce entering the mind-set of the happy couple before wedding day. It is even more disturbing to accept that people think about divorce while they are living together as husband and wife, without telling their spouse. But people do think of these things- prenuptial agreements are part of our practice and are enforceable. An agreement negotiated during the marriage may even be enforceable. An agreement that induces reconciliation in a substantially deteriorated marital relationship will be enforced if fair and equitable. And, of course, property settlement agreements, negotiated and entered into at the end of a marriage in contemplation of divorce are enforceable.

For all practical purposes, the negotiating and signing of a premarital agreement (if done properly) settles the terms of the divorce before the wedding day. A mid-marriage agreement may resolve the parties' financial issues. A reconciliation agreement made in good faith, that is fair and reasonable, and that resuscitates a dying marriage, sets forth clearly the conditions entered into for the marriage to continue. The property settlement agreement is made while technically in the adversarial mode — each party participating in the negotiations, resolving issues relating to the end of their marriage. All documents are up front — both parties participating in their fate. However, the idea of secretly planning for a possible divorce — well that sends chills up even the most cynical of us — it is just plain "creepy."

Is a divorce something that can, or should, be planned for "privately" — before one's spouse realizes the end is near? Should married people evaluate their situation vis-a-vis the death of their spouse, versus their situation after a divorce? Perhaps these considerations while pretending to be in a "good" marriage are a bit duplicitous — but it is naive to suggest that it does no`t happen, or AFTER THE

HONEYMOON IS OVER- BUT BEFORE YOU LET YOUR SPOUSE IN ON THE SECRET.

A. Issues to Address Prior to the Filing of a Divorce Complaint

1. Life Insurance - Upon the death of a decedent, the proceeds of a life insurance policy will be paid to the designated beneficiary of the life insurance policy. As a general rule, so long as the insured is also the owner of the life insurance policy (which is the common scenario) the insured can select and/or change the beneficiary. Of course, this change is not irrevocable and can be changed by the insured at any time while the insured is also the owner of the policy. Nevertheless, New Jersey Court Rule 5:4-2(f) provides that the first pleading in the divorce action must include an affidavit of insurance coverage which must specify if any insurance coverage was modified within the 90-day period preceding the complaint. If a party intends to change the beneficiary of a life insurance policy away from a soon-to-be-ex-spouse, the beneficiary should be changed more than 90 days prior to the filing of the complaint.

What must be evaluated by the matrimonial attorney, is the need to file a complaint for divorce, versus the need to "buy time" in order to change the beneficiary. For example, if your client is being denied access to the children, waiting to file a complaint for divorce may not be an option. Candidly, it is questionable as to whether or not a Court would require a change back to the "status quo," even if the beneficiary designation was modified more than 90 days prior to the filing of the first pleading. In any event, you must discuss this Rule and time-line with every new client so as to evaluate a strategic approach to the case.

Furthermore, be aware of the consequences in a situation when a spouse is changing the beneficiary of the life insurance policy and the new beneficiary will be a minor child. If in fact the intention is that the minor child receives the proceeds, it is often wise to designate a trust as the beneficiary to receive these proceeds for the child. This trust will usually provide that the principal and/or income of the trust will be used for the exclusive benefit of the child in the discretion of a third-party trustee. In the absence of such a direction, the soon-to-be-ex-spouse will likely be appointed guardian of the property of the child and have access and/or control over those proceeds. The trustee of the trust need not be the child's surviving parent. The trust may provide that the trustee may, or may not, consider the support which a parent is required to give to a child. The trustee may also have broad discretion in determining the form of distributions and the timing of these distributions. Holding these monies in trust provides protection from the child's creditors and provides for their disposition in the event of the death of the child before the assets are fully distributed.

2. Powers of Attorney - Often during the course of a marriage, spouses will execute powers of attorney in favor of each other. Normally, these powers of attorney are "general" powers of attorney granting each other complete control over the assets of the marriage and the assets of the individual granting the power.

If a wife gives a husband a general power of attorney, the husband can use this power to access the wife's individual bank accounts, brokerage accounts, etc. Obviously, this can be quite dangerous. Unfortunately, the only way to revoke a power of attorney is to locate all the originals and destroy them or notify all the institutions in possession of such powers and inform them that they have been revoked. Using a power of attorney is a powerful and dangerous tool if in the wrong person's hands. Imagine the damage a devious husband or wife could do to an unsuspecting spouse's financial security. While in all likelihood if the sinister plot is revealed during the divorce proceedings a Court would or should impose sanctions, or at the very least remedy the situation, the reality is that once the money is gone — it's gone! Hopefully, assets exist to be awarded to the duped spouse. If not, the result could be disastrous. If the soon-to-be-ex-spouse has the powers in his or her possession, it would be a good idea to notify all institutions having accounts owned by the principal, in writing, that these powers have been revoked. Obviously, this may "red flag" the intention of the notifying spouse that the divorce is in the future — again, your client should simply know his or her options.

