August 1, 2025

Southern Arizona Estate Planning Council

Community Foundation for Southern Arizona

AGENDA

'Til Divorce Do Us Part:

Essentials for the Intersection of Estate Planning and Family Law

This seminar explores the critical connections between family law and estate planning, equipping estate planners in all fields with essential knowledge to advise clients effectively. In presentations from a family law practitioner, an estate planner, and a CPA, we will cover key considerations and recent developments that influence comprehensive estate and family law strategies. We'll save time at the end for a panel discussion addressing questions from the audience.

8:00 Introduction

8:15 - 9:00 *Kaytlyn Yrun-Duffy* **Prenuptial and Postnuptial Agreements:** Beyond the Basics: This section will delve into the nuances of prenuptial and postnuptial agreements, including their enforceability and impact on estate plans, with a specific focus on insights from the *Austin* case.

9:00 - 9:45 *Shannon M. Derksen* **Estate Planning in the Shadow of Divorce:** We will examine the unique challenges and opportunities in estate planning for clients who are either contemplating divorce, actively divorcing, or have recently finalized a divorce, including the crucial steps of retitling assets. An examination of ethical considerations when representing both spouses in estate planning will also be included.

Break 9:45-10:00

10:00 - 10:45 *Julia Allen Miessner* **Valuing Retirement Plan Assets in Divorce:** This segment will provide practical guidance on understanding and valuing various retirement plan assets for division in a divorce, and how these valuations can affect a client's overall estate plan.

10:45-11:30 Panel Discussion and Q & A

Presenters: *Kaytlyn Yrun-Duffy, Shannon M. Derksen, Julia Allen Miessner*

'Til Divorce Do Us Part: Essentials for the Intersection of Estate Planning and Family Law

Part II: Estate Planning in the Shadow of Divorce

By Shannon M. Derksen, Esq.

I. Introduction.

As estate planners, many of our clients are married couples, but we also know that many marriages end in divorce. The often-repeated statistic that "50% of marriages end in divorce" may not be entirely accurate, as many people marry later in life or after attaining substantial education and as a result have a lower chance of divorce[i], divorce rates seem to be going down, decreasing in Arizona between 2012 and 2022, but there is still a high chance that any given marriage will end in divorce. Arizona was ranked 25 for marriage rates and 27 for divorce rates in 2022, according to the U.S. Census Bureau.[ii] For first marriages, statistics show current divorce rates are approximately 40%, but in second and later marriages, the divorce rate is even higher, nearing 75% for third marriages.[iii]

Most Arizona practitioners deal with blended families and late-in-life love, but for all clients, even "happy couples", the possibility of divorce should be addressed in counselling clients during their estate planning. Likewise, estate plans which give everything to the surviving spouse without restrictions ("I love you" trusts) are in danger of the surviving spouse finding new love later, so the possibility of later remarriage should also be discussed as practitioners counsel their clients. Arizona's community property regime is unique and beneficial in many aspects, but couples contemplating marriage may wish to opt out of it using a prenuptial agreement; estate planners should be careful to avoid disrupting the protections of the prenup without good cause.

In the event a divorce is initiated, estate plans should be closely reviewed and replaced. Estate planners representing divorcing or divorced clients should review asset titling and beneficiary designations closely as most beneficiary designations will need to be redone. For example, life insurance policies are an often-overlooked area where beneficiary designations are not always replaced, which can result in a costly and time-consuming interpleader action down the line.

Finally, estate planners must be mindful of their ethical duties to clients and former clients. Confidentiality, attorney-client privilege, and conflicts of interest are all minefields which must be carefully navigated when dealing with divorcing couples.

