

# Family Law & Practice MCLE Meeting DuPage Judicial Center - ARC 2/19/19

**11:45 AM - Noon** Welcome/Introductions

Zach Martel, Family Law Section Chair

Noon – 1:30 PM Program – Post Judgment Checklist: Estate Planning & Final Tasks

Before Closing Your File

This presentation will address the legal issues which are likely to arise for your clients following entry of a divorce degree and provide practitioners with a summary of steps to take, advice to render, and referrals to be made to ensure clients can more forward with a complete resolution. Topics include estate planning for divorcees, QDRO completion, title transfers, health insurance, and attorney fees.

See Attached for Speaker Bios

**Next Meeting:** 3/19/19 – Dr. Finn will be speaking on the effects of divorce upon

children

**DCBA Events:** 2/21/19 – Happy Hour at Cooper's Corner in Winfield

3/1/19 - 44th Annual Judges' Nite - Cutting the Cord



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# William W. Thorsness



William W. ("Bill") Thorsness is one of the co-founders and an owner of the firm. He has over four (4) decades of extensive experience in successfully representing individuals, business owners, professionals, executives, retirees and their families with all matters relating to their estate planning affairs and the post-mortem settlement of estates. Bill focuses on planning strategies to protect clients and their families from exposure to federal and state estate taxation, losses to divorcing spouses and creditors, and from the extra time and expense associated with probate court proceedings.

Bill was admitted to practice in the State of Illinois in 1973 and is licensed to practice in all the Illinois courts, including the United States District Court for the Northern District of Illinois.

Bill is a member of the Illinois State Bar Association, serves as an Officer and Director of two substantial charitable foundations, is a former director of a metropolitan financial institution, is a member of Harvest Bible Chapel in Rolling Meadows, Illinois, a Life Loyal Member of the Sigma Chi Fraternity and a long term member and former Director of Ruth Lake Country Club, in Hinsdale, Illinois. He frequently speaks about estate planning to public, private and professional groups.

Bill has been married to Marjorie for 38 years and they have four children, two of whom are attorneys, one of whom is an orthopedic surgeon and the other a child and adolescent counselor.

#### **Practice Areas**

- Estate and Financial Planning
- Estate Administration and Settlement
- Probate

- Trusts
- Federal and State Estate Taxation
- Federal Gift and Generation Skipping Taxation
- Business Succession Planning
- Asset Protection Planning

#### **Education**

- Juris Doctor, DePaul University, 1973
- Bachelor of Science (Magna Cum Laude), Business Administration, Bradley University, 1969

#### **Military Service**

• United States Army, Honorable Discharge, 1975

**Kiley M. Whitty** is a Partner at the law firm of Lillig & Thorsness, Ltd. where she manages the Family Law division and specializes in the areas of complex divorce litigation, parentage, legal separation, child support, and the negotiation of premarital and post-marital agreements. Kiley also handles matters involving estate planning and bankruptcy in DuPage, Kane, Will, Cook and surrounding collar counties.

Ms. Whitty graduated from Miami University in Oxford, Ohio with a B.A. in Speech Communications and Political Science and she earned her J.D. from Loyola University School of Law. She was admitted to practice law in the State of Illinois in 2009. She is also admitted to practice in the United States District Court for both the Northern District of Illinois and the Central District of Illinois.

Ms. Whitty is the Third Vice President of the DuPage County Bar Association, having previously served on the Board of Directors, the Planning Committee, Budget Committee, and on the Executive Committee as the Assistant Treasurer. She is also a Past President of the DuPage Association of Women Lawyers and a member of the Illinois State Bar Association. Kiley served as a Director of the DuPage County Bar foundation and is a regular volunteer for DuPage County's Pro Se Help Desk.

Kiley has been recognized for her outstanding qualifications and client service having been named for the last five years an Illinois SuperLawyers Rising Star and an Emerging Lawyer by Illinois Leading Lawyers. Kiley is also a "Top Rated Family Law Attorney" on AVVO based on excellent client reviews and peer endorsements and she was named to The National Advocates Top 40 under 40 List for Matrimonial & Family Law in Illinois.

