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Nonprobate Assets

1. Introduction

Lawyers practicing family law primarily focus on the division of assets between the parties while they are still alive. However, family lawyers also need to focus on what will happen to these assets upon the parties' deaths either during the pendency of the divorce or after. Although this is true for clients of all ages, the likelihood of problems associated with the distribution of nonprobate assets upon death in the midst of divorces is substantially increased for clients who are approaching their golden years or who are already in this phase of their lives. *See Introduction for a discussion of death rates in the United States.*

Upon death, a decedent's estate includes both probate and nonprobate assets. Probate assets are those that pass to persons identified in a will (*see Chapter 3 for a discussion of wills*), whereas nonprobate assets pass outside an estate's administration. Examples of traditional nonprobate assets include qualified and nonqualified retirement plans, individual retirement accounts, and life insurance policies. However, nonprobate assets can also include certain checking and savings accounts, certificates of deposit, investments, and even real property, but only if a beneficiary is

designated and state law allows for such an asset to pass outside of an estate's administration. Nonprobate assets are frequently referred to as "will substitutes." *See Appendix F for a checklist of nonprobate assets in divorce.*

During the divorce process, lawyers identify nonprobate assets that will be divided either by equitable distribution or community property law. If nonprobate assets are sufficiently addressed in property settlement agreements or decrees, lawyers can rest assured that no problems will arise after death either before or after divorce. However, if nonprobate assets are not sufficiently addressed during the divorce process, the results can be disastrous. Statutes, as well as a body of case law, control the distribution of nonprobate assets upon death in the event these assets are not adequately addressed. The facts in *Forcier v. Metropolitan Life Insurance Co.*[1] illustrate the point. Mr. Forcier, employed by Macromedia, Inc. and insured under a group life insurance policy in the amount of $208,000, did not designate a beneficiary.[2] The Forciers were married in May 2000.[3] They later separated and entered into an agreement in July 2003 providing for a waiver of the right to share in each other's estates with no reference to the life insurance policy.[4] Mr. Forcier committed suicide on October 21, 2003, approximately two months before the entry of a divorce decree.[5] The question then became who receives the life insurance proceeds upon his death. Is the issue decided by the terms of property settlement agreements, state revocation upon divorce statutes, or federal law?

The following topics are included in this chapter:

- The transfer of multiple-person accounts and securities upon death, including a discussion of the Uniform Nonprobate Transfers on Death Act and other state statutes dealing with these types of accounts;
- The transfer of real property upon death, which is now also addressed as part of the Uniform Nonprobate Transfers on Death Act;
- The revocation of nonprobate assets upon separation/divorce statutes, including a discussion of constitutional challenges, state and federal case law based on these

statutes, and the preemption of federal law in this arena; and
- The conflicts between the statutes regulating nonprobate assets and statutes revoking nonprobate assets upon separation and/or divorce.

2. Nonprobate Transfers on Death

A. Introduction

The primary legislation governing nonprobate assets is based on the Uniform Nonprobate Transfers on Death Act (the Nonprobate Act).[6] The Nonprobate Act was adopted in 1989 by the Uniform Law Commission (ULC). The act is adopted as Article VI of the Uniform Probate Code[7] and is divided into four parts. Part 1 defines certain nonprobate assets as nontestamentary; Part 2 governs multiple-person accounts; Part 3 governs transfer on death security registration; and Part 4 provides for a transfer on death deed for real property. Parts 2 through 4 of the Nonprobate Act can be enacted as freestanding statutes or as part of an overall state probate code. Each part of the Nonprobate Act will be discussed below. *See Appendix A for the state statutory references to the Uniform Nonprobate Transfers on Death Act and other similar statutes. See Appendix F for a checklist of nonprobate assets in divorce.*

i. Part 1—Uniform Nonprobate Transfers on Death Act

As stated earlier, nonprobate assets are commonly known as "will substitutes." Section 6-101 of the Uniform Probate Code (UPC) defines specific types of nonprobate assets as nontestamentary rather than testamentary. The main policy reason for treating certain assets as nontestamentary is that nontestamentary instruments do not need to be executed in compliance with the Statute of Wills, the enforcement of which had served to invalidate many such arrangements.[8] As such, UPC § 6-101 provides that provisions in insurance policies, contracts of employment, bonds, mortgages,

promissory notes, certificated or uncertificated securities, account agreements, custodial agreements, deposit agreements, compensation plans, pension plans, individual retirement plans, employee benefits plans, trusts, conveyances, deeds of gift, marital property agreements, and other similar written instruments are nontestamentary to avoid the application of the Statute of Wills.[9] Under UPC § 6-101(1)–(3), these assets and/or contracts are handled after death as follows:

