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# Before Death Do We Part:

## The Constitutionality of Revocation-on-Divorce Statutes

### *By Therese Shanks, Esq.*

This is the story of three women, who married three men, and then got divorced. After the men died, these three women—Trudy Stanford, Carolyn Lazar, and Kaye Melin—brought constitutional challenges to revocation-upon-divorce statutes (RODs) before the Nevada Supreme Court, the Ninth Circuit Court of Appeals, the Eighth Circuit Court of Appeals, and, ultimately, the U.S. Supreme Court. These constitutional challenges culminated in the U.S. Supreme Court's decision in *Sveen v. Melin,* which holds that RODs are constitutional.

#### How Revocation on Divorce Statutes Work

A ROD automatically revokes the designation of an ex-spouse as a beneficiary on non-probate transfers. Non-probate transfers include, among other things, life insurance policies and retirement accounts. Nevada enacted its ROD, NRS 111.781, in 2011. Nevada's ROD applies if the ex-spouse died "on or after October 1, 2011 regardless of when the divorce or annulment occurred." NRS 111.781(10).

Nevada's ROD was adopted from the Uniform Probate Code. In addition to Nevada, Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Iowa, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Washington and Wisconsin have all enacted RODs.

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#### *Whirlpool v. Ritter* turned RODs into a Big, Swirling Mess

In 1991, the Eighth Circuit Court of Appeals created a tidal wave of litigation when it issued the opinion of *Whirlpool Corp. v. Ritter*, 929 F.2d 1318 (8th Cir. 1991), finding that Oklahoma's ROD was unconstitutional because it violated the Contracts Clause of the U.S. Constitution.

After *Whirlpool* was decided, the Joint Editorial Board for the Uniform Probate Code issued a public "disapproval of the decision" because the board "believes the *Ritter* opinion is manifestly wrong." JEB Statement, p. 1. The JEB criticized *Whirlpool* because: (1) revocation-upon-divorce statutes do not impair the obligation of an insurance company to pay benefits, (2) revocation-upon-divorce statutes effect the true intent of a divorced donor since these donors generally forget beneficiary designations for ex-spouses, (3) revocation-upon-divorce statutes do not prohibit an ex-spouse from being re-designated as a beneficiary because these statutes are default rules and not mandatory, and (4) the U.S. Supreme Court has never extended Contract Clause regulation to default rules but instead has been incredibly tolerant for retroactive federal legislation that imposes liabilities on pension plans. *Id.*

Following *Whirlpool* and the JEB's statement, courts outside of the Eighth Circuit overwhelmingly rejected *Whirlpool* and its reasoning. *See Allstate Life Ins. Co. v. Hansen,* 200 F. Supp. 2d 1012 (E.D. Wis. 2002); *Stillman v. Teachers Ins. & Annuity Ass'n Coll. Ret. Equities Fund,* 343 F.3d 1311 (10th Cir. 2003); *In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002); *Mearns v. Scharbach,* 12 P.3d 1048 (Wash. Ct. App. 2000). State courts inside of the Eighth Circuit also rejected *Whirlpool. See Buccholz v. Storsve,* 740 N.W.2d 107 (S.D. 2007). Even the lower federal courts within the Eighth Circuit also expressed disapproval of *Whirlpool*, but reluctantly adhered to its holding because they were bound by *stare decisis. See Scott v. Pub. Sch. Ret. Sys. Of Mo.,* 764 F. Supp. 2d 1151 (W.D. Mo. 2011); *MONY Life Ins. Co. v. Ericson,* 533 F. Supp. 2d 921 (D. Minn. 2008).

#### *Melin, Lazar* and *Stanford*

The constitutionality of RODs came front and center in 2017.

