

Inheritance and Divorce

by Naomi Cahn and Amy Zeittlow | September 6, 2016 8:30 am

Thank goodness for September: August is one of the two months of the year^[1] in which couples are most likely to get divorced. Indeed, we hear much about divorce rates and high-profile divorce battles over money, but much less about other financial aspects of divorce, such as the impact on inheritance. But that impact could be significant. Baby Boomers anticipate inheriting \$6 trillion^[2], and they may be passing on as much as \$30 trillion^[3] to their children. And, the divorce rates continue to be high, perhaps as high as 50 percent^[4], so parents need to consider what happens to their money when their children get divorced.

A recent court case caught our attention, and we'll provide a slightly modified version of the case here (*the names have been changed for privacy*). Soon after "Charles" and "Dena" married, Charles' father, "Frank" set up a trust to benefit his "issue," that is, his "lawful blood descendants." The purpose of the trust was the "comfortable support, health, maintenance, welfare and education" of the recipients. During a little more than two years of their more than 10-year marriage, Charles received \$800,000 from the trust, money that "augmented" his family's "upper middle-class lifestyle." Once Charles filed for divorce, he received no more money from the trust because "the trustees deemed it too risky to distribute funds to [Charles] at a time when he might be required to share the funds with [Dena], a nonbeneficiary." As part of the divorce, the courts had to decide whether Dena had any legal rights to Charles' interest in the trust. The trial court judge valued Charles' interest in the trust at more than \$2 million, included it as part of the marital property to be divided, and awarded Dena with 60 percent of that amount. After several appeals, the Massachusetts Supreme Court determined^[5] that Charles' interest in the trust was not "sufficiently certain" to be treated as marital property.

As we discussed this case, we kept wondering, "Was it Frank's intent to exclude his daughter-in-law?" Given the way the trust is set up, and in light of how the trustees acted after Charles filed for divorce, we suspect it may have been. However, the initial trial court judge interpreted the details of the trust in favor of the ex-daughter-in-law. Ultimately, elements of the case highlight key lessons for modern families as they broach the wealth transfer and estate planning process, especially when a descendent divorces.

Understand the Underlying Principles of Inheritance Laws

Formal estate planning can include drafting a will, creating a trust, and/or drafting various types of powers of attorney for health care or financial decision-making. Depending on state law, a will may need to be witnessed or notarized in order to be legally binding. And, laypeople may not fully understand how a trust works. For example, once someone has set up a trust, it is the terms of the trust that control. So, using our above example, even though he set up the trust, Frank was not necessarily a trustee. To modify the trust, he would have to comply with state law concerning changing the terms of the trust, and that might involve going to court. So, even if Frank intended that his former daughter-in-law would benefit in some way from the trust, the terms of the trust take precedence.

In the absence of planning, default inheritance laws generally follow bloodlines. A core assumption is that individuals want "flesh and blood" (now including adoption) to inherit, so spouses and stepchildren are out, but biological or adopted children and descendants are in. So, inheritance descends down the line (in the absence of a will) and across, to the decedent's spouse—but not to an ex-spouse nor to the descendants'

spouses. According to current default rules, excluding Dena, an ex-spouse of a descendant, follows logically. However, these default inheritance laws may not reflect the values or needs of modern families[6].

Modern Views of the Family Challenge Those Underlying Principles

In their work[7] surveying society's perceptions regarding inheritance and obligation to family members after a divorce or remarriage, sociologists Lawrence Ganong and Marilyn Coleman observed that some social scientists believe that "intimacy and sentimentality are the major cohesive factors" in families today. Thus, for many families, divorce might not necessarily dissolve kin ties if relationships are emotionally or interpersonally satisfying to the participants. Even after a divorce, ex-family members might still feel ongoing obligations of inheritance or care. Indeed, when Ganong and Coleman asked whether a former daughter-in-law should be included in a will after a divorce, they found that one-quarter believed the former daughter-in-law should be included, especially if she remained in contact with her former father-in-law, while his son did not. They believed that "emotional closeness," regardless of genetic ties, meant she was still a family member." The vast majority of respondents (75 percent) believed that the son should inherit, although they were even more likely to include him when he remained close to his father. Bloodlines trump quality of relationship for biological kin. However, for family members added by marriage, even if divorced, the determining factor rested on the quality of relationship to the elder.

We don't know about the quality of the relationship between Frank and his daughter-in-law. When Frank set up the trust, it would have been easy to include Dena. Like many parents and grandparents, however, he may well have set up the trust to exclude her because he wanted to benefit his descendants—but then again, he may not have anticipated a divorce.

Communicating Intentions to Include OR Exclude

A trust or will provides a relatively straightforward way to transfer wealth to the people we wish. An individual can plan to exclude or to include in-laws or step-relatives or ex-step-relatives when developing an estate plan. At that initial point, it is important to consider carefully what choices to make; and, if someone in the family gets divorced, for example, then it is worth revisiting any planning documents.

In today's modern families, affective ties may be stronger than blood. The underlying rules of inheritance law may not follow the intent of the testator's heart. One cannot presume the spouse of a child will benefit from the estate. Divorce reinforces that the spouse is not blood kin. If a parent values an in-law (or ex-in-law), monetizing that honor must be intentionally planned. As more and more people divorce, the affective connections between grown children and their in-laws may be strong, and even include a caregiving situation. We should be mindful of protecting the financial interests of all those we consider family, with or without divorce.*

***Disclaimer:** This post is for general informational purposes only and not for the purpose of providing legal advice. You should contact an attorney for advice on preparing or updating a will, or for any other legal issue.

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Endnotes:

1. two months of the year: <http://www.businessinsider.com/divorce-most-common-march-august-2016-8>
2. inheriting \$6 trillion: <https://www.metlife.com/assets/cao/mmi/publications/studies/2010/mmi-inheritance-wealth-transfer-baby-boomers.pdf>
3. as \$30 trillion: <http://www.cnbc.com/2014/07/22/great-wealth-transfer-will-be-30-trillionyes-thats-trillion-with-a-t.html>
4. 50 percent: <http://www.cdc.gov/nchs/nvss/marriage-divorce.htm>
5. the Massachusetts Supreme Court determined: https://scholar.google.com/scholar_case?case=17329238002193220284&hl=en&as_sdt=6&as_vis=1&oi=scholar
6. inheritance laws may not reflect the values or needs of modern families: <http://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=3967&context=nclr>
7. their work: <https://www.amazon.com/Changing-Families-Responsibilities-Obligations-Remarriage/dp/0805826912>

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