- Money or other benefits due to, controlled by, or owned by a decedent before death must be paid after a decedent's death to a person **whom the decedent designates either in the instrument or in a separate writing, including a will**, executed either before or at the same time as an instrument, or later;
- Money due or to become due under the instrument **ceases to be payable** in the event of the death of the promisee or the promisor before payment or demand; or
- Any property controlled by or owned by the decedent before death that is the subject of an instrument **passes to a person the decedent designates either in the instrument or in a separate writing**, including a will, executed either before or at the same time as an instrument, or later.[10]

UPC § 6-102, however, clarifies that individuals receiving nonprobate transfers can nonetheless be liable for allowed claims or statutory allowances if the decedent's estate is inadequate.

Part 1 of the Nonprobate Act no longer serves as a freestanding act because it does not include the provisions found in Part 4 regarding real estate, which were added as part of the 2010 reorganization of the Nonprobate Act. However, some states did enact a version of Part 1 prior to 2010. And other states have similar statutes.[11] *See Appendix A for the state statutory references for Part 1 of the Uniform Nonprobate Transfers on Death Act and similar state statutes. See sections 4.A through D, following, for a discussion of revocation of nonprobate assets upon separation and/or divorce statutes and section 4.E for a discussion of conflicts between statutes regulating the disposition of nonprobate assets and statutes*

providing for the revocation of nonprobate assets upon divorce and/or separation.

ii. Part 2—Uniform Multiple-Person Accounts Act

Part 2 of the Nonprobate Act applies to contracts of deposit between depositors and financial institutions, e.g., checking and savings accounts, certificates of deposit, and share accounts.[12] In the case of divorcing spouses, Part 2 applies to (1) multiple-party accounts, which are accounts payable on request of one or more of two or more parties whether or not a right of survivorship is mentioned[13] and (2) payable on death accounts.[14] However, Part 2 does not apply to (1) accounts established by partnerships, joint ventures, or business organizations, (2) accounts controlled by persons as agents or trustees for corporations or unincorporated associations, or (3) fiduciary or trust accounts.[15] Part 2 of the Nonprobate Act is applicable in many states, and others have enacted similar statutes. *See Appendix A for the state statutory references for Part 2 of the Uniform Nonprobate Transfers on Death Act and similar statutes.*

a. Multiple-Party Accounts

Many divorcing spouses have joint checking and savings accounts. Usually, these accounts are the first financial assets transferred after separation. There is a presumption in multiple-party accounts, in the absence of proof otherwise, that these accounts belong to married persons in equal amounts.[16] Multiple-party accounts can provide for a right of survivorship;[17] and, upon death, named survivors take the sums on deposit.[18] If the sums on deposit are community property, the Nonprobate Act does not alter their character or the community rights of spouses; however, if multiple-party accounts in community property states expressly provide for survivorship, those provisions will prevail and cannot be altered by a will.[19] The Nonprobate Act also does not affect any law governing tenancy by the entireties.[20]

In the event these accounts are not transferred after separation and/or divorce, the Nonprobate Act has no provision for revocation of multiple-person accounts upon separation and/or divorce.

