

# The Intersection of Divorce Law and Estate Planning *“After the Final Goodbye”*

INNS OF COURT TABLE 3 PRESENTATION

DECEMBER 2021



*JOIN US FOR A NEW TWIST ON AN OLD FAVORITE!*

♥ We are happy to bring back a few of our favorite couples from the Newlywed Game, but sadly they are now unwed and newly dead. That's right, for most these couples one spouse is now tragically deceased. Don't fret - the good news is we have everyone joining us, with a few in ghost form. Now it's time to ask YOU the legal questions about their specific scenarios! Let's give them some posthumous legal advice!

# Couple One



**MR. SAL SCATTERBRAINED  
AND  
MR. BENNY BENEFACTOR**

**(THE EX-SPOUSE AS BENEFICIARY/LEGATEE)**

# Scenario One

♥ In life, Sal Scatterbrained never seemed to have it together. That didn't stop Benny Benefactor for falling for him. However, after six years of marriage Benny Benefactor decided that he had had it with Sal's chaos and he filed for divorce. Sadly, just months after their divorce was finalized, Sal accidentally tripped on his untied shoelace in the middle of the street and was hit by a car. Sal Scatterbrained, always so forgetful, never changed his will OR his life insurance policy before his untimely death.

# What Happens Next?

- ♥ Does the death of a party post-divorce have an impact on a finalized divorce?
- ♥ What happens when you forget to remove an ex-spouse as a beneficiary of a financial account or life insurance?
- ♥ What happens when you forget to change your will and you've left assets to your ex-spouse?



## In the Matter of Lynn Mortner and Theodore Mortner, 168 NH 424 (2015)

Wife filed petition for divorce and a divorce decree was issued based on the parties' memorandum of understanding that purported to settle the action. Wife subsequently filed a motion to reconsider, requesting the court to vacate the divorce decree because the husband had died before the court had issued it. After a hearing, the Dover Family Court granted the wife's motion. The temporary administrator of the husband's estate appealed and the wife cross-appealed. The court affirmed the decision, the husband's death abated the divorce action.

## In the Matter of Patricia Sweatt and Arthur Sweatt, 170 NH 414 (2017)

Wife brought an expedited divorce action against husband, as she anticipated passing away because of a severe illness. The Dover Family Court entered a bifurcated divorce decree that decreed the parties were divorced and instructed the clerk's office to schedule a final hearing on the division of assets. The wife had passed away prior to the hearing and her daughter attempted to step in for her, although the daughter was not yet the administrator of her estate. The husband then asked for the divorce to be abated. That motion was denied. Eventually, the daughter was appointed administrator and the court allowed her to be substituted for the wife in the hearing. The husband asked for his abatement motion to be reconsidered, and it was denied. Husband filed an appeal. The court upheld the bifurcated divorce decree, as it ended the marriage prior to the wife's death, and the trial court had not abused their discretion by allowing the daughter, once appointed administrator, to substitute for the wife in the hearing.

# Estate of Frederick v. Frederick, 141 NH 530 (1996)

The ex-husband was named the beneficiary of annuity pension accounts that the wife/decedent had purchased prior to their marriage. The annuities provided that the beneficiary designation could be changed at any time, but the decedent never requested a change. The estate argued that the decree of divorce extinguished the ex-husband's rights to the proceeds of the annuities, and the trial court agreed. The Supreme Court reversed summary judgment and held that a divorce decree was required to *unambiguously* state an intent to remove a beneficiary in order to alter an original designation under a life insurance contract. The divorce decree at issue provided only that the parties intended to release each other from any and all obligations incurred during the marriage. The word "obligations" in the divorce decree could not be read to include the designation of a beneficiary, as there was no requirement that the decedent name or continue having her ex-spouse as her beneficiary.

# Estate of Tremaine v. Tremaine, 146 N.H. 674 (2001)

During their marriage, the decedent named the ex-wife as the beneficiary of his IRA. The decedent and the ex-wife divorced prior to the decedent's death. Although the divorce decree contained a stipulation concerning the IRA, the decedent did not change the named beneficiary. The ex-wife claimed that the language of the divorce decree was not an express and unambiguous statement of intent as required by the Dubois/Frederick test, that the decedent's financial affidavit did not list his IRA, thus failing to give her notice of the rights she would be relinquishing, and other errors. The appellate court held that a divorce decree must unambiguously evidence an intent to remove a beneficiary in order to effectively alter an original designation under an IRA contract. A divorce decree could only change a contractual beneficiary designation when it expressly stated that the parties intended such a result. The appellate court held that the language of the stipulation concerning his IRA in the divorce decree could be interpreted to mean that the ex-wife was to retain her interest. Therefore, the divorce decree failed to unambiguously change the beneficiary designation.