3. Individual Retirement Accounts - Individual Retirement Accounts (IRA) are as popular today as ever before. With people moving from job to job and company to company, 401(k) plans and other qualified benefit plans are usually rolled-over into IRAs. Often, they are one of the largest assets of an estate, sometimes exceeding $1,000,000 in value.

The disposition of an IRA is governed by a beneficiary designation form. Upon the death of the owner of the IRA, the value of the account will be payable to the beneficiary. Normally, a spouse will designate a surviving spouse as the beneficiary of the IRA. This often makes sense for income tax planning purposes as a surviving spouse can rollover an IRA into his or her own name and continue to defer recognition of income until the surviving spouse attains the age of 70½.

Nevertheless, in cases where significant animosity exists between the spouses, and a divorce is contemplated, the owner of the IRA may wish to change the beneficiary to anyone other than the soon-to-be-ex-spouse. While this may accelerate the income tax recognition (e.g. the distribution of the proceeds must commence within one year after the death of the owner), the owner will be assured that the proceeds will not belong to the surviving spouse. Contrary to popular opinion, making this change without spousal approval is not prohibited, as IRAs are not covered by ERISA. However, a similar change cannot be made with ordinary employer-sponsored qualified retirement plans as they are subject to ERISA and REA.

4. Gifts and the Establishment of Trusts to Protect Assets From Dissipation-and Ultimately From Equitable Distribution. Of course, we know that assets acquired during the marriage are subject to equitable distribution, regardless of the party to whom these assets may be titled. But, what happens if the assets no longer belong to the spouse or spouses? What happens if one spouse unilaterally gives the assets away during the marriage, unbeknownst to the other spouse? What happens if the spouse makes such a gift for what may very well be legitimate and well-intentioned purposes? What if the spouse unilaterally dissipates the assets for a legitimate purpose to prevent the other spouse from irretrievably dissipating them for an illegitimate purpose?

We are well aware of the Court's disapproval of unilateral dissipations of monies. In Monte v. Monte, the Court held that the "intentional dissipation" of assets by one party "is no more than a fraud on marital rights" to the detriment of the other spouse. The Court thus held that such dissipation is chargeable to the dissipating spouse. Further, among the factors considered in making equitable distribution of property is the "contribution of each party to the . . . dissipation . . . in the amount or value of the marital property . . .."

However, assume the husband in a marriage is an alcoholic who refuses to receive treatment, refuses to work, and has a tendency to incur debt for unreasonable purposes. He drives an automobile while intoxicated, exposing himself to unimaginable liabilities. The wife works hard, has built a business of her own, and has amassed individually titled assets, which would be subject to equitable distribution. The marriage has disintegrated, but the spouses are still living together for the sake of their minor children. The wife is concerned about preserving the wealth which she (or they) has amassed. They have children to support and educate, and it is clear to her that she will continue to have that financial responsibility. She establishes an irrevocable trust for the benefit of their three children and begins to make sizable contributions to the trust, without the consent or knowledge of her husband. These contributions go on for a period of three years and total $90,000. The wife, after feeling confident that her hard earned money is "protected" as a result of the funding of this trust, files a complaint for divorce. Can the husband claim that these assets were unilaterally dissipated and should, therefore, be charged against the wife's share of equitable distribution?

In Kothari v. Kothari, the husband, an immigrant from India, sent large sums of money to his parents in India in accordance with Indian custom. The trial court held that the wife was entitled to equitable distribution equal to one-half of the monies sent to the husband's parents. Considering if the husband "dissipated" the assets, the Court noted that the Legislature, when adopting N.J. Stat. Ann. §2A:34-23.1(i), did not define the word "dissipation." The Court stated that "[i]t is clear, however, that the concept is a plastic one, suited to fit the demands of the individual case." The Court cited the following factors in making a determination that the husband unilaterally dissipated marital assets:

1. The proximity of the expenditure to the parties' separation
2. If the expenditure was typical of expenditures made by the parties prior to the breakdown of the marriage
3. Whether the expenditure benefited the joint marital enterprise or was for the benefit of one spouse to the exclusion of the other
4. The need for, and amount of, the expenditure

In our fact pattern referred to above, assume that the trust established by the wife directed that the funds be used to fund the higher education of the children. While the trust may have been established by the wife in relatively close proximity to the end of the parties' marriage, planning for the future of children is generally a "typical" expense, and certainly benefits the overall "marital enterprise." No one could argue that there is not a "need" for the expense. Could not a convincing argument be made that the husband should not receive credit for these monies when determining equitable distribution?