#### **LEGAL WAYS TO PASS ASSETS AT DEATH:**

- 1. Will ("Paid For" Will or "State Made" Will)
- 2. Joint Tenancy with Right of Survivorship
- 3. Tenancy by the Entirety
- 4. Beneficiary Designation (or T.O.D. or P.O.D.)
- 5. Trust

#### **GOALS AT DEATH:**

- 1. Pass assets to Surviving Spouse, if living, otherwise to Children, with the least amount of shrinkage
  - A. Avoid Probate Court Bureaucracy and Expense
  - B. Avoid U.S. Estate Tax
  - C. Avoid Illinois Estate Tax
  - D. Avoid U.S. Income Tax
  - E. Protection from creditors
- 2. Name Guardians for Children
- 3. Consider Financial Security for Surviving Spouse
- 4. Postpone Children getting \$ too soon
- 5. Protect Children from Surviving Spouse's remarriage or frailties such as naiveté or old age dementia
- 6. Protect Children from Surviving Spouse's diverting of assets to his or her Children by a prior marriage
- 7. Protect Children from divorce
- 8. Protect Children from their own creditors
- 9. Protect Children from probate and estate taxes at their subsequent death
- 10. Protect Grandchildren from Children diverting assets to Spouses of Children



#### ILLINOIS STATE DISBURSEMENT UNIT

P.O. Box 5921 Carol Stream, IL 60197-5921 Customer Service: (877) 225-7077

#### DIRECT DEPOSIT AUTHORIZATION AGREEMENT

I, hereby authorize the Illinois State Disbursement Unit, (SDU) to initiate credit entries for deposit of child support payments and if necessary, to initiate debit entries and adjustments for any credit entries made in error to my account at the Depository Institution named below.

| Account Type (check one)  Checking Account Savings Account   | unt<br>at (Contact your bank to obtain the l | bank routing number a | and savings accou    | unt number) |       |
|--|--|-----------------------|----------------------|-------------|-------|
| Name and Location of Bank  | Name of bank                                 | City                  | State                |             |       |
| Bank Routing Number  |  | ·                     | State                | Zip<br>     |       |
| Bank Account Number  | 9-digit routing n                            | umber                 |                      |             |       |
| This authorization is to remain in termination in such time and in such  |  |                       |                      |             |       |
| Full Name:<br>Daytime Phone Number:  |  |                       |                      |             |       |
| List all the docket numbers to when Docket   | hich direct deposit authoret Number          | _                     | ent will app         | ly:         |       |
| Signature (req   | uired to validate this request)              |                       | Date                 | <u> </u>    |       |
| Please fax the completed form with the Unit at the above address. The proce continue to be mailed to your address. |  |                       |                      |             |       |
| To receive notification on the state Disbursement Unit please provide  |  |                       |                      |             |       |
| Mobile phone number:   | <i>E</i>                                     | Email:                | se print and write c | alogr[v]    |       |
| Preference (Circle One): Text Me If both mobile phone number and email ac  |  | ·                     |                      |             | ıail. |



William W. Thorsness and Kiley M. Whitty Lillig & Thorsness, Ltd.

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# You've Entered the Judgment for Dissolution of Marriage- Now What?

#### Step One: Analyze the Judgment/MSA for Action Items

- ▶ Does the Marital Settlement Agreement or Judgment contemplate the entry of a Qualified Domestic Relations Order (QDRO)?
- ▶ Was a Support Order entered requiring withholding to the SDU?
- ▶ Was your client awarded real estate or a vehicle?
- Was your client awarded all or a portion of his or her own retirement accounts?
- ▶ Is your client enrolled in his or her own health insurance plan?
- ► Has your client created an estate plan? Did your client have an individual or joint will or trust at the time of the divorce?

#### Step Two: Advise Client of the Action Items

- What this looks like:
  - ▶ Letters of Direction
  - ▶ Legal work to be completed
  - ▶ Make appropriate referrals
- ▶ Benefits of Follow-Through:
  - ► Increase credibility with client
  - ▶ Increase likelihood of referrals and repeat clients
  - Avoid non-billable inquiries from former clients months after you've closed the case
  - ▶ These final tasks are billable
  - Most importantly: CYA!