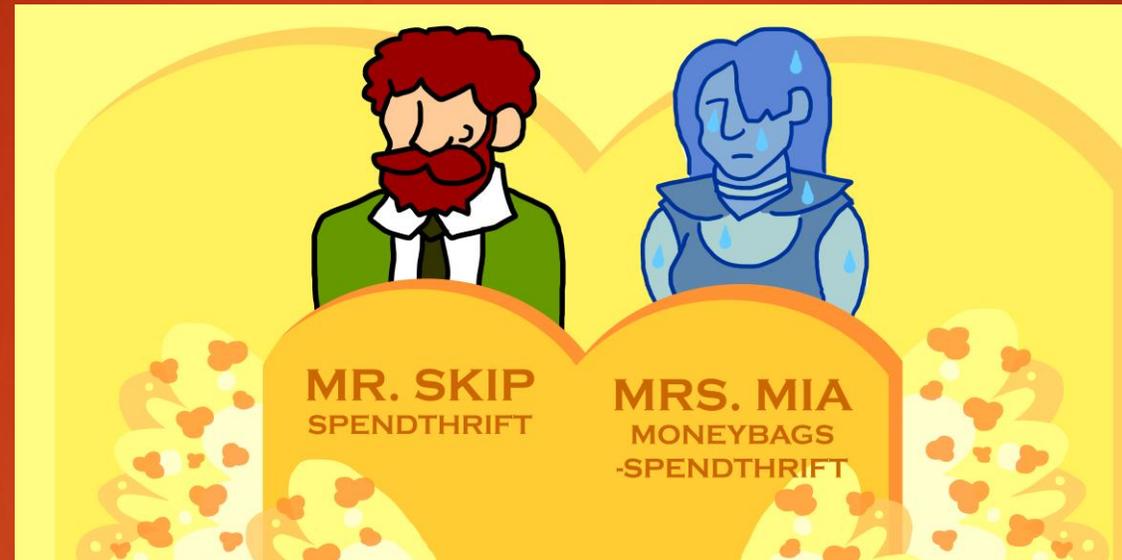
## RSA 551:13 Revocation

I. Except as provided in paragraph II, no will or clause thereof shall be revoked unless by some other valid will or codicil, or by some writing executed in the same manner, or by canceling, tearing, obliterating or otherwise destroying the same by the testator, or by some person by the testator's consent and in the testator's presence.

II. If after executing a will the testator is divorced or the marriage is annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. ...

III. If after executing a trust instrument in which a sole grantor reserves a power to alter, amend, revoke or terminate the provisions of the trust, the grantor is divorced or the marriage is annulled, the divorce or annulment revokes any disposition or appointment of property made by the trust to the former spouse, any provision conferring a general or special power of appointment to the former spouse, and any nomination of the former spouse as trustee, unless the trust expressly provides otherwise. ...

# Couple Two



**MR. SKIP SPENDTHRIFT**

**AND**

**MRS. MIA MONEYBAGS-SPENDTHRIFT**

**(THE EX-SPOUSE AS CUSTODIAL PARENT TO MINOR CHILDREN)**

# Scenario Two

- ♥ “Opposites attract” ...but can only stay together for so long! Mia Moneybags was an ambitious young law student when she met and fell in love with her future husband, the happy-go-lucky Skip Spendthrift. Mia Moneybags-Spendthrift became a high powered corporate lawyer, while Skip mostly worked part-time gigs and spent lots of (Mia’s) money on “get rich” schemes. Despite their differences, the Moneybag-Spendthrifts had three young children: Marley, Max, and Mel. But after Mia learned Skip spent the kids’ college fund on a night out in Vegas, the couple divorced. Unfortunately, not too long after that, while finally taking a day off, Mia drowned after her colleague’s yacht capsized.