Lawyers need to check their state statutes regularly to determine if revocation upon separation and/or divorce statutes are enacted. Some states have statutes revoking multiple-party accounts upon divorce.[21] But cases in some states indicate that revocation upon separation and/or divorce statutes are not applicable to these accounts.[22] The legislative trend is to incorporate revocation upon separation and/or divorce statutes into other facets of state codes; therefore, it may not be readily apparent if these revisions have been made. *See sections 4.A through D, following, for a discussion of revocation of nonprobate assets upon separation and/or divorce statutes and section 4.E for a discussion of conflicts between statutes regulating the disposition of nonprobate assets and statutes providing for the revocation of nonprobate assets upon divorce and/or separation.*

In some divorce cases joint accounts remain open to pay the expenses of spouses remaining in the marital home. It would be a better practice to either open new accounts or retitle existing accounts to plan for the possibility of death, particularly in cases where the possible decedents are the primary financial source of an account's funds. Although it may seem apparent, if clients have multiple-party accounts after separation and/or divorce, it is imperative to advise them to immediately close these accounts if it is their intent not to have these assets pass to their spouses. The failure to advise clients of this possible unintended result may result in a malpractice claim, particularly if the amount in these accounts is significant.

If death occurs after property settlement agreements are executed, provisions waiving any interests in specific accounts and/or specifically referring to revocation of beneficiary designations may have some effect on judicial determinations of who takes the funds after death; however, financial institutions are not likely to honor the terms of such a provision. If financial institutions do not honor waivers, litigation over the distribution of the proceeds may ensue. Nonspecific waivers of all claims in such accounts will likely have no effect on financial institutions' determination of ownership after death.

b. Payable on Death Accounts

Payable on death (POD) accounts are similar to multiple-party accounts and provide for the ownership of checking and savings accounts, certificates of deposit, and share accounts to pass to

named beneficiaries.[23] It is not uncommon for married couples to title these accounts in this manner. Beneficiaries on POD accounts have no interest in the money in accounts during the lifetimes of the parties.[24] The same principles apply to POD accounts as are discussed previously in section 2.A.ii.a concerning multiple-party accounts.

iii. Part 3—Uniform TOD Security Registration Act

Part 3 of the Nonprobate Act is commonly referred to as the Uniform TOD Security Registration Act[25] (the TOD Act) and was adopted in 1989 and revised in 1998 by the Uniform Law Commission. The TOD Act can either be a freestanding act or can be included as Part 3 of Article VI of the Uniform Probate Code. The TOD Act is applicable in all states except Louisiana and Texas. *See Appendix A for the state statutory references for Part 3 of the Uniform Nonprobate Transfers on Death Act and similar state statutes. See sections 4.A through D, following, for a discussion of revocation of nonprobate assets upon separation and/or divorce statutes and section 4.E for a discussion of conflicts between statutes regulating the disposition of nonprobate assets and statutes providing for revocation of nonprobate assets upon divorce and/or separation.*

The TOD Act applies to securities and securities accounts. Securities are shares, participation, or other interests in property, in a business, or in an obligation of an enterprise or other issuer and include certificated securities, uncertificated securities, and security accounts.[26] Security accounts are (1) reinvestment accounts associated with securities, securities accounts with a broker, cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to an account before an owner's death, or (2) a cash balance or other property held for or due to an owner of a security as a replacement for or product of an account security, whether or not credited to an account before an owner's death.[27] The TOD Act permits owners to (1) avoid probate and (2) designate who will receive securities upon their death. This also avoids problems of creating forms of joint ownership that do not permit individuals to have sole control of their securities. Registrations under the TOD Act commonly take the following forms:

John S. Brown TOD (or POD) John S. Brown, Jr.
John S. Brown Mary B. Brown JT TEN TOD John S. Brown, Jr.
John S. Brown Mary B. Brown JT TEN TOD John S. Brown, Jr. SUB BENE Peter Q. Brown or Mary B. Brown JT TEN TOD John S. Brown, Jr. LDPS[28]

As with multiple-party accounts and POD accounts discussed earlier in section 2.A.ii, if TOD accounts are not transferred after separation and/or divorce, the TOD Act has no provision for their revocation upon separation and/or divorce. Only some states have statutes revoking TOD accounts upon divorce.[29] Lawyers need to check their state statutes regularly to determine if revocation upon separation and/or divorce statutes are enacted. The legislative trend is to incorporate revocation upon separation and/or divorce statutes into other facets of state codes; therefore, it may not be readily apparent if these revisions have been made.

