

EFFECT OF DISSOLUTION OF MARRIAGE

A. 755 ILCS 5/4-7(b) provides that upon dissolution of marriage or declaration of invalidity of marriage the testator revokes every legacy or interest or power of appointment given to or nomination to fiduciary office of the testator's former spouse in a will executed before the entry of the judgment of dissolution of marriage or declaration of invalidity of marriage and the will takes effect in the same manner as if the former spouse had died before the testator.

B. 760 ILCS 35/1 provides that judicial termination of the marriage of the settlor of a trust revokes every provision which is *revocable* by the settlor pertaining to the settlor's former spouse in a trust instrument or amendment thereto executed by the settlor before the entry of the judgment of judicial termination of the settlor's marriage, and any such trust shall be administered and construed as if the settlor's former spouse had died upon entry of the judgment of judicial termination of the settlor's marriage unless the judgment of judicial termination of marriage expressly provides otherwise. Under the Illinois Trust and Dissolutions of Marriage Act, 760 ILCS 35/1, upon a judicial termination of marriage of the settlor of a trust, every provision which is revocable by the settlor pertaining to the settlor's former spouse in a trust instrument or amendment which has been executed by the settlor before the entry of the judgment of judicial termination is revoked and the trust is to be administered and construed as if the settlor's former spouse had died upon entry of the judgment of judicial termination of the settlor's marriage. Under this statute a provision is considered "revocable by the settlor" if the settlor has the power at the time of entry of the judgment of judicial termination of marriage to "revoke, modify or amend said provision, either alone or in conjunction with any other person or person". Note that under this definition, if the settlor has reserved no such powers to revoke or amend the trust, i.e. under the terms of an irrevocable life insurance trust or gift trust, the dissolution of marriage would not affect the spouse's right to serve as trustee. The terms of settlement between the parties might include a specific provision whereby the spouse would resign as trustee and/or renounce all rights under the trust, and the order of dissolution might so reflect this agreement.

Specifically, a special needs trust is irrevocable and the above statute does NOT apply to special needs trusts!

C. Operation of law terminated the former spouse's status as beneficiary of the other spouse's IRA. *In re Estate of Davis*, 225 Ill.App.3d 998, 589 N.E.2d 154 (2nd Dist. 1992).

D. The Seventh Circuit in *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown*, 897 F.2d 275 (7th Cir. 1990) held that because the parties signed a voluntary property settlement agreement that included an explicit mutual waiver of rights each had in other's pension plan, the Wife was not entitled to be a beneficiary of the interest the husband had in his qualified pension plan.

E. A waiver by the wife in a property settlement agreement of any interest in the husband's life insurance policy barred the ex-wife from collecting as a beneficiary. *Mutual Life Insurance Co. v. Juntanen*, 189 Ill.App.3d 224, 545 N.E.2d 224 (1st Dist. 1989).

F. Under the Illinois Trust and Dissolutions of Marriage Act, 760 ILCS 35/1, upon a judicial termination of marriage of the settlor of a trust, every provision which is revocable by the settlor pertaining to the settlor's former spouse in a trust instrument or amendment which has been executed by the settlor before the entry of the judgment of judicial termination is revoked and the trust is to be administered and construed as if the settlor's former spouse had died upon entry of the judgment of judicial termination of the settlor's marriage. Under this statute a provision is considered "revocable by the settlor" if the settlor has the power at the time of entry of the judgment of judicial termination of marriage to "revoke, modify or amend said provision, either alone or in conjunction with any other person or person". Note that under this definition, if the settlor has reserved no such powers to revoke or amend the trust, i.e. under the terms of an irrevocable life insurance trust or gift trust, the dissolution of marriage would not affect the spouse's right to serve as trustee. The terms of settlement between the parties might include a specific provision whereby the spouse would resign as trustee and/or renounce all rights under the trust, and the order of dissolution might so reflect this agreement.

G. A revocable, non-amendable trust instrument may include a provision indicating that upon the termination of marriage all rights of the spouse designated therein, including the right to serve as trustee and as a beneficiary, would terminate.

H. There is no corresponding provision for termination of a former spouse's rights under a life insurance policy absent a specific change in the beneficiary designation or a specific termination of the former spouse's rights under the order of dissolution.

I. The United States Supreme Court and *Egelhoff ex-rel. Breiner*, 121 S.Ct. 1322 (S.Ct. 2001) held that ERISA overrode state statutes which provided for "revocation-on-divorce" of beneficiary designations under employer-provided life insurance and pension plans. Consequently, any change in beneficiary designation must be reflected in the order and implemented under ERISA standards.

PRE-DIVORCE PLANNING: While the statutory provisions noted above or the terms of an order of dissolution may cure or address beneficiary or fiduciary designations of a former spouse, these provisions only become effective upon the dissolution of marriage. During a period of separation or pending divorce, these designations are unaffected. Consequently, clients in such situations should carefully consider the terms of their wills or living trusts as well as other assets passing through titling, such as joint tenancy property, life insurance beneficiary designations, retirement plan beneficiary designations, annuity contracts and payable on death accounts.

Beneficiary designations on IRAs may be changed without spousal consent. However, ERISA qualified plans require spousal consent for beneficiary changes. A client may consider withdrawing from a qualified plan and transferring plan assets to an IRA if this option is available.

Irrevocable designations, such as under an irrevocable life insurance trust, may be reviewed to determine if a trustee or a designated third party has the ability to amend or modify the terms of the trust.

Joint tenancy accounts may be closed or joint tenancy assets severed.