II. Ethical Considerations. Estate Planners and other allied professionals should be aware of ethical considerations when representing spouses, divorcing parties, and parties who have divorced. Some of these considerations include:

A. Conflicts of Interest

Representing "happy spouses" is par for the course for most estate planners, and joint revocable trusts are common in Arizona. In entering into a joint representation, your representation letter should include language to outline your responsibilities to both of your clients and the necessity of withdrawal from representing both upon development of a conflict (i.e. divorce). Many practitioners consider their representation terminated upon the signing of the estate plan, however there are ongoing duties to former clients that must be followed, pursuant to E.R. 1.9.

i. Sample Language - "Happy Spouses" Joint Representation Agreement Language:

DUAL REPRESENTATION GUIDELINES

> State Bar Ethics Rules require that I tell both of you about my obligations with regard to dual representation. If at any point you find yourselves in deep disagreement with each other about the disposition of property or other matters, the potential conflict of interest could prevent me from continuing as the lawyer for both of you in your estate planning. If you become separated or begin the process of divorce, you should also notify me. In my position as lawyer for both of you, I cannot take sides; I must be impartial. Each of you is entitled to my unbiased services and to all knowledge that I have about your total estate plan. In short, I cannot represent one of you to the detriment of the other. Therefore, should differences arise about property disposition or property rights, then I would recommend that you both retain independent attorneys of your own choosing, and I would then withdraw.[iv]

Attorneys must meticulously avoid conflicts of interest, as outlined in Arizona Rules of Professional Conduct 1.7 and 1.9. Representing both spouses, even in an uncontested divorce, is generally impermissible due to inherent conflicts. Similarly, an attorney cannot advise both spouses on their individual estate plans during a divorce. Once you become aware that divorce is on the horizon, the best course of action is to withdraw from representing both. In some situations, a conflict waiver may be possible (i.e. in drafting a 3rd party Supplemental Needs Trust which both ex-spouses' estates will contribute to for their disabled child, discussed below), but for a situation where there is not a common goal such as this, ethics counsel should be consulted before considering such a representation.

B. Competence and Diligence

Attorneys must possess the requisite knowledge and skill in both family law and estate planning to adequately advise clients, as required by Arizona Rule of Professional Conduct 1.1. They must diligently inform clients about the need to update estate plans during divorce and the potential consequences of failing to do so. Referrals to separate counsel should be provided in the event an attorney is not competent to advise on a specific matter.

C. Confidentiality

Maintaining client confidentiality is paramount, as per Arizona Rule of Professional Conduct 1.6. Information shared by one spouse, even if related to shared assets, cannot be disclosed to the other without explicit consent or legal compulsion. The representation agreement in a joint representation should include language as to what will be shared. See above for sample language.

D. Communication and Informed Consent

Attorneys must clearly communicate the implications of divorce on existing estate plans and the necessity of creating new ones, in accordance with Arizona Rules of Professional Conduct 1.4 and 1.2. Clients must provide informed consent regarding the scope of representation and the decisions made concerning their estate.

E. Avoiding Undue Influence

Attorneys should be vigilant in ensuring that decisions regarding estate planning are made freely and voluntarily by the client, without undue influence from the estranged spouse or other parties, adhering to Arizona Rules of Professional Conduct 1.7 and 2.1.

III. Divorce To-Do List: Replacing the Estate Plan.

Upon initiating divorce proceedings, one immediate priority should be to review and, if necessary, revoke or amend existing estate planning documents. This preventative measure is crucial to prevent unintended outcomes. However, parties should be aware of limitations placed upon them by preliminary injunction at the outset of the divorce proceeding.[v] Concealing, encumbering, or disposing of assets is not permissible, however the divorcing spouses should ensure that their estate plans are separately updated to name new fiduciaries and beneficiaries in the event a death occurs during the divorce process. A later post-divorce update to establish a new separate property trust or make other updates as needed is also a good idea, depending on the financial situation and assets.

A. Wills and Trusts

In Arizona, A.R.S. § 14-2804 generally states that a divorce revokes any disposition or appointment of property made by a divorced individual to their former spouse in a will or trust. [vi] However, it is imperative to update or create a new will and review trusts to avoid ambiguity and ensure desired beneficiaries and fiduciaries are clearly designated. This proactive step prevents potential litigation and ensures the client's current intentions are honored. In addition, if a death occurs during the process of divorce and a final decree has not been entered, 14-2804 may not be applicable and the soon-to-be-ex-spouse may be an unexpected beneficiary and fiduciary, if substitute documents were not completed. Again, divorcing spouses and their advisors must be cognizant of any restrictions regarding the disposition of assets including by preliminary injunction. If the parties do not wish to wait until the court enters an order relating to the division of the marital estate, it is possible to enter into a contract to do so, pursuant to A.R.S. 14-2804 which revokes upon "a court order or a contract relating to the division of the marital estate".