5. Review of Shareholder Agreements or Buy/Sell Agreements - Occasionally, when two or more people are in business together, they will enter into a shareholder agreement which provides that if one of the shareholders or partners is involved in a divorce proceeding, the other shareholders or partners have the right to buy the interest of the divorcing shareholder. Thus, any such agreement should be carefully reviewed and analyzed to quantify any possible risks before a complaint is filed. If there are significant negative consequences that will ensue if a complaint for divorce is filed, a renegotiation of the agreement might be warranted. Certainly, if the filing of the complaint for divorce might bring undesired results with respect to the complainant's livelihood, he or she may wish to consider other alternatives. What is the relationship which the spouse seeking the divorce has with his or her partners? How might they react? Will they hold your client's feet to the fire? Is such an agreement even enforceable? Careful consideration must be paid to the consequences of these agreements.

The Big Question - Does Your Client File a Complaint for Divorce, or Wait and See if Their Spouse Dies?

1. Is The Spouse Better Off Divorced Or As A Surviving Spouse - A surviving spouse has certain rights that a divorced spouse does not possess.

A. Elective Share - N.J. Stat. Ann. §3B:8-1 provides that even if a spouse is disinherited in a will, that surviving spouse may be entitled to an "Elective Share." An Elective Share is generally one-third of the "Augmented Estate." However, an Elective Share can only be obtained if "at the time of death the decedent and the surviving spouse had not been living separate and apart in different habitations or had not ceased to cohabit as man and wife, either as a result of judgment of divorce from bed and board or under circumstances which would have given rise to a cause of action for divorce or nullity of marriage."

Therefore, a determination must be made as to if a spouse seeking a divorce would be better off as a widow (or widower) or as a divorcee. This will require an analysis of the assets of the family and the individual spouses, as well as an analysis of the anticipated result in a divorce proceeding.

B. How is the "Augmented Estate" computed? The Augmented Estate is computed as follows:

The Probate Estate
Reduced by: (i) Funeral and administration expenses
(ii) Enforceable claims against the estate
Increased by: (i) Transfers after May 28, 1980, to a person other than the spouse, for less than full consideration, where the decedent retained certain powers or rights over such property;
(ii) Transfers made within two years of death of the decedent, where the aggregate transfers to any one donee in either year exceeded $3000;
(iii) The value of property owned by a surviving spouse at, or as a result of, the decedent's death to the extent that the property was derived from the decedent by other than testate or intestate succession without full consideration;
(iv) The value of property described in (iii) above which was transferred by the surviving spouse during the marriage, without full consideration, to a person other than the decedent and which would have been included in the spouse's Augmented Estate if the surviving spouse predeceased the decedent.

C. Certain items excluded from Augmented Estate. The following items are excluded from the Augmented Estate:

(i) Life and accident insurance, payable to a person other than the surviving spouse;
(ii) A joint annuity or pension, payable to a person other than the surviving spouse; and
(iii) A transfer of property if made with the written consent or joinder of the surviving spouse.

D. How is the Elective Share satisfied? New Jersey's Elective Share statute is unique from other states in one very significant way; New Jersey's Elective Share is based upon need. The Elective Share is first satisfied out of the surviving spouse's independent wealth and out of decedent's bequests and non-probate transfers to him or her. Thus, if the surviving spouse's own independent assets exceed one-third of the value of the Augmented Estate, the surviving spouse is not entitled to an elective share.

E. Analysis. When you are trying to determine whether it is in your client's best interests to seek a divorce or stay married, you must carefully analyze the anticipated results in both scenarios. If a client thinks that they will benefit financially on the spouse's death, they must understand that, at best, all they will be entitled to is a combination of (i) the elective share (if any), (ii) jointly owned assets with rights of survivorship (net of attendant liabilities), and (iii) certain other assets which they have a legally protected right to receive (i.e. ERISA qualified benefits, as discussed above). In some cases, these death benefits may exceed what the spouse might be entitled to in a divorce action. However, in some cases, they might be better off divorcing the spouse and quantifying each party's respective rights.