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#### **Action Items Relative to Title Transfers**

- ► Transferring Vehicle Title and License Plates
  - Online Application for Vehicle Transaction(s) available at <a href="http://www.ilsos.gov/pert/">http://www.ilsos.gov/pert/</a>
  - ► Client will need title number and VIN
  - ▶ Direct client to have former spouse execute the Affirmation of Correction and to sign title over to client
- ► Transferring Real Estate Title
  - Draft Quit Claim Deed and Coordinate Execution
  - Prepare and coordinate execution of Grantor/Grantee Statement where required (Cook County)
  - Direct clients on option to complete recording themselves or whether they wish for you to handle it: contact municipality regarding transfer stamp, complete necessary forms, deliver to recorder's office
  - ▶ Be sure it is actually recorded!

# Action Items Relative to Sale of Real Estate

- ▶ The MSA provides for real estate to be listed by a date certain and for the parties to select a realtor. Is there anything for you to do?
  - ▶ Make referrals to real estate attorneys or be sure your client knows if you do real estate work yourself (subject to a conflict waiver)
  - ► Follow-up with client to be sure listing agreement has been signed and sale is proceeding in accordance with MSA (opportunity for post-decree Petition for Rule to Show Cause)
  - ▶ If there are provisions regarding certain obligations that are to be satisfied from the proceeds of the sale, let your client know you are available to speak with the title company, realtor, and real estate attorney to ensure proceeds are properly allocated

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# Action Items Regarding Division of Retirement Assets

- ▶ Be sure to appropriately assess which assets require QDROs and which do NOTadvise clients on steps to take for those to be divided by other means
- ▶ Be sure the MSA assigns responsibility to one party or the other for drafting QDROs where required (seek clarification of a Judgment which does not impose this obligation)
- Determine whether one of the parties' attorneys is drafting the QDRO or whether drafting will be outsourced to a third party attorney or agency
- Set deadlines for exchanging the draft QDRO or for engagement of the third party
- Be diligent about getting timely approval from the opposing counsel or noticing the QDRO for entry
- Make sure the QDRO makes it to the appropriate plan administrator
- Know the risks of delay/misinformation:
  - ▶ No restrictions on disbursement until court executed Order is received (in most cases)
  - ▶ No protection against disbursement in the event of death
  - Malpractice

- ▶ Wiggins vs. Feda, 2011 WL 10102605 (2d. Dist 2011)\*
  - ▶ Wife's attorney found to have violated standard of care for failing to secure her interest in former spouse's pension plan prior to his death which occurred within 3 years of the entry of Judgment
  - Case involved preparation of QDRO as opposed to QILDRO and delay in causing the proper order to be entered
  - Attorney ordered to pay Wife what she would have received in pension benefits from date pension payments commenced until former spouse's date of death
- Various trial court level cases- sample fact patterns:
  - ► Failure to timely have QDRO entered resulting in \$120,000 in attorneys fees to reinvent the wheel and get the spouse the funds in a different way
  - MSA provided for asset to be divided by QDRO which was the incorrect mechanism. Delay in determining appropriate manner in which to divide cost spouse significant interest in stock options where the stocks were experiencing extreme price volatility at the time
- Even where the cases are ultimately dismissed (voluntarily and pursuant to settlement) or if the complaints are dismissed due to the statute of limitations, you have exposure. This means money!
  - ► See O'brien v. Scovil, 332 III.App.3d 1088 (3d Dist. 2002)- QDRO never entered. Husband died and proceeds paid to designated beneficiaries. Dismissed only because statute of limitations had run.
  - ➤ See Christophersen v. Franklin, 2011 WL 10136038 (2d Dist. 2011)\*- Attorney wrongfully assumed that Wife could obtain pension benefits that were classified as disability benefits from his former employer. Following divorce, Wife learned the award of 60% of his pension disability benefits was worthless. Dismissed due to statute of limitations. PLA to Supreme Court denied.