In addition, advisors should be aware that the nomination of the ex-spouse to the role of Personal Representative or Trustee is also "knocked out" by the entry of the divorce decree - the estate plan should be redone to ensure that an appropriate PR and Trustee are named. In the event the ex-spouse or soon-to-be ex-spouse is still the appropriate party to serve (i.e. as Trustee for an ongoing trust for a minor or disabled child of the marriage), the estate planning documents should be revised to explicitly state that the anticipated change in marital status shall not result in removing the ex from those fiduciary roles.

B. Beneficiary Designations and Asset Titling

Beneficiary designations on assets such as life insurance policies, retirement accounts (401(k)s, IRAs), and annuities typically supersede provisions in a will. Arizona law (A.R.S. § 14-2804) also addresses beneficiary designations on non-probate transfers, generally revoking the designation of a former spouse upon divorce. However, it is critical to actively review and change these designations to align with the client's current wishes, as interpretations can vary and exceptions may exist. Some states have different laws regarding beneficiary designations and thus these should not be overlooked. Likewise, some contract-based assets may provide different, unexpected outcomes - to avoid ending up in an interpleader action after the ex-spouse's death, ensure that beneficiary designations are updated.

Likewise, all asset titling should be closely reviewed, any jointly-held, CPWROS, JTWROS, etc. in favor of the now ex-spouse should be re-titled. Beneficiary deeds should be revoked by recording a revocation. Estate planners who are working with divorced individuals should ensure that their intake forms are detailed and that they review asset titling as part of the process to ensure no assets are overlooked.

C. Powers of Attorney

General Durable Powers of Attorney and Healthcare Powers of Attorney grant the named agent significant authority over financial and medical decisions. If the estranged spouse is designated as an agent, these documents should be explicitly revoked and new ones executed naming a trusted alternative. If Powers of Attorney were recorded, consider recording a revocation (or the new Powers of Attorney, which includes revocation language, if your client prefers). New Healthcare Powers of Attorney should include language revoking prior HCPOAs, and should be provided to the same health professionals as former ones were, and put into the HCPOA registry if previously used.

IV. Considerations for Divorcing Couples with Children with Special Needs.

Clients who are parents, or guardians or conservators, of a person with special needs should also include a provision in their Wills to name a successor guardian and conservator, similar to the provision that you would include for a parent of a minor child to name a guardian and/or conservator of the minor child. When estate planning in the shadow of divorce, estate planning discussions should cover these scenarios to determine if the co-parents can come to an agreement on who should serve. In addition, the co-parents should discuss special needs planning and attempt to coordinate their plans when possible for efficiency of administration.

Divorcing couples who share a disabled child should coordinate their new separate estate plans to, for example, allow SNTs created by each former spouse's estate plan to potentially be combined for ease of administration, and to, if possible and they can agree, coordinate on the naming of a successor guardian and conservator for a disabled adult in their new Wills, so that the matter does not need to be litigated later on.

Determining whether a prenuptial or postnuptial agreement is in place is also important when representing a spouse in the process of divorce for their new estate plan. The parties may have agreed to certain support obligations that may need to be included in the new estate plan. If the disabled child existed at the time of marriage or a post-nup addresses it, these provisions may specify that a SNT is needed to support the disabled child after divorce, and to avoid the inefficient two-SNT problem discussed in the preceding paragraph. Practitioners who write pre - and post - nups should consider whether to include additional provisions about support of and living situations for a disabled child for the reasons outlined above. However, these agreements cannot violate A.R.S. § 25-203 A by going against public policy, or B by adversely affecting the right of a child to support.

ii. ***Sample Language: Wills:*** ***<u>Guardian and Conservator:</u>*** If it is necessary to appoint a guardian or conservator for any minor and/or disabled child or children of mine, and the child's other parent [my ex-spouse _____] is unable to serve, I nominate _____, to serve as Guardian of the person and Conservator of the property of such child(ren). If _____ is unable or unwilling to serve, I nominate _____ to serve as Guardian of the person and Conservator of the property of such child(ren). I direct that no person nominated in this Will be required to furnish any bond as guardian or conservator. If a bond is required by law, no surety on any bond shall be required.

