"Renegotiated Families" and Donative Intent

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Naomi R. Cahn, *Revisiting Revocation Upon Divorce?*, 103 **Iowa L. Rev.** 1879 (2018).

Last year I reviewed Adam J. Hirsch, *Inheritance on the Fringes of Marriage*, which explored whether donors would want their fiancé, ex-fiancé, separated spouse, or divorcing spouse to take a share of their estate. Following this theme of donor intent vis-à-vis a current or former intimate partner, I was particularly interested in Naomi Cahn's article, *Revisiting Revocation Upon Divorce*, in which she challenges lawmakers' assumptions about decedents' relationships with their former spouses and their former spouses' relatives after divorce or annulment. Under the 1990 Uniform Probate Code, divorce or annulment revokes any provisions in a will or nonprobate instrument concerning the former spouse. It also revokes bequests to the former spouse's relatives, including her children from another relationship, parents, siblings, nieces and nephews—the testator's former stepchildren and in-laws. Although the presumption of revocation may be rebutted in limited circumstances, this is both difficult and rare. Many states follow the 1990 UPC's approach.

I must admit that the application of the doctrine of revocation upon divorce to a former spouse's relatives has never seemed quite right to me. Maybe it is because I share close relationships with my spouse's relatives and would continue to want them to benefit from my estate if my marriage were to end in divorce. My expectations are also based on my parents' own experience with divorced relatives. My mother was very close to her sister's ex-husband until his death and my father is very close to his brother's ex-wife. Of course, my own personal experience is not evidence of what most donors would want, but Professor Cahn identifies several developments that demonstrate that the donor's relationship with the former spouse and the former spouse's relatives may not necessarily end when the legal relationship is terminated.

Professor Cahn observes that the divorce process has changed since the 1970s from the acrimonious battles often found in family law casebooks in which the petitioner had to prove fault to a kinder and gentler no-fault divorce. She explains that while some divorces are still acrimonious, lawyers now encourage clients to engage in mediation and other collaborative approaches that allow former spouses to co-parent and maintain amicable relationships after divorce. Of course, an amicable relationship and effective co-parenting does not mean that a donor's testamentary preferences vis-à-vis a former spouse will remain the same after divorce. Nonetheless, I was reminded of Professor Hirsch's study finding that more than more than 60% of divorcing spouses (those who were in the process of divorcing but do not have a final divorce decree) wished to leave part of their estate to the divorcing spouse. While a donor's preference vis-à-vis a divorcing spouse might not be the same as her preferences vis-à-vis a former spouse, it suggests that Professor Cahn is wise to question whether revocation upon divorce actually reflects the intent of most donors.

I appreciated Professor Cahn's policy arguments for revisiting the presumption of revocation upon divorce. She observes that revocation may have disparate effects on women, racial and ethnic minorities, and less wealthy individuals. She explains that as a result of women's lower earnings, fewer years in the paid workforce, and longer life expectancy, surviving former spouses are likely to be older women with fewer assets for retirement when compared with divorced men. Consequently, revocation of a designation to a former spouse has a disproportionately negative impact on divorced women. She

further observes that individuals who do not update their will and nonprobate beneficiary designations after divorce may be less educated and have fewer resources than wealthier individuals who have access to lawyers who will remind them to update their estate plan after divorce and do it for them. Although the effect of revocation on racial and ethnic minorities, who are more likely to divorce but less likely to have a will or assets at death, is much less clear, Professor Cahn wisely cautions that given these gender, racial, and class differences, lawmakers should examine the consequences of the presumption of revocation on different groups.

Professor Cahn's discussion of several empirical studies involving relationships between former family members further demonstrates that revocation upon divorce may not reflect the donor's intent, especially when there are children of the marriage. Her own study of adult children caring for a dying parent found that one-fifth of former spouses provided some level of caregiving to the former spouse. As I read this article, I thought about divorced friends and family members and how they might act in similar circumstances. It is not surprising that a mother would help her adult son care for his dying father, even if the mother and father are divorced. It would also not be surprising if the father wanted the mother to continue to benefit from his estate, especially if they maintained a cooperative, and possibly even friendly, relationship. Professor Cahn's discussion of another study finding that one-quarter of individuals believe that a former daughter-in-law should be included in a will after a divorce similarly demonstrates that revocation upon divorce statutes do not always reflect a donor's intent.

Despite these changes in the divorce process and post-divorce relationships, Professor Cahn acknowledges that the presumption of revocation upon divorce may serve to effectuate decedent's intent in some, if not many, cases. The presumption benefits donors who intended to update their estate plan after divorce but never got around to it or assumed that the designation to a former spouse and her family members would automatically be revoked after divorce. Other donors, however, may have expected that the designations they made while married would remain in effect until they affirmatively changed them. Professor Cahn examines other countries' approaches to designations benefitting a former spouse—some countries have no presumption of revocation upon divorce while others do—to demonstrate that the UPC approach is not necessarily the best approach.

Given the lack of empirical evidence on divorced donors' intent and the low probability that lawmakers will abolish the presumption of revocation upon divorce any time soon, Professor Cahn proposes practical solutions that would increase the likelihood of effectuating decedent's intent without unduly burdening the courts. Her stated "goals in exploring these reforms are, first, to develop a more functional approach that would acknowledge caregiving and functional familial relationships, and second, to respect donative intent." (P. 1907.) I was particularly persuaded by her recommendation that lawmakers retain the presumption of revocation but place a time limit on its application. This proposal, modeled on South Africa's approach, would provide a divorced donor with some time to change the beneficiary designations but if they are not changed within that time period, the law would presume that the divorced donor intended to keep the designations made before the divorce.

Professor Cahn also proposes amending revocation upon divorce statutes to allow rebuttal of the presumption by extrinsic (but clear and convincing) evidence of donor's intent. Such evidence might include the relationship between the donor and the former spouse (or the former spouse's relatives if they are designated beneficiaries) after the divorce, the length of time between the divorce and donor's death, and any oral statements that indicate intent.

My favorite solutions were those that courts and lawyers could adopt rather easily. Professor Cahn proposes that family courts include advice on divorce filing forms explaining the revocation upon divorce rule (or whatever default rule the state has adopted) and allowing divorcing spouses to make an alternative designation on the form itself. She also reminds family law practitioners to advise their

divorcing clients to update their beneficiary designations to reflect their intent, and trust and estate lawyers to draft documents that clarify the status of a designation to a spouse and the spouse's relatives in the event of divorce. She observes that trusts and estates lawyers routinely draft provisions designating who should take a bequest if "my spouse does not survive me" and can easily add language designating who should take if "my spouse and I divorce."

Professor Cahn's article is a must read for anyone interested in recognizing the post-divorce collaborative and caregiving relationships that family law encourages and respecting divorced donors' intent vis-à-vis a former spouse and the former spouse's relatives.

Note About the Title: The term "renegotiated families" is taken from Robert E. Emery, Renegotiating Family Relationships: Divorce, Child Custody, and Mediation (1994).

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