F. Use of Applicable Exclusion Amount or Annual Exclusion of Both Spouses. Each U.S. citizen or resident is entitled to pass $675,000 of wealth to any other person or persons during his or her lifetime; or upon their death (in the aggregate), without the imposition of federal estate or gift taxes. Thus, a husband and wife together can transfer $1,350,000 without the imposition of a tax. The Internal Revenue Code further provides that a gift from one spouse can be treated as made one-half (1/2) from each spouse if an appropriate election is made and the spouses are married to each other at the time of the gift and the non-contributing spouse does not remarry during the year of the gift. Should you counsel your client to stay in the marriage long enough to use the credit of the other spouse which otherwise might be wasted?

Example: Herman is married to Wilma but is considering filing a complaint for divorce. Herman has children from a prior marriage and Wilma has no children. Herman has wealth of about $5,000,000 consisting predominantly of a closely held business, most of which is not subject to equitable distribution. Wilma has insignificant assets and is unlikely to receive any significant assets after the divorce. Herman wishes to make gifts of minority interests in his business to his children worth $1,200,000. However, Herman will have to pay a gift tax for transfers to the extent they exceed $675,000. With Wilma's consent, however, Herman can "split the gifts" and take advantage of Wilma's $675,000 credit which otherwise might be wasted. Thus, this will permit Herman to transfer $1,350,000 of value to his children without the imposition of a gift tax.

In addition to the $675,000 credit discussed above, each individual is entitled to make annual gifts of $10,000 to any other individual without being subject to federal gift tax. Moreover, these so-called "annual exclusion" gifts do not reduce the $675,000 credit otherwise available to each U.S. citizen or resident. As discussed above, 26 U.S.C. §2513 permits a married couple to treat any gift made by one spouse as made one-half by each spouse. Thus, prior to a divorce, a spouse can double the annual exclusion gifts he or she could otherwise make if the soon-to-be-ex-spouse consents.

The ability to use the $675,000 credit belonging to the soon-to-be-ex-spouse, and his or her annual exclusion gift rights, can have significant value. Thus, a spouse anticipating a divorce may wish to consider delaying the filing of a complaint to use this opportunity. Likewise, for the spouse whose credits will be used not for his or her benefit, this may provide a significant bargaining chip in a divorce action, as this credit may have significantly more value to the other spouse, which he or she may be willing to pay for with a larger share of equitable distribution.

II. AFTER THE SECRET IS OUT & THE COMPLAINT IS FILED —
NOW WHAT?
ISSUES TO ADDRESS DURING THE DIVORCE PROCEEDING

A. Preparing and Executing a New Last Will and Testament - N.J. Stat. Ann. §3B:3-14 provides that "if after having executed a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any dispositions or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, or guardian, unless the will expressly provides otherwise." (Emphasis added). Unfortunately, the provisions of N.J. Stat. Ann. §3B:3-14 only apply in the event of divorce. Therefore, during the pendency of a divorce proceeding, any provisions in a will for the benefit of a spouse, or appointing a spouse as a fiduciary will be enforceable in the event that the testator should die before a judgment of divorce is issued.

Because of the possibility of death during the pendency of divorce, it is imperative that a review of any existing wills occurs to determine if changes are necessary. Generally, if a soon-to-be-ex-spouse is going to be disinherited under a will, the will should specify that the testator has intentionally made no provision for the spouse.

B. What happens if an individual dies during a divorce proceeding without a will? In this situation, the surviving spouse will be entitled to an intestate share of the estate. In the event of intestacy, N.J. Stat. Ann. §3B:5-3 provides that a surviving spouse will be entitled to the following:
1.If there is no surviving issue or parent of the decedent, the surviving spouse receives the entire estate;
2.If there is no surviving issue but the decedent is survived by a parent or parents, the surviving spouse receives the first $50,000, plus one-half of the balance of the intestate estate;
3.If there are surviving issue, all of whom are issue of the surviving spouse also, the surviving spouse receives the first $50,000, plus one-half of the balance of the intestate estate;
4.If there are surviving issue, one or more of whom are not issue of the surviving spouse, the surviving spouse receives one-half of the intestate estate.

C. What claim does a surviving spouse have against an estate of a deceased spouse who has disinherited the surviving spouse during the pendency of a divorce?