In 2017, the Nevada Supreme Court heard and decided *Stanford v. Massachusetts Mutual Life Insurance Company,* No. 70021, 2017 WL 4351368 (September 28, 2017); the Ninth Circuit heard and decided *Lazar v. Kroncke,* 862 F.3d 1186 (9th Cir. 2017); and the Eighth Circuit heard and decided *Melin v. Sveen*, 853 F.3d 410 (8th Cir. 2017).

In *Stanford,* Trudy Stanford argued that she was the rightful beneficiary of her deceased ex-husband's state-deferred compensation account because her beneficiary designation was not expressly revoked in the divorce decree, and Nevada's ROD was an unconstitutional violation of the Contracts Clause.

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# Family Law Conference: Celebrating its 30th Year!

The upcoming Family Law Conference, scheduled for February 28–March 1, 2019, marks the 30th year of the annual event organized by the Family Law Section of the state bar.

Conference activities will take place at the Tri-County Fairgrounds in Bishop, California for the third year in a row. The theme of the conference is "Bishop: Where Everybody Knows Your Name." In a nod to the MTV era, attendees are encouraged to dress in the retro fashion of the 1980s. Other fun social activities and valuable, instructive programs are planned.

Register to attend now by visiting the State Bar of Nevada's website at www.nvbar.org.

**2019 Family Law Conference**

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Regular rates valid 10/31/18 – 1/28/19
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## BEFORE DEATH DO WE PART: THE CONSTITUTIONALITY OF REVOCATION-ON-DIVORCE STATUTES

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The Nevada Supreme Court declined to consider Trudy's constitutional challenge because it found that the plain language of the divorce decree awarded Trudy's ex-husband all "interest" in his deferred compensation plan. That interest included Trudy's beneficiary designation. Trudy sought certiorari with the U.S. Supreme Court.

In *Lazar,* the Ninth Circuit rejected Carolyn's argument that she was the rightful beneficiary of her deceased ex-husband's IRA account because Arizona's ROD violated the Contracts Clause. 862 F.3d at 1200. The Ninth Circuit rejected *Whirlpool* and found that Lazar had no vested contractual right given that the beneficiary designation could be changed up until death. *Id.* Lazar sought certiorari with the U.S. Supreme Court.

In *Melin*, the Eighth Circuit upheld *Whirlpool* and ruled that Minnesota's ROD violates the Contracts Clause. 853 F.3d at 812. The decedent's surviving children sought certiorari with the U.S. Supreme Court.

### *Sveen v. Melin*

Because *Sveen* arose from the *Whirlpool* circuit, the U.S. Supreme Court granted certiorari in *Sveen*, and held its decision on certiorari on *Lazar* and *Stanford* in abeyance pending oral argument and briefing in *Sveen.* It ultimately denied certiorari in both appeals after reversing the Eighth Circuit Court of Appeals in *Sveen.* In an eight-to-one opinion, the Supreme Court upheld Minnesota's ROD as constitutional because it reasoned "that the average Joe does not want his ex inheriting what he leaves behind." *Sveen v. Melin,* 138 S. Ct. 1815, 1819, 201 L.Ed.2d 180 (2018).

To reach its holding, the Supreme Court examined whether Minnesota's ROD substantially impaired contractual relationships by either "(1) undermin[ing] the contractual bargain," (2) "interfer[ing] with the party's reasonable expectations," or (3) "prevent[ing] the party from safeguarding or reinstating his rights." *Id.* at 1821-22. It found that the ROD did none of these things.

First, the Supreme Court found that RODs support, rather than undermine, the policyholder's contractual bargain as "most divorcees do not aspire to enrich their former partners." *Id.* at 1822-23. Failure to change a beneficiary designation is, more often than not, "likely the result of neglect than choice." *Id.* at 1823.

Second, the Supreme Court found that RODs do not interfere with a policyholder's reasonable expectations because judges have substantial discretion to change beneficiary designations when presiding over the divorce. *Id.*

Finally, the Supreme Court found that RODs do not prevent a policyholder from safeguarding his rights because he "can reverse the effect of the Minnesota statute with the stroke of a pen." If a divorcee desires their former spouse to remain the designated beneficiary, all they must do is fill out and mail in a change of beneficiary form. *Id.* at 1823-24.

