



THE ENFORCER

BY DAVID FINDLING

THE FINDLING LAW FIRM

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GIVE ME LIBERTY AND DROP DEAD DEATH AND DIVORCE

The two largest assets in a divorce are typically the marital home and the parties' retirement savings. For more than 84 million Americans, retirement and security for their families means participation in a qualified employee benefit plan.¹ After a divorce, they expect that their share of the retirement will pass on to their new spouse and children. They believe that the retirement plan balance would not go to their former spouse. However, this is incorrect. Due to federal pre-emption, State law provisions for termination of beneficiary designation may be ineffective. In the event of divorce, the ex-spouse, who was previously designated as a beneficiary, could still collect.

Article Limitations

This article's scope will be limited to the provisions of State law effecting beneficiary designations under a non-ERISA (Federal Employee Retirement Income Security Act of 1974) plan. Basically, a benefit conferred by an employer (such as health or life insurance or a retirement benefit) is governed by ERISA. A self purchased benefit, outside the scope of employment, would not likely fall within ERISA's orbit. A future article will address ERISA's effect on beneficiary designations.

Termination of the Governing Interest

Many states, including Michigan, have enacted legislation aimed at thwarting the efforts of ex-spouses to collect the proceeds of wills and benefit plans by enacting so called revocation upon divorce statutes. Michigan's revocation upon divorce statute, MCL 700.2807, treats the spouse of the first marriage as having predeceased the decedent, in accordance with MCL 700.2807(1)(a) and (3) making the ex-spouse unable to collect.² MCL 700.2807 revokes a will or an ex-spouse's interest in a will substitute automatically, unless the will says otherwise or unless your decree of divorce says otherwise.

The revocation upon divorce statute essentially applies to any disposition of property, probate or non-probate

assets or named personal representative, with the potential exception of ERISA benefits. Other provisions, including MCL 700.2807(3), may also be applicable, as it provides that upon divorce, each provision of a governing instrument is given effect as if the former spouse and relatives of the former spouse disclaimed all provisions revoked by that section. The reference to "relatives" in MCL 700.2807(3) refers only to relatives of the former spouse, who are not also relatives of the decedent. Therefore, if you wish to devise property or money to step-children or relatives of your ex-spouse, you must redraft this provision making clear that in spite of the divorce this is still your intention.

In the event of a remarriage to a former spouse, MCL 700.2807 operates to revive automatically the designation of probate and non-probate assets to the spouse.³

Conclusion

Revocation upon divorce statutes like Michigan's MCL 700.2807 are still applicable to wills and will substitutes so long as the will substitute does not also fall under the governing provisions of ERISA. However, as employee benefit plans are increasingly used as will substitutes, conflicts will continue to arise between ERISA provisions and Michigan's Estates and Protected Individuals Code (EPIC).

So what should you advise your clients? Tell them that in addition to the revocation provisions of their Judgment of Divorce and State law, they need to execute a change of beneficiary form. This applies to life insurance, retirement plan or any other benefit. This all encompassing procedure will avoid your having to determine whether the benefit is governed by ERISA. It will also help avoid your client's estate (and you) being embroiled in a fight over who gets the benefit.

ENDNOTES

1. U.S. DEPT OF LABOR.
2. MCL 700.2807
3. MCL 700.2807(4)