In Carr v. Carr, the New Jersey Supreme Court addressed this very issue. During the pendency of divorce proceedings initiated by a wife, her estranged husband died and left his entire estate to his children from a prior marriage. Mrs. Carr filed an order to show cause to substitute the executor of the husband's estate as a defendant, to restrain the disposition of the decedent's estate, to continue pendente lite support payments, and requesting a hearing to resolve the issues of alimony, equitable distribution, and legal fees. The trial court held that the divorce action and claims for alimony and equitable distribution were terminated by Mr. Carr's death, and discontinued Mrs. Carr's pendente lite support. However, the Court permitted Mrs. Carr to amend her complaint to seek equitable remedies, which she did. Mrs. Carr also appealed the trial court's dismissal of the alimony and equitable distribution claims. The Appellate Division unanimously affirmed the trial court's opinion. A petition for certification was granted.

Our Supreme Court affirmed the trial court's determination that the equitable distribution statute does not authorize the distribution of marital assets except upon divorce of the parties. Since Mr. Carr died prior to a judgment of divorce, equitable distribution was not authorized. However, Mrs. Carr was likewise not entitled to a claim for an elective share because she and Mr. Carr were no longer living together. This placed Mrs. Carr in a so-called "black hole." She had no right to equitable distribution and no right to an elective share. Nevertheless, the Court held that Mrs. Carr is entitled to some form of equitable relief and the equitable remedy of constructive trust should be imposed upon the marital property under the control of the executor of Mr. Carr's estate. Thus, the Court fashioned a remedy to provide treatment similar to equitable distribution for the benefit of Mrs. Carr.

D. Issues to Address in New Will. The new will should address the manner in which assets are going to be held for any minor children. It is generally undesirable to leave any bequest to a minor child outright in a will if the decedent intends to protect the bequest from the minor child's other parent. Thus, an outright bequest (i.e. in a residuary clause of a will) to a minor child might endanger these funds if the other parent (the ex-spouse of the decedent) is irresponsible or incapable of managing such money. Generally, the testator should consider naming a third party to act as the trustee of such bequest until the child attains a specified age. This arrangement will protect the assets from the reach of the child's parent.

Additionally, a new will may name new guardians of any minor children, as well as a new executor of the estate. Though, as a general rule, a surviving parent is normally appointed as the custodian when the custodial parent predeceases, N.J. Stat. Ann. §9:2-5 provides that the Court has discretion to order otherwise. Therefore, if a client has significant concerns regarding the surviving parent of the child, he or she may wish to provide for the appointment of another person as the guardian of the child or children after his or her death. While this will not be binding upon the Court, it should at least carry some weight for the benefit of the guardian appointed in the deceased parent's will.

E. Should the Surviving Spouse Simply be Disinherited in the Will? While the testator may often wish to disinherit the surviving spouse, to do so may result in negative tax consequences to the children of the marriage who will be the ultimate beneficiaries. As stated above, an omitted spouse may be entitled to an elective share from the estate. In the absence of any direction to the contrary in a will, if a surviving spouse is successful in asserting a claim for an elective share, such spouse will receive 1/3 of the augmented estate. The spouse will receive this elective share free of any obligation to leave such money to any other person. Thus, for example, if a husband receives an elective share upon the death of his spouse, there is no prohibition upon him transferring these assets during his lifetime or upon his death to anyone other than the children of the marriage.

Furthermore, if a spouse is disinherited from a will, there will be an increased tax liability upon the death of the first spouse as there will not be any marital deduction available.

Assuming the entire estate is thus payable to the children of the decedent, any amounts in excess of $675,000 will be subject to estate tax upon the decedent's death. Through the use of an estate planning concept known as a QTIP Trust (an acronym for Qualified Terminable Interest Property), the children may receive a greater benefit from the combined estate of both spouses. A QTIP Trust must provide that the surviving spouse is entitled to a life estate in the principal of the trust, and the beneficiaries designated by the spouse under whose will the trust is established, will receive the remainder of the trust. This technique results in the deferral of estate taxes as the value of the QTIP Trust will be included in the taxable estate of the surviving spouse upon his or her death. However, this does permit such amounts to avoid taxation on the death of the first spouse.

Unfortunately, in order to take advantage of such a technique, the surviving spouse must be entitled to all the income from the QTIP Trust during his or her lifetime, and the trust must be funded with at least 2/3 of the augmented estate (rather than 1/3 of the augmented estate), otherwise the surviving spouse may still be entitled to an additional distribution pursuant to the elective share statutes.

F. Estate Planning for the Parents of Divorcing Spouses - N.J. Stat. Ann. §2A:34-23 provides that in determining equitable distribution, any property acquired during the marriage by either party by way of gift, devise or intestate succession shall not be considered. Nevertheless, the receipt of a gift, devise or bequest can result in a change of circumstances justifying a reduction of alimony payable by the non-inheriting spouse, or an increase in alimony payable by the inheriting spouse. Thus, parents of a divorcing child may wish to revise their estate plan to provide that any distributions to the child shall instead be held in trust for the benefit of the child with the independent trustee having powers to make distributions to the child (or grandchildren) in the trustee's sole discretion.