And with that, the Supreme Court ended a decades-long debate over the constitutionality of RODs. The **PRACTICE POINTER** to take away from *Sveen* is that clients who wish to preserve beneficiary designations for their former spouses must either specifically state that in their marital settlement agreement or must send in a change of beneficiary form re-designating their former spouse following divorce.

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# A Team Approach to Divorce Without the Threat of Litigation: Collaborative Divorce

*By Melissa Exline, Esq.*

Few family law attorneys in Nevada offer Collaborative Divorce as a means for couples to obtain a decree of divorce. This is despite the fact that the Collaborative Law approach to dispute resolution has grown nationally as a means to aid couples trying to get a divorce. Indeed, as far back as 2011, Nevada enacted the Uniform Collaborative Law Act, which specifically allows for the Collaborative Law process. NRS 38.400 *et. seq.*

## So, What is Collaborative Divorce?

Collaborative Divorce is a way for married couples to get a divorce without the threat of litigation. How is this achieved? Don't we just negotiate pre-litigation and see what we can get done? If it fails, then file suit—right? Collaborative Law addresses precisely this last part, i.e., it takes away the incentive to throw up your hands and file when there is an apparent stalemate.

First, a little background: In 1990, a Minnesota lawyer named Stu Webb began a process that he called "Collaborative Law" with a key feature—the "disqualification agreement." In 2001, the American Bar Association (ABA) published the first book about Collaborative Law, entitled *Collaborative Law, Achieving Effective Resolution in Divorce Without Litigation*.[1] The book, which was updated in 2009, was written by Pauline H. Tesler, a collaborative attorney in San Francisco who was one of the initial people involved in the evolution of the Collaborative Law movement.[2] Stu Webb turned to Collaborative Law in response to the wearisome and frustrating nature of litigated divorce.[3] Both Webb and Tesler were instrumental in growing Collaborative Law as a new model for divorce lawyers.

The "disqualification agreement" is, in fact, a key element. It is a binding stipulation that disqualifies both spouses' attorneys if either party threatens or elects to go to court. This aspect is further included in Nevada law. NRS 38.490 explicitly allows the collaborative lawyer to withdraw from the process if litigation ensues. The reason this works is the spouse has "skin in the game" to continue to negotiate. Unlike mediation, where a party can refuse to agree after a significant amount of work has been put into reaching the tentative agreement, or when parties are involved in pre-litigation negotiation where an angry spouse elects litigation at any moment, in Collaborative Law, a party is faced with throwing away the lawyer and the lawyer's work to begin anew in order to opt to fight in court. This is daunting (and expensive) for a person who starts a case with the mindset of doing a "better" divorce. The net result is a party tends to work with their lawyer to reach the finish line short of going to court.

## A Team Approach

In Nevada, most collaborative lawyers work with a divorce "team." This team includes collaboratively-trained attorneys, mental health professionals as coaches for the parties (translation—the coach is the safe place for the party to unload his or her emotional burden rather than

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doing so all on the lawyer), child specialists (if needed), and financial professionals (the ones who can really dig in on tax issues, budgets, valuations and other money-related matters). An Interdisciplinary Collaborative model was developed in which the divorcing couple hires a divorce team consisting of divorce coaches (one for each party), a financial neutral, and a child specialist (if applicable and not required simply because the couple may have children), in addition to a collaborative attorney for each party.[4]

> "Collaborative Practice provides you and your spouse or partner with the support and guidance of your own lawyers without going to court. Additionally, Collaborative Practice allows you the benefit of coaches, child and financial specialists all working together with you on your team."
>
> International Academy of Collaborative Professionals (IACP). *Id.*

### Less Scorched Earth—More Respect

Another part of Collaborative Law is the voluntary good faith disclosures of all relevant and material information. All of the cards are on the table. The parties agree to maintain open communication and the teamwork to overlap as many shared goals as possible at the outset of the case. Everyone works together to problem-solve with the team to get each side as much of the limited "pie" as possible. The parties must work in good faith to reach a resolution. The goal is a mutually-acceptable agreement and a "win-win" in family law. Yes, I used those words, instead of "lose-lose," which is found in a typical litigation-model divorce.