# What Happens Next?

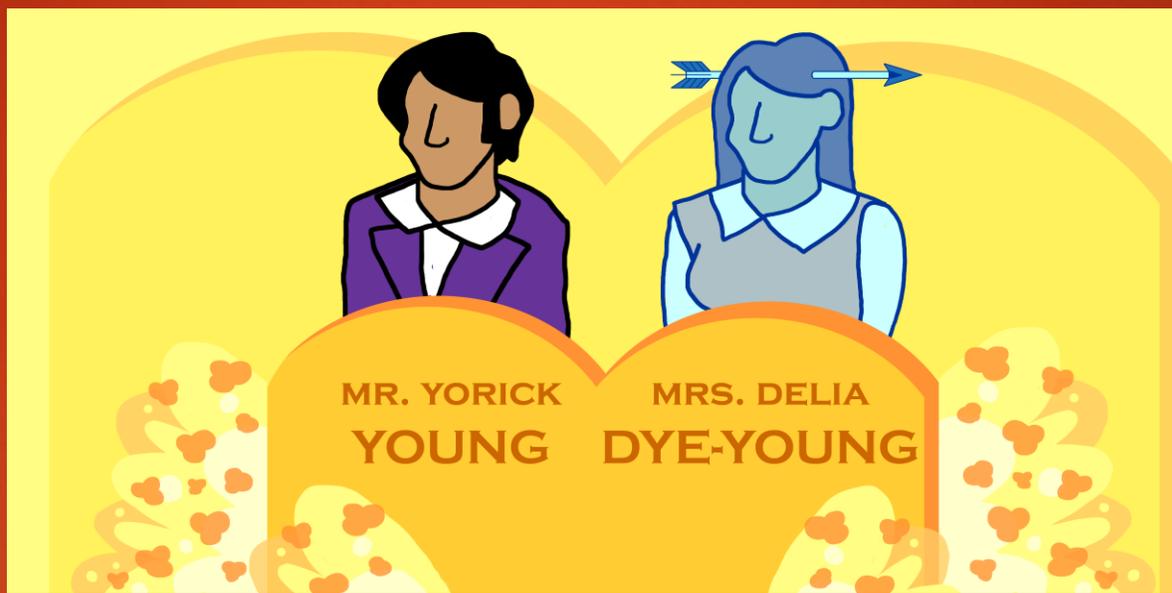
- ♥ Can the parents of a deceased ex-spouse provide for that spouse's surviving children *inter vivos* without being at risk of the surviving spouse accessing those funds?
- ♥ Can a party to a divorce ask a court to protect assets from a wasteful or underemployed spouse? What about an ex-spouse?
- ♥ Can a party to a divorce modify their estate plan during divorce proceedings?
- ♥ Can a surviving ex-spouse access assets of their deceased ex-spouse?



# Elter-Nodvin v. Nodvin, 163 N.H. 678 (2012)

The beneficiary's interest in an insurance policy does not rise to the level of a vested property interest unless the insured is somehow prohibited from **changing** the **beneficiary** designated in the policy, and petitioner had not alleged that anything prohibited her former husband from **changing** the **beneficiaries** of the disputed policies and accounts. Even if the purpose of a trial court's anti-hypothecation order in a **divorce** case was to preserve the status quo so that the trial court could equitably divide the couple's assets during the **divorce** proceeding, the husband's nomination of different beneficiaries of his insurance policy in no way impaired the trial court's ability to order him to name a particular beneficiary in the **divorce** proceedings. Rather, the trial court lost its ability to make such an order because the husband died, not because he **changed beneficiaries**. Thus, his actions did not violate the anti-hypothecation order and therefore could not serve as the basis for imposing a constructive trust.