G. Liquidity Problems. What happens in the event that a testator revises their will to disinherit a spouse and leaves their entire estate to the testator's children and then the testator dies? To the extent that the estate is in excess of $675,000, an estate tax will be payable. How much tax is payable depends upon the extent to which the estate exceeds $675,000? For example, an estate of $1,000,000 will result in estate taxes of approximately $130,000; an estate of $2,000,000 will result in estate taxes of approximately $550,000. This tax is generally due within 9 months after death. How is it paid? Generally, the estate will be required to liquidate assets to pay the taxes. What if the estate consists mostly of retirement benefits the distribution of which can be delayed over the lifetime of the beneficiary? If the retirement benefits are the only asset to use, the funds must be removed from the retirement plan, resulting in the acceleration of income taxes. This is less than ideal. What if the estate consists of a closely held business? While there is some relief in the form of a deferral on payment of the estate tax, the business may ultimately be required to be sold to pay the taxes.

Perhaps the testator should consider purchasing life insurance to pay the estate taxes. If the life insurance is purchased through an irrevocable life insurance trust, the proceeds may be estate and income tax free and the proceeds can be used to pay the estate taxes, thus permitting the continued deferral of the retirement benefits and eliminating the need to sell any other assets to pay the taxes.

H. Alimony Trusts. How do you protect a recipient spouse's interest in alimony payments where the assets of the obligor spouse could be jeopardized in the future, or if the alimony recipient is financially unsophisticated? How do you address the situation where the spouses want to cut all ties to each other by payment "up front" of alimony? One way is through the use of a Section 682 Trust (so-called as the treatment of this trust for tax purposes is governed by 26 U.S.C. §682 of the Internal Revenue Code.

The trust is established by the transfer of cash, investment assets or business assets from the obligor spouse to the trustee of the trust. The trust provides that the income from the trust is payable to the obligee spouse in satisfaction of alimony and/or support obligations. Absent Section 682, the obligor spouse would be taxable on all the trust income, rather than the obligee spouse. Section 682, however, is a special fiduciary income tax provision governing the taxation of distributions from such trusts to legally separated and divorced spouses. It provides that the recipient spouse shall include in gross income any income (other than income constituting child support) to which the recipient spouse is entitled and which, but for Section 682, would be includible in the income of the obligor. Section 682 does not shift the income tax burden for income distributed in satisfaction of the obligor's support obligations; the obligor is still required to pay the tax on such income. If the trust income in a particular tax year is insufficient to make required distributions of both spousal and child support, income distributions are deemed to be applied first to child support.

III. It's Over! Issues to Address After a Divorce Judgment is Entered

A. Revise all Beneficiary Designations - As stated above certain assets do not pass pursuant to the terms of a Last Will and Testament (i.e. life insurance, retirement plans, IRAs). Thus, simply changing the will to provide that these benefits go to somebody other than the surviving spouse, without also changing the beneficiary designation will not work. Thus, it is imperative that a newly divorced spouse revises all the beneficiary designation forms to remove the ex-spouse as the beneficiary.

B. What happens if the beneficiary designations are not changed and the owner spouse dies? N.J. Stat. Ann. §3B:3-14 removes the ex-spouse as a beneficiary of a will after divorce but it does not provide the same treatment with respect to other testamentary devices. Thus, it would appear that the failure to revise the beneficiary designations would result in the ex-spouse being entitled to such benefits. This was the case in Vasconi v. Guardian Life Insurance Company.

In Vasconi, a property settlement agreement entered into by the decedent and his former spouse that was subsequently incorporated into a Final Judgment of Divorce, provided for a mutual waiver of alimony and a mutual waiver of all claims or obligations either may have had to the other arising out of the marital relationship. The agreement further provided for a relinquishment of all claims either may have had in the estate of the other party on the latter's death. Approximately 1 ½ years after the judgment of divorce, the husband died without changing the beneficiary designation on his life insurance policy. Since there was no formal written change of beneficiary, the trial court and Appellate Division held that the former wife was entitled to the death benefit. Relying upon the ruling in Carr v. Carr, the Supreme Court reversed the Appellate Division and remanded the matter to the trial court to determine if the decedent intended to keep his former spouse as the beneficiary of the policy.

