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Dying Intestate After Divorce

How Your Deceased Client's Ex-Husband Got into Her Shoe Closet

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I have been practicing law for over 25 years, but I am still shocked when I hear that a person who spent so much time, effort, and money in a divorce proceeding has not taken the time to confer with an attorney and sign a will. (For purposes of this article the client will be a deceased female with an ex-spouse who is a male.)

Divorced parents with minor children need wills. One of the horrifying outcomes of not having a will in New York State is that your client, a single mother, may be empowering her ex-spouse to act as administrator of her estate. Unless your divorced client with minor children wants her ex-husband rifling through her intimate apparel and very personal papers after her death, she needs to run, not walk, to her attorney's office and sign a will.

New York Law

More often than not, single parents want their children to inherit their wealth, but may not feel compelled to prepare and sign a will, since the law provides for distribution to the children anyway.

Under New York law, when a person dies without a will, the disposition of property held in her name is governed by New York's Estates, Powers, and Trusts Law (EPTL) § 4-1.1, the section that defines those who can inherit from a decedent that has died intestate. For example, if the decedent is survived by issue (for example, two children, one 11 years old and one 14 years old), the property will pass to the issue by representation — that is, half to each child.

However, before that property can be collected and distributed, a personal representative must be appointed. If a person has a will, that representative is the executor named in the will. If a person dies intestate, an administrator must be appointed. Under New York's Surrogate's Court Procedure Act (SCPA) § 1001, the persons who can be the administrator are, in the order named: the spouse (but if the divorced spouse remains unmarried she won't have a spouse); children (there are two in the example above); grandchildren (there are none in our scenario); the father or mother of the decedent; and then the brothers and sisters of the decedent.

The Consequences of Lacking a Will

In our example, there are two children, both minors. SCPA § 707 states that an "infant" (defined in SCPA § 703(27) as a person under age of 18) is ineligible for such an appointment. Since the children are ineligible for appointment, who would serve as administrator? Would it be the mother and father of the deceased? It would seem that a parent would be the natural selection of the deceased client.

Unfortunately, that is not the case. The person who would be entitled to letters of administration is the guardian of the property of the minor. SCPA § 1001 reads, "[i]f the sole distributee … is an infant, … his fiduciary, committee or conservator, if he is eligible and qualifies shall be granted letters of administration."

Who is eligible to become the guardian (fiduciary) of the property of the minor child of your former client (the deceased recently divorced mother)? The ex-spouse! As long as there is a parent who has not given up parental rights, or is not otherwise disqualified to serve as a guardian, that parent would be the person first entitled to be named guardian of the property. In that capacity, he would be able to petition the court for letters of administration for the estate of his ex-wife. Once appointed, the administrator can then go through all the personal effects and papers of the deceased. In fact, that is part of the duties of an administrator.

Remember that acrimonious divorce and the fight over property? What would your client have said if you informed her that her ex-spouse would be able to act as the administrator of her estate?

New Jersey, Compared

New Jersey may be more sensitive than New York when appointing administrators. In that state, courts can use discretion.

In *Matter of Marles*, the court looked at New Jersey Statutes Annotated (N.J.S.A.) § 3B:10-11 and stated, "[t]here is nothing in the statute that requires the surrogate or the court to appoint the former spouse of the intestate decedent as administratrix ad prosequendum where … the former spouse is the mother and guardian of the decedent's two minor children." *In re Estate of Marles*, 2011 WL 5026028 (N.J. Super. Ct. App. Div. 2011).

However, there is an older case where an ex-spouse was appointed as administrator in a challenge by the parent of the decedent. In *In re Stewart's Estate*, 117 N.J. Eq. 256 (Prerog.Ct.1934), the decedent's only heir was a six-year-old child who was in the custody of his mother, the decedent's former wife. A dispute arose between the ex-wife and the decedent's father as to who should serve as administrator of the estate. The court stated that the "right of administration grows out of the right to distribution" and, therefore, those who are entitled to distribution of a decedent who dies intestate "have an exclusive primary right to administration." The court held that the decedent's former wife should serve as administratrix of the estate because she had custody of the decedent's sole heir and the decedent's father had no interest in the estate.

A 'Fix' That Doesn't Stick

Some practitioners may be saying, "But my client signed a separation agreement, later incorporated into a divorce decree, under which both spouses waived their right to serve as administrator of the estate of the other." However, a New York court has held that such a provision does not extend to cover a situation where the spouse is entitled to serve as administrator in his/her capacity as guardian of the property of his/her minor children. *See Estate of*

Porrata, 392 N.Y.S.2d 221 (Sur.Ct.1977). If the spouses were to explicitly waive any rights to act as administrator in his or her capacity as guardians of minor children, such a provision may protect the parties from the *Porrata* ruling. However, the safer and more practical solution is to make sure the divorced client signs a new will.

A Real Solution

If an ex-spouse is appointed as administrator and guardian, he not only gains control of the estate administration, but also of the property that the minor children are inheriting from their mother.

Without doubt, parties who have been through bitter divorces will not want their ex-spouses to have legal title to their assets during the children's minority. To avoid this, divorcing clients should be guided to prepare a will in which: 1) an executor is named; 2) a trust is created for each child for his or her lifetime or for a period that will terminate when the child reaches an appropriate age; and 3) a trustee is named for such trusts.

If a divorcing client has a will that was executed during the marriage, it is important that, as soon as the parties separate, the client revokes her existing will and signs a new one. Otherwise, if the will created during marriage leaves her entire estate to her husband, and she dies before the divorce is final, the client's Last Will and Testament will dictate the disposition of her property.

Conclusion

Both New York and New Jersey law will "write" the ex-husband or -wife out of the will if there is a divorce decree (*see* NJSA 3B-3:14 and EPTL § 5-1.4). But before that decree, the only person who can stop your client's soon-to-be ex from inheriting his or her assets is your client. Without a new will, the soon-to-be ex-spouse that your client is spending thousands of dollars deposing and investigating for hidden assets may be the beneficiary of your client's estate.

Yes, even with a new will eliminating the spouse, the spouse may be entitled to a right of election to take a portion of your client's property pre-divorce. However, a new will during the proceedings can eliminate the spouse as executor and as 100% beneficiary under the will.

Remind your clients to change their IRA and life insurance beneficiary designations upon separation as well. Although federal ERISA law will dictate that the spouse must remain the beneficiary of certain qualified plans, such laws do not apply to IRAs and life insurance policies. For IRAs and life insurance, the client is free to name the children's trusts as the beneficiaries (subject to agreements to the contrary and, in certain instances, to a right of election claim). Again, the law (other than ERISA) will disregard a former spouse's name on a beneficiary designation once the divorce is final; before that, the spouse's name sticks. Intestate

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