With Collaborative Divorce, the goal is to create a lasting agreement, formed by the parties. Hopefully, it will allow a divorced family the ability to move into their new single status without the baggage and acrimony fighting in court often invites. Divorce with respect is possible.

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[1] *See* Pauline H. Tesler, Collaborative Law: Achieving Effective Resolution In Divorce Without Litigation (2001).

[2] *See* Gary L. Voegele, Ronald D. Ousky, and Linda K. Wray, Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes, William Mitchell Law Review, Vol. 33, Iss. 3, 2007, Art. 10.

[3] *See* Stu Webb, Collaborative Law: A Practitioner's Perspective on Its History and Current Practice, 21 J. Am. Acad. Matrim. Law. 155 (2008) (discussing the creation and development of collaborative law); Stu Webb, Collaborative Law: An Alternative for Attorneys Suffering "Family Law Burnout," 13 Matrim. Strategist, July 2000, at 7.

[4] *See* International Academy of Collaborative Professionals: What is Collaborative Practice, http://www.collaborativepractice.com.

For more information on Collaborative Practice visit Nevada Collaborative Divorce Professionals (NCDP) at www.nevadacollaborativedivorce.com.

**Melissa Exline is a local of Northern Nevada, who graduated from Reed High School, with honors, and later attended the University of Nevada, Reno, where she graduated in 1999 with dual degrees in Philosophy and Political Science. In 2002, Exline earned her Juris Doctor from Golden Gate University School of Law in San Francisco.**

**Her first six years as an attorney were spent honing her skills in civil litigation, working in a broad spectrum of areas including contracts law, construction defects, torts, employment law, and bad faith insurance disputes. In September 2008, Exline joined her friend Kim Surratt and began working at Surratt Law Practice, practicing Family Law and Estate Planning. Exline is also Vice President of Nevada Collaborative Divorce Professionals (NCDP).**

# Estate Planning Issues and Divorce

## *By Alicia Johnson, Esq.*

Family law and estate planning are areas of law that intersect from time to time. Unfortunately, I have completed a married couple's trust estate plan only to find that a year later they are facing divorce. When a couple divorces and they have a trust, inevitably questions arise regarding the division of assets and the status of the trust during and after the divorce. How is the trust affected by the filing of divorce? How are assets in the trust divided? Should the trust be revoked?

### Estate Planning Issues That Arise While Divorce Proceedings Are Pending

The typical trust for most married couples is a revocable living trust, meaning that it can be jointly revoked by the spouses during their lifetime. The rub, of course, is that ***both*** spouses must revoke or amend or remove community assets from the trust, and often, one spouse is not willing to cooperate during the course of the divorce. In that case, if one spouse dies while a divorce is pending but before the divorce decree is entered, the assets in the trust will automatically pass to the surviving spouse, who typically has full power to amend and revoke the trust after the death of the first spouse. Accordingly, the surviving spouse has complete and utter control of all the marital assets. Separate property maybe be transferred out of the trust with just the signature of the spouse who owns the separate property; however, the terms of the trust should be reviewed carefully before such a transfer is attempted.