# Couple Three



**MRS. DYE-YOUNG**

**AND**

**MR. YOUNG**

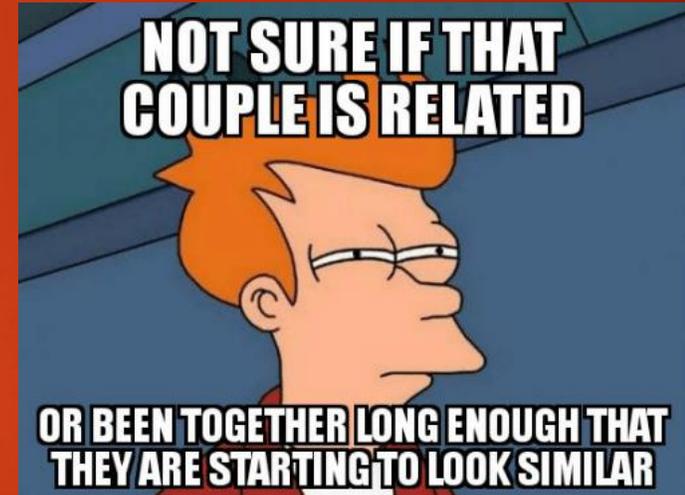
**(CHILD SUPPORT & TRUSTS)**

# Scenario Three

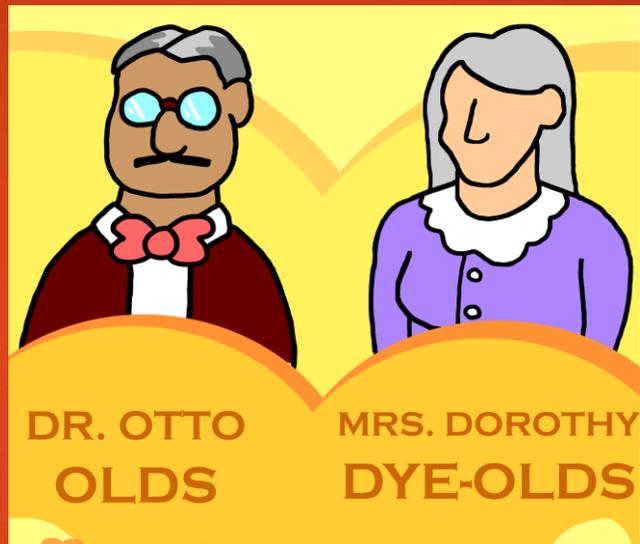
♥ Delia Dye-Young and Yorick Young got married...young. They were high school sweethearts and did everything together – they went to the same college, had the same major, and ended up working for the same company. The couple had two kids, Yolanda and Derek. However, at some point, Delia decided she wanted something different, so she filed for divorce and decided to start a new, better paying job out of state. Part of the divorce decree was that Delia would pay child support to Yorick. Alas, poor Delia died!

# What Happens Next?

- ♥ What happens when a support-paying ex-spouse dies?
- ♥ What protections can be put into place to ensure that the spouse needing support is able to receive same should the payor spouse die?
- ♥ What is the role of life insurance to guarantee child support and alimony payments?



# Couple Four



**DR. OLDS  
AND  
MRS. DYE-OLDS**

**(ESTATE PLANNING & GRANDCHILDREN; HEALTH CARE &  
FINANCIAL DURABLE POA)**

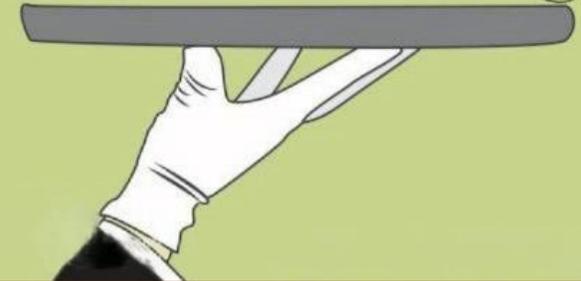
# Scenario Four

♥ Dr. Otto Olds and Mrs. Dorothy “Dot” Dye-Olds found love after their first marriages collapsed. Dot was the mother of Delia, who has recently died. Dot dotes on her grandchildren. Otto had no children from his first marriage. He also spoils his step-grandchildren and wants to make sure he can help support them now that Delia has passed. While Dot is a retired teacher and substitutes here and there, Otto is a practicing eye doctor who hopes to retire in the next two years. While no one died in this scenario, this couple wants to be prepared for everything – death, divorce, advanced directives...

# What Happens Next?

- ♥ Can the parents of a deceased ex-spouse provide for that spouse's surviving children *postmortem* without being at risk of the surviving spouse accessing those funds?
- ♥ Can advanced directives be modified during a divorce proceeding? What happens when they are not and one ex-spouse dies?
- ♥ In a post-divorce scenario, what changes in investments, retirement age and lifestyle may be necessitated and how does the evolution of post-divorce retirement planning impact an ex-spouse's estate plan?

I don't spoil  
my grandkids.  
I'm just very  
accommodating.



# In the Matter of Earley & Earley, 2021 N.H.

LEXIS 67

(May 5, 2021)

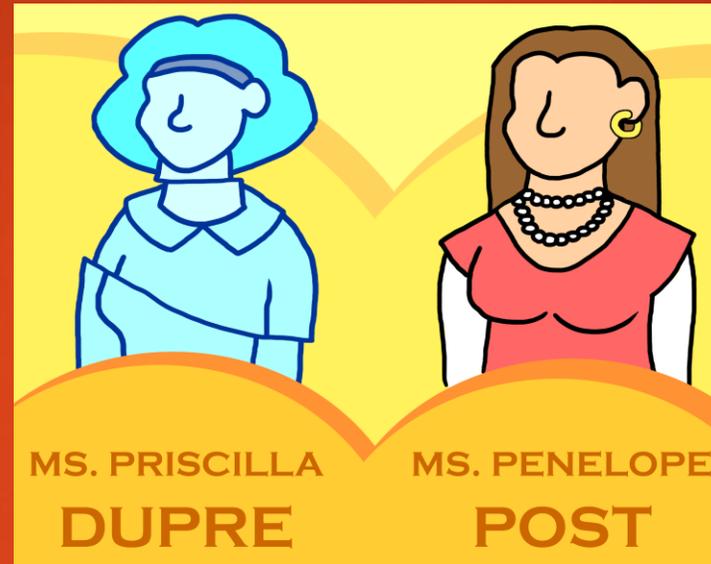
In divorce cases, if the trial court apportions marital property, it must do so equitably. Marital property includes all tangible and intangible property and assets, real or personal, belonging to either or both parties, whether title to the property is held in the name of either or both parties. Any property acquired up to the date of a final decree of divorce is considered marital property. Accordingly, the trial court must determine, as a matter of law, what assets constitute marital property. Then, it must exercise its discretion to equitably distribute those assets. The trial court's determination as to what assets are marital property presents a question of law, which is reviewed *de novo*. RSA 458:16-a, I, II.