However, registration of securities under the TOD Act can be canceled or changed at any time without beneficiaries' consent.[30] Upon the death of owners of securities and/or security accounts, ownership passes to beneficiaries who survive.[31] Although it may seem apparent, if clients have securities and/or security accounts after separation and/or divorce that list spouses as beneficiaries, it is imperative to advise them to immediately change any beneficiary designation if it is their intent to not have these assets pass to their spouses. The failure to advise clients of this possible unintended result may result in a malpractice claim, particularly if the amount in these accounts is significant.

When representing clients who are beneficiaries of these accounts, lawyers should seek preliminary injunctions to prevent account owners from changing their beneficiary designations. However, preliminary injunctions need to specifically reference which accounts are being affected to be effective. The point is illustrated in *Nicholas v. Nicholas*,[32] a Kansas case,[33] where the husband held both POD and TOD accounts. The court entered a **nonspecific marital property restraining order** that did not refer to these accounts. After the entry of the restraining order, the husband changed the beneficiaries on the POD and TOD accounts. He died two days before the divorce trial.[34] The question before the court

was whether the husband disposed of marital property in violation of the restraining order that "affected the value of the marital estate or placed the property outside the adjudicatory power of the court."[35] The court held that the husband did not dispose of marital assets because under Kansas's nonprobate asset statutes, beneficiary designations can be changed at any time, and the value of the marital estate was not affected by the change in the beneficiary designations. However, the divorce action abated upon the husband's death, and, as a result, the nonprobate assets passed to the husband's named beneficiaries and not to the wife.[36]

If preliminary injunctions are not entered prohibiting specific beneficiary designations from being changed during the pendency of divorces, lawyers engaged in property settlement negotiations should consider negotiating for this to be included in property settlement agreements. Property settlement agreements could provide for beneficiary designations not to be changed at least until divorces are final. This would provide spouses with some assurance of financial security in the event of death. However, copies of the applicable beneficiary designations should be obtained to ensure that these provisions are carried out.

If death occurs after property settlement agreements are executed that do not include prohibitions on changing beneficiaries, provisions waiving any interest in specific TOD accounts may have some effect on judicial determinations of who takes the funds after death; however, financial institutions are not likely to honor the terms of such a provision. If financial institutions do not honor waivers, litigation over the distribution of the proceeds may ensue. Nonspecific waivers of all claims in such accounts will likely have no effect on financial institutions' determination of ownership after death.

iv. Part 4—Uniform Real Property Transfer on Death Act

In 2009, Part 4 was added to the Nonprobate Act to provide for the nonprobate transfer of land. Known as the Uniform Real Property Transfer on Death Act, Part 4 of the Nonprobate Act allows for land owners to execute and record a deed identifying a beneficiary

or beneficiaries to receive the owner's interest in the property at the owner's death.[37] Such a transfer on death (TOD) deed is distinguishable from a retained life estate[38] as it is revocable prior to the property owner's death,[39] and the property owner retains all power to transfer or encumber the property, which would pass to the beneficiary or beneficiaries subject to all liens and encumbrances.[40] The transfer on death deed is explicitly defined as nontestamentary,[41] but the Nonprobate Act does require the same capacity to make or revoke a transfer on death deed as is required to make a will.[42] Only an individual can execute a transfer on death deed, to the exclusion of corporations, partnerships, trusts, estates, associations, governmental agencies, and any legal or commercial entities other than an individual.[43]

As of early 2020, 18 states have adopted the Uniform Real Property Transfer on Death Act, 11 states have adopted similar statutes, and a number of states have proposed legislation regarding same (e.g., Connecticut, Mississippi, Rhode Island). *See Appendix A for the state statutory references for Part 4 of the Uniform Nonprobate Transfers on Death Act.* For example, in 2009, Ohio enacted a statute that provides for a transfer on death designation affidavit, in which the owner of an interest in a property designates a beneficiary to receive his or her interest upon death.[44] Ohio had been one of the first states to allow transfer on death deeds, having enacted a law providing for same in August 2000, but that law was repealed and replaced with the current transfer on death designation affidavit scheme.

