Wills, Divorce and Life Insurance

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Have you ever wondered what happens to the outcome of a person's Last Will and Testament following the divorce of a married couple? Even more interesting is what happens to a named spouse as a beneficiary of a life insurance policy when a couple divorces.

The answer is fairly simple. Florida law treats the divorcing couples as if they predeceased one another. In other jurisdictions, the laws may be different causing some unusual outcomes. In most cases, the married couple will immediately rewrite their Wills following the judgement of dissolution of marriage. But sometimes the immediate need to change named beneficiaries is forgotten and years later when one of the divorcing couples re-marries and then dies, a problem may develop.

When this occurs, any language that passes property to the former spouse is reviewed to see what happens if he or she predeceased. Suppose the language of the Will states that the deceased person's property were to pass to the step-children (former spouse's children) upon the death of the Testator. Once again, Florida law would prevent that property from passing to the deceased person's step-children.

In the case of the scenarios mentioned above the outcome would depend on whether the deceased person's Will was written and executed prior to the divorce. Had it been written following the divorce, then in that event, the deceased person's property would pass to the former spouse or step children.

Does the same situation occur when dealing with life insurance and retirement benefits? The answer is it depends on the State where the deceased person passes. In Florida, a recent change in the law would once again treat the divorced spouse who would benefit from the life policy as pre-deceased. However, there have been recent constitutional questions whether that is allowed.

You have to remember that life insurance is a contract as opposed to a gift like that of a Will. The constitution protections regarding the freedom to contract are such that they cannot be altered by the government. When the government starts to re-write a contract (such as the changing of a beneficiary of a life policy) that action becomes unconstitutional depending on when the life policy was signed versus the date of the statute.

The State of Florida and other States have argued that it is not unconstitutional because a contract calls for two parties to agree on an outcome. In this case, the recipient of the life policy is not a contracting party, but merely the benefactor of an expectancy to a life policy. The agreement is between the insured and the insurance company. But this raises additional questions such as the government (via statutes) altering the terms and conditions of the life policy between the insured and insurance company.

Once again the State's argument is that the contract is for the payment of insurance upon the death of the insured and not the selection of the party to whom it is go too. Therefore, the government is not changing the terms and conditions of a policy only the third party benefactor. The States claim that they are simply protecting the insured from passing funds from his or her policy to someone who they likely did not want to provide for after the dissolution of marriage.

In essence, beneficiaries to a life insurance policy have no vested rights, they only have an expectancy interest. Furthermore, the beneficiaries are not parties to the life insurance policy and have no standing to bring an action raising a claim of unconstitutionality and lastly; the statutes affecting the life policy only affect the donative intent of the insured and not the agreement's terms to pay upon death.

Remember that a life insurance policy is a third party beneficiary contract making it a combination contract and donative transfer to the third party. Is this also true for an annuity? The general answer is yes because at the death of the annuitant, the remaining funds are donated to a beneficiary. Think of it as a life insurance policy.

The constitutionality of a States statute removing a beneficiary from a contract policy or a Will have been challenged multiple times. The majority of those cases where the dissolution of a beneficiary's interest in a life insurance policy were overturned occurred when the statute was enacted retroactively. Most statutes when enacted are pro-active – meaning the statute becomes operable beginning at a certain date in the future.

The reason for this is that the government can't go backwards and change contract terms due to the constitutional rights of freedom to contract. However, the government can put in place a law that affects future events prior to signing a contract. For that reason, Florida's law concerning divorces and beneficiary designations is pro-active and not retroactive.

If you have experienced a divorce and wonder if your life policy or Last Will and Testament beneficiary designations will be affected, I strongly recommend you seek the attorney of your choice and have that discussion. Failure to do so my affect your immediate family for years to come.