Notwithstanding the holding in Vasconi, matrimonial attorneys should consider advising their clients after a final judgment is issued, to revise all beneficiary designations and consider consulting with a Trust and Estates Attorney. Additionally, matrimonial attorneys might also be wise to consider adding specific language to property settlement agreements to provide that each party intends to remove the other as beneficiary of all life insurance policies, IRAs, retirement plans, etc.

In Groh v. Groh, the Court refused to extend the holding in Carr v. Carr to ERISA qualified plans, holding that federal law pre-empts state law and, thus, prohibits the Court from requiring the distribution of the death benefits from the plan to anyone other than the surviving spouse.

We hope that this article makes you stop and think about creative approaches to a client's matrimonial situation - and urges you to look beyond the obvious issues during those first meetings with a potential client. And never underestimate the impact, and benefit, of estate planning!

Patricia M. Barbarito is a partner with the Morris County law firm of Einhorn, Barbarito, Frost & Botwinick, PC, where she practices family law in the firms' nine lawyer family law department. Ms. Barbarito is a former Chair of the Family Law Section New Jersey State Bar Association; Certified Matrimonial Attorney; and on the Board of Managers of the American Academy of Matrimonial Attorneys.

Gary R. Botwinick is counsel to the firm. Mr. Botwinick chairs the firms Trusts and Estates/Taxation practice group. He has lectured on various topics regarding estate planning and taxation. He was formerly an attorney with the Manhattan District Counsel Office of the Internal Revenue Service and received his LL.M. in Taxation from New York University. He is a member of the Northern New Jersey Estate Planning Council and the Professional Advisory Committee of the Jewish Community Foundation of Metrowest.

1 N.J. Stat. Ann. §37:2-31 et seq. sets forth the Uniform Premarital Agreement Act. A premarital agreement is defined as "an agreement between prospective spouses made in contemplation of marriage to be effective upon marriage." The Act requires the agreement to be signed by both parties, and have a statement of assets attached. See also DeLorean v. DeLorean, 211 N.J. Super. 432 (Ch. Div.

1986); D'Onofrio v. D'Onofrio, 200 N.J. Super. 361 (App. Div. 1985); Marschall v. Marschall, 195 N.J. Super. 16 (Ch. Div. 1984).

2 See Pacelli v. Pacelli, 319 N.J. Super. 185 (App.Div. 1999) cert. denied 161 N.J. 147 (1999). In this case, the Appellate Division discusses the enforceability of a "mid-marriage" agreement. This is distinguished from a reconciliation agreement, which the courts have held enforceable if fair and equitable. Id. at 191. In either situation, clearly it is anticipated that both parties will participate in negotiations before entering into an agreement that will have a significant impact upon their economic future.

3 See Nicholson v. Nicholson, 199 N.J. Super. 525 (App. Div. 1985) for a discussion of factors to be considered by the Court when evaluating the validity of a reconciliation agreement.

4 See Lepis v. Lepis, 83 N.J. 139 (1980); Petersen v. Petersen, 85 N.J. 638 (1981); Schlemm v. Schlemm, 31 N.J. 557 (1960), addressing the issue of the enforceability of an agreement entered into at the end of a marriage and fixing the respective parties' rights upon entry of a final judgment of divorce.

5 "The first pleading of each party shall have annexed thereto an affidavit listing all known insurance coverage of the parties and their minor children, including but not limited to life, health, automobile, and homeowner's insurance. The affidavit shall specify the name of the insurance company, the policy number, the named insured and, if applicable, other persons covered by the policy; a description of the coverage including the policy term, if applicable; and in the case of life insurance, an identification of the named beneficiaries. The affidavit shall also specify whether any insurance coverage was canceled or modified within the ninety days preceding its date and, if so, a description of the canceled insurance coverage. Insurance coverage identified in the affidavit shall be maintained pending further order of the court." New Jersey Court Rule 5:4-2(f), effective April 5, 1999.

6 In the alternative, if the funds were distributed outright to the minor child, the decedent's ex-spouse might ultimately benefit from these monies in the event that the child dies before reaching the age of majority (See N.J. Stat. Ann. § 3B:3-1, providing that a minor cannot make a will, and N.J. Stat. Ann.

§3B:5-4(b), providing that the intestate estate of a decedent belongs to a surviving parent where there are no surviving spouse or children).

7 See N.J. Stat. Ann. §46:2B-8, et seq.

8 See N.J. Stat. Ann. §§46:2B-13 - 46:2B-14.

9 See 26 U.S.C. §§401(a)(9); 402(c)(9); 408(a)(6).

10 See 26 U.S.C. §401(a)(9)(B).

11 ERISA is the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 839 (1974). It governs the administration of most private pension and benefit plans. REA is the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984). It creates a substantive property right for the spouses (male or female) of all plan participants by adding the concept of an automatic pre-retirement survivor benefit, which the participant's spouse has an absolute right to receive unless waived in writing. REA also prohibits a participant from naming anyone other than his or her spouse as a beneficiary of a qualified retirement plan without written spousal consent.