\*Rule 23 Case

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# **Action Items for Orders of Support**

- ► If outside DuPage, be sure you complete the withholding order and send the the Support Order and Withholding Order to the SDU, employer, States' Attorney, and parties
- Provide client instructions on creating an account, authorizing direct deposit, and accessing SDU



#### **Actions Items For Health Insurance**

- ► Advise clients of termination of benefits and options for obtaining new coverage: COBRA, Enrollment through employer as a Life Event, private marketplace coverage
- ▶ Ensure clients have a certified copy of the Judgment as evidence of the life change

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# Actions Items for Protection of Assets Upon Death: Estate Planning for the New Divorcée

- Impact of Existing Beneficiary Designations- What if your client doesn't make appropriate changes?
  - Generally, case law suggests that the beneficiary designation trumps a will, a trust, or any intestate beneficiary claim
  - Hebert v. Cunningham, 2018 IL App (1st) 172135 (1st Dist. 2018) Husband and Wife were married in 1981. In 1998, Husband indicated on a Designation of Beneficiary Form that he was married to Wife and named her the primary beneficiary of his 401(k) plan. In 2003, Husband and Wife were divorced. The MSA included a provision awarding each party sole ownership of their separate retirement assets, free and clear from any claim of the other and included a waiver as to all property rights and claims which he or she now has or may hereafter have in and to the property. Husband died in 2014, having never executed a document changing the designation of Wife as the beneficiary of the 401(k) account. Husband had a will executed in 2013 which (presumably) did not name Wife as a beneficiary.
    - ▶ What result?

# Actions Items for Protection of Assets Upon Death: Estate Planning for the New Divorcée

- ▶ The Plan Administrator for the 401(k) determined that Husband's estate, rather than Wife, was the proper beneficiary, consistent with the Executor's direction.
- ▶ Wife filed for declaratory judgment alleging she is the rightful beneficiary. The Plan administrator removed the action to the US District Court for the Northern District. The Executor also asserted breach of the divorce decree action against Wife and sought imposition of a constructive trust for the benefit of the state.
- District Court held that the beneficiary designation was unaffected by the divorce decree and a waiver in a non-QDRO divorce decree should be disregarded if it conflicts with the beneficiary designation set forth in the ERISA plan documents. Federal court concluded it would be more appropriate for the circuit court to determine whether Wife could retain the funds based on the claim that she violated the divorce decree.
- ▶ Circuit Court held and appellate court affirmed that Wife's interest in the 401(k) was extinguished by the divorce decree and her waiver of any current or future interest therein.
- Result: Wife held the funds only in constructive trust for Husband's estate and was ordered to turn them over to the executor to be distributed in accordance with his estate.

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## Actions Items for Protection of Assets Upon Death: Estate Planning for the New Divorcée

#### ► Takeaways:

- ▶ The language in the MSA *might* protect your client if he/she fails to property amend beneficiary designations and carefully prepare an estate plan, BUT this decision was case-specific and very dependent upon the language included in the MSA
- The immediate outcome was still to give the funds to the designated beneficiary and it took extensive litigation to ensure they were turned over to the intended party
- ▶ This outcome did NOT avoid the costs of probate

# Actions Items for Protection of Assets Upon Death: Estate Planning for the New Divorcée

- ▶ Inherent Risks for Divorced Persons Without Estate Plan
  - Probate
  - "State Made Will"
  - Conflict among family members in the event of the person's incapacitation who is authorized to act?
  - Natural tendency to name a family member as a joint tenant on an account or on title to property "for estate planning purposes" which does not align with the person's wishes for disposition of property upon death - This makes for a poor alternative to designating a Power of Attorney
  - Forgetting to change beneficiary designations and risk of property passing pursuant to old plans
  - Failure to properly obtain irrevocably life insurance trusts or require the former spouse to do so as required by an MSA can result in a windfall to children if spouse names child rather than former spouse or allows spouse exclusive control over the funds, not subject to it being "for the benefit of the children" if your client simply, names former spouse as beneficiary