A different approach has been taken in Florida and Michigan. Neither of those two states has adopted the Uniform Real Property Transfer on Death Act or similar statute, but courts there have upheld the use of enhanced life estate deeds, also known as "Lady Bird Deeds," which have many of the same properties as transfer on death deeds but lack some of the formal requirements.[45]

Because new legislation regarding transfer on death deeds or similar instruments is being introduced frequently, lawyers should check their state statutes regularly for any updates regarding this area of law. But family law practitioners need to be aware that such property interests exist, whether or not transfer on death deeds or

similar instruments are recognized in their state of practice. Parties to a divorce action may own property in a different state or may be the beneficiary of such a deed in another state. Depending on the law of the state in which the parties are getting divorced, the beneficial interest provided to a divorcing spouse by a transfer on death deed may be a factor affecting the division of the marital estate.

Furthermore, individuals approaching their golden years who have begun the estate planning process are more likely to have executed a transfer on death deed or similar instrument as a way to avoid probate. Attorneys should specifically inquire about any beneficial interests or expectancies that their clients have received or given away regarding real property, in addition to more straightforward legal interests. If a transfer on death deed has been executed regarding marital or community property, attorneys should explore with their clients whether the instrument needs to be revoked. If the titled owner to a property dies during the pendency of the divorce and the named beneficiary on a transfer on death deed is not the owner's spouse, there is a heightened potential for litigation regarding the transfer of the property interest.

The Uniform Real Property Transfer on Death Act does not include a mandatory provision for the revocation of a transfer on death deed upon divorce or annulment. However, Uniform Probate Code (UPC) section 6-413 contains bracketed language that would allow a state to conform the provision to other state statutes, including a statute providing for revocation on divorce.[46] The revocability of the transfer on death deed cannot be altered by another instrument and therefore remains revocable regardless of a promise not to revoke.[47] The comment to UPC § 6-406 states that a promisee may have a remedy pursuant to other state law if a transferor breaks a promise not to revoke the transfer on death deed, but it emphasizes that the deed nonetheless remains revocable. Thus, in states that enact the Uniform Real Property Transfer on Death Act but do not enact other state legislation providing for revocation on divorce, litigation is anticipated in divorce actions where one spouse, as part of a property settlement agreement, promises to execute and/or not revoke a transfer on death deed naming the other spouse as a beneficiary to an interest in real property.

B. Other State Nonprobate Asset Statutes

Although the Uniform Nonprobate Transfers on Death Act (the Nonprobate Act) dominates the field of nonprobate transfers on death—31 states and the District of Columbia enacted multiple-party account statutes, and 47 states and the District of Columbia enacted securities transfer on death statutes—some states have other statutory schemes dealing with nonprobate assets on death, most notably California, Kansas, Maryland, Missouri, Texas, and Washington.[48] In those states that did not adopt versions of the Nonprobate Act, lawyers need to check their state statutes regularly to determine if revocation upon separation and/or divorce statutes are enacted. The legislative trend is to incorporate revocation upon separation and/or divorce statutes into other facets of state codes; therefore, it may not be readily apparent if these revisions have been made. *See sections 4.A through D ahead for a discussion of revocation of nonprobate assets upon separation and/or divorce statutes and section 4.E for a discussion of conflicts between statutes regulating the disposition of nonprobate assets and statutes providing for the revocation of nonprobate assets upon divorce and/or separation.*

3. Individual Life Insurance and Individual Retirement Accounts

A. Introduction

Payouts from life insurance policies and distributions of individual retirement accounts (IRAs) are nonprobate transfers upon death. This section discusses individually purchased life insurance policies and IRAs that are not governed by the Employee Retirement Income Security Act of 1974 (ERISA).[49] This does not include employer-sponsored group life insurance policies that are governed by ERISA.[50] The distribution of life insurance proceeds from individual policies and IRAs upon death are the most common nonprobate assets that cause difficulties upon separation and/or

divorce. The failure to address these assets in property settlement agreements and/or decrees, coupled with clients not changing their beneficiary designations, can cause a multitude of problems. This situation is contrasted with property settlement agreements and/or decrees including life insurance to cover spousal support obligations. In those situations, there is typically a monitoring mechanism to ensure that beneficiary designations are current.