If the spouses can agree to transfer the assets out of the marital trust, the marital assets can be held as tenants in common (as opposed to joint tenants with right of survivorship), so that if one spouse dies, the deceased spouse's one-half of the community property will pass in accordance with his or her will. Of course, if the assets are held as tenants in common (most commonly real property), the one-half interest will be subject to probate in the event of a death of either spouse. Therefore, the ideal scenario is that each spouse creates his or her own, separate revocable living trust, which can hold that spouse's one-half interest in the community property and the spouse's separate property, if any, and dictate what happens to that one-half interest on the death of that spouse. These separate trusts can hold each spouse's interest in the community property during the pendency of the divorce but will also hold the divided assets after the divorce.

### Estate Planning Issues That Arise After Divorce

Once the decree is entered, the relevant task is the actual division of the assets pursuant to that decree. Sometimes the spouses have already accomplished the division at the time of divorce, but usually, at a minimum, the real property must be transferred per the decree. If the real property is in a revocable living trust, the property must be transferred out of the trust to the spouse awarded the property before any attempt to revoke the trust is made. A common problem is that the spouse awarded the property does not take this crucial step and discovers, years later, that the property is either still in the trust or is still in the name of both parties. This can create multiple problems, particularly if a property awarded to one spouse continues to be held in joint tenancy, and the spouse awarded the property dies. Does the divorce decree govern? Or does the surviving joint tenant take the property? The best way to avoid such convoluted issues is to ensure that clients follow through with the proper execution of the deeds pursuant to the terms of the decree. In addition, divorced parties need to revoke the marital trust after all assets are transferred out and execute new wills and/or trusts.

If a divorced party has a will that names a former spouse as executor and bequeaths all property to the former spouse, NRS 133.115 provides that the divorce revokes every designation of beneficiary interest to the former spouse as well as any designation of the former spouse as personal representative. The only exceptions are if the decree or a separate property agreement states otherwise, or the will was created after the divorce. (Yes, you can give all your property to your former spouse in a will created after your divorce, if you so desire.) In addition, the statute treats the former spouse as dying before the testator, so that the contingent beneficiaries of the will, i.e., children, become the new beneficiaries. While the statute prevents an inadvertent award of property to a former spouse, it is an imperfect mechanism to avoid undesired outcomes. For example, the spouses may have originally agreed to make the contingent beneficiaries a one-half distribution to each side of their families. As a result, the estate will now pass, in part, to the family members of the former spouse, an outcome that is far from ideal. Therefore, it should be a priority of the newly-divorced client to execute a new estate plan.

### Estate Planning Issues That Arise Upon Second Marriage

It is certainly not unusual for a client who is divorced or who is widowed to get married again. Typically, the second marriage is later in life, the client has accumulated separate assets and wealth, and the client would like to see his or her children inherit the assets and not the new spouse. When I meet with a client in this situation for estate planning, I will always recommend a prenuptial agreement in conjunction with a separate revocable living trust for each party. The prenuptial agreement preserves the separate property, and the estate plan ensures that the separate property is inherited by the children. Additionally, trusts can be set up to benefit the new spouse for a period of time or even the new spouse's lifetime, with the residuary passing to the children on the death of the new spouse. When drafting a prenuptial agreement, the advice should be that trusts should be set up in conjunction with the agreement to address the client's goals with regard to inheritance of the separate assets.

Estate planning issues should be carefully navigated when divorce is involved. If estate planning is not timely addressed and someone dies, the results can be complicated and the outcomes less than desirable.

**Alicia Johnson was born and raised in Reno, Nevada and is committed to serving this community. Johnson graduated from Gonzaga University in 2001, *magna cum laude*, with a degree in Public Relations and with a women's golf scholarship. In 2004, Johnson graduated from Seattle University School of Law, *cum laude*. From 2007 to 2013, Johnson practiced law at a large firm in Carson City and served the needs of small businesses and families all over Northern Nevada, gaining valuable experience in the areas of business, real estate, wills, trusts, probate, and litigation.**

**She established Johnson Law Practice in 2013 to provide accessible legal services to small business and families, and continues to provide legal services in the areas of estate planning, real estate and business law.**