12 N.J. Stat. Ann. §2A:34-23.

13 212 N.J. Super. 557 (App. Div. 1986).

14 Id. at 568.

15 N.J. Stat. Ann. §2A:34-23.1(i).

16 These gifts may qualify as "annual exclusion gifts" as discussed below.

17 255 N. J. Super. 500 (App. Div. 1992).

18 Id. at 506.

19 Id. at 507.

20 N.J. Stat. Ann. §3B:8-1.

21 See N.J. Stat. Ann. §§3B:8-3; 3B:8-6.

22 N.J. Stat. Ann. §3B:8-5.

23 N.J. Stat. Ann. §3B:8-18. See also Estate of Cole, 200 N.J. Super. 396 (Ch. Div. 1984).

2426 U.S.C. §§2001; 2010; 2012.

25 26 U.S.C. §2513.

26 26 U.S.C. §2503(b).

27 N.J. Stat. Ann. §3B:5-3.

28 120 N.J. 336 (1990).

29 Carr v. Carr, 229 N.J. Super. 370 (App. Div. 1988).

30 Carr v. Carr, 114 N.J. 520 (1989).

31 Carr v Carr , 120 N.J. at 342.

32 Id. at 344.

33 Id. at 346, n.2.

34 Id. at 351.

35 "In case of the death of the parent to whom the care and custody of the minor children shall have been awarded by the Superior Court, or in the case of the death of the parent in whose custody the children actually are, when the parents have been living separate and no award as to the custody of such children has been made, the care and custody of such minor children shall not revert to the surviving parent without an order or judgment of the Superior Court to that effect. The Superior Court shall have the right, in an action brought by a guardian ad litem on behalf of the children, to appoint such friend or other suitable person, guardian of such minor children, and shall have the right to remove such guardian, and to appoint a new guardian or guardians, and to make such judgments and orders, from time to time, as the circumstances of the case and the benefit of the children shall require." N.J. Stat. Ann. §9:2-5.

36 See N.J. Stat. Ann. §3B:8-1, et seq.

37 There is an unlimited marital deduction from the gross estate for federal estate tax purposes which ultimately provides that there will be no estate tax attributable to bequests to a surviving spouse. See 26 U.S.C. §2056.

38 See 26 U.S.C. §2056(b)(7).

39 See 26 U.S.C. §2056(b)(7).

40 See 26 U.S.C. §2056(b)(7)(B)(ii).

41 See N.J. Stat. Ann. §3B:8-17.

42 See Aronson v. Aronson, 245 N.J. Super. 354 (App. Div. 1991); Miller v. Miller, 160 N.J. 408 (1999).

43 See Stiffler v. Stiffler, 304 N.J. Super. 96 (Ch. Div. 1997).

44 See 26 U.S.C. §2001.

45 26 U.S.C. §6075(a).

46 The estate tax is payable by the executor. 26 U.S.C. §2002.

47 See 26 U.S.C. §401(a)(9).

48 See 26 U.S.C. §2057.

49 An Irrevocable Life Insurance Trust is designed to own and hold a life insurance policy until the death of the insured. Since the insured is not the owner of the policy at the time of his or her death, the death benefit will not be includible in his or her taxable estate. Thus, by transferring ownership of the policy to the trust, significant estate benefits may be achieved. See 26 U.S.C. §§2033; 2035; 2041.

50 "There shall be included in the gross income of a wife who is divorced or legally separated under a decree of divorce or of separate maintenance (or who is separated from her husband under a written separation agreement) the amount of the income of any trust which such wife is entitled to receive and which, except for this section, would be includible in the gross income of her husband, and such amount shall not, despite any other provision of this subtitle, be includible in the gross income of such husband. This subsection shall not apply to that part of any such income of the trust which the terms of the decree, written separation agreement, or trust instrument fix, in terms of an amount of money or a portion of such income, as a sum which is payable for the support of minor children of such husband. In case such income is less than the amount specified in the decree, agreement, or instrument, for the purpose of applying the preceding sentence, such income, to the extent of such sum payable for such support, shall be considered a payment for such support." 26 U.S.C. §682.

51 124 N.J. 338 (1991).

52 288 N.J. Super. 321 (Ch. Div. 1995).