Life insurance policies involve contracts between insureds and insurance companies. Beneficiaries of life insurance policies do not have an interest in insurance contracts until an insurer's death. This is known as an expectancy interest, which is described in *Hollaway v. Selvidege*:[51]

> Where a right to change the beneficiary is reserved in the policy, the beneficiary has no vested or indefeasible interest during the lifetime of the insured, but only a revocable expectancy contingent upon being the beneficiary at the time of the insured's death. A beneficiary has only an inchoate right to the proceeds of a policy, subject to being divested at any time during the lifetime of the insured, by transfer, assignment, or change of beneficiary, or in some cases by the death of the beneficiary before the insured.[52]

IRAs are also contracts between individuals and financial institutions. Named beneficiaries on IRAs also only have an expectancy interest, which is described in *Stribling v. Stribling*:[53]

> [A] beneficiary's rights to proceeds do not attach until the IRA owner's death. Until then, the beneficiary merely has an expectancy in the IRA because until the owner's death, the owner can do with the IRA as desired, including changing the beneficiary designation or cashing out the account altogether.[54]

Since beneficiaries only have an expectancy interest in life insurance or IRA proceeds, the question arises whether these interests can even be contracted for during divorces.

In some states, the distribution of life insurance and IRA proceeds are governed by revocation of nonprobate assets upon separation and/or divorce statutes. *See sections 4.A through D ahead*

for a discussion of revocation of nonprobate assets upon separation and/or divorce statutes and section 4.E for a discussion of conflicts between statutes regulating the disposition of nonprobate assets and statutes providing for the revocation of nonprobate assets upon divorce and/or separation. However, in some states, insurance codes and domestic relations codes regulate the distribution of life insurance proceeds. For example, in South Carolina life insurance policies can have a termination of coverage upon divorce provision, and policies can be reissued after divorce. However, clients must make the application within 60 days after the entry of divorces.[55] Lawyers need to check their state statutes regularly to determine if revocation upon separation and/or divorce statutes are enacted. The legislative trend is to incorporate revocation upon separation and/or divorce statutes into other facets of state codes; therefore, it may not be readily apparent if these revisions have been made. *See Appendix F for a checklist of nonprobate assets in divorce.*

B. Individual Life Insurance Policies

When spouses die and there is a question about who will receive the proceeds of life insurance policies where beneficiary designations are not changed after separation and/or divorce, courts are asked to interpret property settlement agreements and/or divorce decrees. Of course, if there are no property settlement agreements and/or decrees, the life insurance proceeds in most situations will pass to named beneficiaries under the terms of life insurance policies. The facts in *Hughes v. Scholl*[56] are common in situations where beneficiary designations are not changed:

> At the time of their divorce, Edna and Keith executed a property settlement agreement, later incorporated into their decree, which did not specifically address the insurance policies, but merely contained a comprehensive "mutual release" claim. In the ensuing nine years, Keith never changed his beneficiary designations although he apparently made inquiries of the company about surrendering or converting the policies. After Keith's death, Edna asserted a right to the policies' proceeds and was opposed

by Keith's estate which argued that her status as beneficiary was revoked by the divorce.[57]

The life insurance proceeds were awarded to the former spouse.[58]

As illustrated above, clients often do not take the necessary steps to change their beneficiary designations. In the event of death after separation and/or divorce, the question is made easier if property settlement agreements and/or decrees address specific life insurance policies. If specific life insurance policies are not delineated in property settlement agreements and/or decrees, courts must look to property settlement agreements and/or decrees to determine their intent by traditional contract interpretation, i.e., within the four corners of the document. The ensuing litigation as a result of a failure to address beneficiary designations in property settlement agreements and/or decrees will involve former spouses, decedents' estates, and insurance companies. These cases are complex and costly. Ultimately, the responsibility for changing beneficiary designations rests with clients; however, when the situation presents itself, questions will be raised about what could have been done in the divorce proceedings to prevent these unintended results.