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## Actions Items for Protection of Assets Upon Death: Estate Planning for the New Divorcée

- ▶ Inherent Risks for Divorced Persons Who Fail to Update Pre-Decree Estate Plans
  - Prior trust could have been a joint trust with former spouse
  - Prior will/trust could have afforded authority/decision-making to persons associated with the former spouse who your client would no longer wish to be in that position of power
  - ▶ The Illinois Trusts and Dissolutions of Marriage Act ("TDMA") treats a prior spouse as having died upon entry of the Judgment for Dissolution of Marriage, leaving, in many cases, "second choices" as those in a position of power, and allowing earlier distribution to the contingent beneficiaries (many times the children)
    - Note: The Hebert case addressed the TDMA and whether it applies to a 401(k) to extinguish or revoke the prior spouse's interest in the asset as of the date of dissolution. The Appellate Court did not address this issue, finding the spouse had forfeited the argument by not raising it before the circuit court. See In re Estate of Davis, 225 III. App3d 998 (2d Dist. 1992) finding that the TDMA revoked the predissolution beneficiary designation of the wife for an IRA.
    - ▶ This may not be a great outcome if no other beneficiary was designated, leaving the asset to be addressed in probate





How "Shrinkage" Occurs Reprinted from THE WALL STREET JOURNAL.

SDAY, FEBRUARY 4, 1987

C 1987 Dow Jones & Company, Inc All Rights Reserved FEDERAL ESTATE TAX GROSS ESTATE Revocable Living Trusts Become Popular Option in Estate Planning LESS #1 (EXEMPTION) 2002 - 1,000,000 2004 - 1,500,000 2006 - 2,000,000 2009 - 3,500,000 2010 - Tax Repealed When John Tapp's father died four years to, he left a Will and complicated business fairs that went through probate. "It was a ess," Mr. Tapp says. Estate taxes and proba \$ 10,300 affairs that went through probate. "It was a mere." Mr. Tap system. Estate taxes and probate few were berly.

100,000 | 13,300 | 13,300 | 10,000 | 13,300 | 10,000 | 13,300 | 10,000 | 13,300 | 10,000 | 13,300 | 10,000 | 13,300 | 10,000 | 13,300 | 10,000 | 13,300 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 14,300 LESS #2 (MARITAL DEDUCTION) LESS #3 (CHARITABLE DEDUCTION) LESS #4
(EXPENSES OF DEATH & DEBTS) "The Grouche Marx Problem."

A growing number of older Americans are putting their assets into living trusts because they want to avoid being placed under a court-appointed guardian it they become unable to manage their affairs. If a home or stock is in Johnt tenancy, a wife can't sell it if her husband has a stroke and isn't NET ESTATE

### Proper Estate Planning as the Solution

- ▶ Revocable Living Trust
  - ▶ Designate the #1 person the individual wishes to be in control upon death or disability now that the former spouse is no longer the "go to"
  - Protect children's interests from themselves (age restrictions), from their creditors, from future spouses, and maybe even from their other parent (desiring to get control back over assets he/she once owned prior to the divorce)
  - Greater desire to protect their legacy without the spousal inheritance as the first line of defense- ensure money remains available for grandchildren
  - ▶ Create a virtual "safe" for the property they fought so hard for in the divorce
- Powers of Attorney
  - Designate someone who can make decisions in the event of incapacity the spouse, and often joint account holder, as the default no longer exists
- Asset Transfer Instructions
  - ▶ Ensure all of the assets are properly transferred to the "safe" to avoid litigation with a former spouse
- Irrevocable Life Insurance Trusts (ILIT)
  - Often required by the terms crafted in the MSA, but rarely implemented as the MSA intended

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# Proper Estate Planning as the Solution

- ▶ Why does this matter if you are not an Estate Planning attorney?
  - Make the referral- build increased rapport with your client and increase your referral base/network
  - ▶ Limit exposure for yourself from your client's inaction if language in MSA gave the client "false hope" and assets are not adequately protected
  - ► Ensure compliance with the MSA relative to life insurance beneficiary designations and avoid exposure for your client for non-compliance