V. Special Considerations for Clients with Diminishing Capacity.

Clients with changing cognitive baselines may become paranoid or suspicious of their spouses, leading to the desire to divorce. The overlap of family law and elder law is another area where divorce can create a shadow over how practitioners represent their clients. For example, if an individual is the subject person in a guardianship and conservatorship action, the guardian would need to participate in the divorce proceeding - however if the guardian is the spouse, or during the pendency of a GC action, a guardian ad litem may be needed to represent the best interests of the incapacitated person. Practitioners should be especially aware of their duties with regards to ER 1.14 in these situations.

Best practices under ER 1.14 per Arizona State Bar[vii]:

> When a client's capacity to make adequately considered decisions related to the representation is diminished, the lawyer shall, as reasonably possible, maintain a normal client-lawyer relationship with the client. The lawyer must treat the client with attention and respect and, as far as possible, maintain communication with the client, even if the client has a legal representative or other involved third parties. The lawyer may take reasonably necessary protective action only when the lawyer reasonably believes a client with diminished capacity is at risk of substantial harm <u>and</u> cannot adequately self-protect.
>
> When taking protective action, a lawyer may sometimes be impliedly authorized to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

VI. Conclusion.

Divorce, like marriage, birth, and death, is a time when estate plans, beneficiary designations, and asset titling should be closely reviewed and revisited. Advisors on the front lines can help their clients navigate these difficult life transitions to ensure that unintended outcomes do not occur. Taking proactive ethical steps such as those outlined above will help you and your clients avoid situations where assets pass into the wrong hands, and result in a better outcome for all involved.

REFERENCES

[i] Alison Aughinbaugh, and Donna S. Rothstein, "Patterns of marriage and divorce from ages 15 to 55: Evidence from the NLSY79," *Monthly Labor Review,* U.S. Bureau of Labor Statistics, September 2024, https://doi.org/10.21916/mlr.2024.15

[ii] U.S. Census Bureau, U.S. Marriage and Divorce Rates by State: 2012 & 2022, August 29, 2024, https://www.census.gov/library/visualizations/interactive/marriage-divorce-rates-by-state-2012-2022.html

[iii] https://www.usatoday.com/story/life/health-wellness/2024/09/05/marriage-divorce-rate/74899214007/

[iv] *See also, Practice 2.0 from State Bar of Arizona for sample fee agreement provisions https://www.azbar.org/for-legal-professionals/practice-tools-management/practice-2-0/start-your-practice/sample-fee-agreements-letters-and-forms/ , for example:*

> Joint Representation (two or more clients)
>
> We are representing both you and _____ in the same or a related matter. At this time, such representation is permitted because there does not appear to be a conflict of interest between the parties. This may change and a conflict may arise at some later point in the representation. We will continue to evaluate the case and the existence of any possible conflicts of interest. Should a conflict arise, we will advise all affected clients and comply with the requirements of Ethical Rule 1.7, which may include withdrawal. In addition, all parties agree and provide their consent that we may discuss the case with one or all of you, together or apart, and that we will not keep information confidential between the parties while jointly representing you. [NOTE TO LEGAL PROFESSIONAL: If you intend to represent two or more clients jointly, seek each client's informed consent confirmed in writing. See Ariz. EO 07-04 for details regarding what to include in a waiver, including issues arising out of conflicting testimony, conflicting settlement positions and the impact of the joint representation on the attorney-client privilege. You must also discuss with your clients and should clearly articulate prior to or within a reasonable time after beginning your joint representation which client will get the original file and which will be given a copy of the original file at the conclusion of the representation. See ER 1.16(d), comment 9.]

[v] *See* A.R.S. § 25-315 (https://www.azleg.gov/ars/25/00315.htm)

[vi] https://www.azleg.gov/ars/14/02804.htm

[vii] https://www.azbar.org/for-legal-professionals/ethics/best-practices/er-1-14-client-with-diminished-capacity/