An analysis of what should be done to prevent these unintended results begins with a review of the applicable law. Some courts hold that property settlement agreements containing nonspecific waivers of all claims in which the parties relinquished all claims to the marital estate are sufficient, and life insurance proceeds are not awarded to former spouses.[59] However, the overwhelming majority of courts hold that property settlement agreements containing nonspecific waivers of all claims in which the parties relinquished claims to the marital estate are not sufficient and life insurance proceeds were awarded to former spouses.[60]

The problem with the case law that has developed over the years in these situations is that courts can look at the same waiver provisions in property settlement agreements and/or decrees and come to entirely different conclusions. The solution to the problem is relatively simple. If clients have life insurance policies, lawyers should recommend at the outset that they make changes in their beneficiary designations. Copies of all applicable policies and any applicable change of beneficiary designation forms should

be obtained for clients' files. However, if clients have not made changes in their beneficiary designations at the time of entering into property settlement agreements, the property settlement agreements and/or decrees should specifically reference those policies including the name of the insurance company and the policy number. Because clients only have an expectancy interest in life insurance proceeds, specific language should also be included that all current beneficiary designations in favor of spouses are revoked and should place the responsibility for making the change on one of the parties, **preferably in boldface type**. Lawyers also need to resist the temptation of not including specific references to life insurance policies where property settlement agreements are reached in principle over the major issues and there is a concern that clients will not sign off on them if information has to be obtained to include specific references to the life insurance policies. Clients will also need reinforcement to carry through on these instructions. Many lawyers send closing letters after final decrees are entered reminding clients that they need to make the necessary changes in their life insurance beneficiary designations. These extra steps will help to prevent extensive and expensive litigation over the distribution of life insurance proceeds after divorce.

C. Individual Retirement Accounts

The same situation exists for IRAs as was discussed earlier in section 3.B for life insurance. When former spouses die and there is a question about who will receive the proceeds of IRAs where beneficiary designations are not changed after separation and/or divorce, courts are asked to make this determination by interpreting property settlement agreements and/or divorce decrees. Of course, if there are no property settlement agreements and/or decrees, the IRAs in most situations will pass to named beneficiaries listed on account designations. Unfortunately, as with life insurance policies, this is an all too common experience. The facts in *PaineWebber, Inc. v. East*[61] illustrate the factual situations that arise when beneficiary designations are not changed:

> Husband opened an IRA during the marriage in which his wife was named as the beneficiary. The parties

> subsequently divorced, and the parties' agreement contained a waiver by the wife of any interest she may have had in the IRA, as well as a waiver of any interest she may have had in his estate. Following the divorce, Husband did not change the beneficiary designation. The former wife was awarded the funds in the IRA.[62]

The same problems discussed previously in section 3.B for the distribution of life insurance proceeds where beneficiary designations are not changed equally apply to IRAs. And, as with life insurance policies, if there is a waiver of specific IRA accounts in property settlement agreements and/or decrees, courts will have an easier time of interpreting who is entitled to the proceeds. For example, in *Stribling v. Stribling*,[63] the following language was sufficient to waive a former spouse's right to IRA proceeds **where the IRAs were specifically identified** in the agreement:

> The parties acknowledge that each party is retaining his or her retirement accounts accumulated through their respective employment. The parties further acknowledge they are waiving any interest they may have in the other party's retirement. As a result, the parties agree to sign any and all documentation necessary to fully waive any right or entitlement he or she may have had in the retirement of the other. The parties will fully cooperate in securing the necessary waivers, releases, QDRO's or other required documents for the signature of the waiving party.[64]

This waiver would not have been effective to waive an IRA interest if such accounts had not been specifically identified because IRAs are not usually accumulated through employment.

The case law applicable to IRAs is not as extensive as the case law for life insurance policies. Nevertheless, there are cases where property settlement agreements address specific IRAs but do not address beneficiary designations and the IRA proceeds are awarded to former spouses.[65] And there are cases where property settlement agreements do not include specific references to IRAs and beneficiary designations were not changed, and the IRA proceeds were not awarded to former spouses.[66] The same procedures that are discussed previously in section 3.B for life insurance