Because the statute governing spendthrift trusts expressly prohibited any interest in a trust that was subject to a spendthrift provision from being classified as marital property, and here respondent's interest in a trust was subject to a spendthrift provision, respondent's interest in the trust was not marital property subject to equitable division. RSA 458:16-a; 564-B:5-502(e).

## RSA 137-J:15: REVOCATION

**137-J:15 Revocation. – I. An advance directive or surrogacy consistent with the provisions of this chapter shall be revoked ... (c) By the filing of an action for divorce, legal separation, annulment or protective order, where both the agent and the principal are parties to such action, except when there is an alternate agent designated, in which case the designation of the primary agent shall be revoked and the alternate designation shall become effective. Re-execution or written re-affirmation of the advance directive following a filing of an action for divorce, legal separation, annulment, or protective order shall make effective the original designation of the primary agent under the advance directive.**

# Couple Five



**MS. DUPRE**

**AND**

**MS. POST**

**(PRE & POST NUPTIAL AGREEMENTS)**

# Scenario Five

- ♥ Priscilla duPre and Penelope Post were a very put-together couple. These two Type A-planners lived for organization: rigid schedules, detailed calendars, and precision in everyday life. It was love at first Outlook invite. They quickly started living together and began preparing for their wedding. Priscilla is the heir to a big stationary company (their top product? You guessed it...planners), so the family lawyer recommended a prenuptial agreement. The wedding was scheduled for June, the prenup was signed right after Thanksgiving, but then out of the blue, Penelope insisted they elope at Christmas! Although she agreed, this sudden spontaneity disturbed Priscilla, and the couple began quarrelling. To try to calm down Priscilla, Penelope recommended they sign a post-nuptial agreement, too, which they did. However, duPre-Posts couldn't make it work, and they divorced the next fall. On a site visit to the family's paper factory, Priscilla was pushed into a woodchopper by a disgruntled factory worker and died.

# What Happens Next?

- ♥ At what point can a married couple enter into a post-nuptial agreement?
- ♥ Can a spouse who is contemplating divorce enter into a post-nuptial agreement without disclosing the potential divorce to the other spouse?
- ♥ What if both spouses acknowledge that they are entering into the post-nuptial agreement while contemplating a future divorce?
- ♥ On what grounds can a post-nup (or pre-nup, for that matter), be overturned by the Courts?



# Estate of Wilber, 165 N.H. 246 (2013)

In 2007, the couple executed a postnuptial agreement in which the husband agreed to transfer his property in Maryland to the wife, who agreed not to make any claim on his New Hampshire property during her life or after death. The court first held that postnuptial agreements could be enforced in New Hampshire. Next, respondent had not shown that the agreement was unfair to the wife. No evidence suggested fraud, mistake, or duress. The facts that there was no financial disclosure document did not show that a material fact was withheld from the wife, and the fact that the wife did not have counsel did not invalidate the agreement. Nothing indicated that the wife did not understand the financial implications of the agreement. The wife had been married to the husband for about 50 years and paid their bills for at least some time in the later years of the marriage. There was no evidence that the exchange was unconscionable because of some gross inequality in the value of the spouses' respective rights under the agreement. Furthermore, the husband had kept his promise to convey title to the Maryland property to the wife, who had accepted title.

After her husband omitted her from his will, a wife sought to claim a statutory share under **RSA 560:10** (2007) of certain real property. Following the wife's death, the 9th Circuit — Nashua Probate Division (New Hampshire) allowed respondent, the wife's estate, to claim the share. Petitioner, the husband's estate, appealed.

The court reversed the trial court's decision. It remanded the case for further proceedings consistent with its opinion.