



WSSFC 2023

Friday Opening Plenary

Three Views: A “Crossfire”

Moderator:

Kathryn L. Knowlton, Disability Rights Wisconsin, Milwaukee

Panelists:

Angela M. Frozena, Frozena Law LLC, Kenosha

Megan A. Phillips, Richter & Phillips LLP, Madison

Liz Tobolt, Liz Tobolt Law LLC, Hartland

About the Presenters...

Angela M. Frozena owns Frozena Law LLC in Kenosha where her practice is focused on estate planning and related practice areas. She received an Honors Bachelor of Science from Marquette University in Applied Mathematical Economics, her law degree from the University of Wisconsin-Madison, and a Master of Business Administration from the University of Wisconsin-Whitewater with emphases in Finance, Management, and International Business. In addition to the private practice of law, Ms. Frozena has experience in the financial services industry as a trust officer, compliance officer, management consultant, and operations manager.

Kathryn L. Knowlton is the Supervising Attorney for the Victim Advocacy Program at Disability Rights Wisconsin, and is the owner and managing attorney of Knowlton Law Group, LLC in Wauwatosa and Stone Lake, Wisconsin. Her primary areas of practice are victim rights enforcement, and family law, with special emphasis in survivor advocacy and representation. Kate earned her J.D. at Marquette University, while teaching English at the secondary level with her degree from UW-Madison. For over a decade, Kate has worked with law enforcement and through the criminal justice process, directly representing victims at both the state and federal levels.

Megan A. Phillips a founding partner at Richter & Phillips, focusing on family law and civil litigation. She also defends licensed professionals before various boards within the Department of Safety and Professional Services. She earned a B.A. in journalism and psychology from the University of Wisconsin – Madison and returned there for law school. Megan has taught negotiations and mediation at the University of Wisconsin Law School for over 10 years. She was chosen by her peers and a selection committee as a Super Lawyers Rising Star in 2022, and was also selected nine consecutive years prior.

Liz Tobolt grew up on a family dairy farm in North Lake, Wisconsin and began selling real estate after graduating from high school. While selling real estate full-time, Tobolt earned her business degree from UW-Whitewater and her JD from Marquette Law School. Today Tobolt is a solo practitioner in her Hartland law firm where she practices exclusively real estate law. Aside from teaching seminars at the Wisconsin State Bar she's also taught classes at UW-Madison Law School, WCTC, and continuing ed and Broker's classes for the Wisconsin Realtor's Association. In addition to teaching and practicing law, Tobolt is First Weber's number one agent in terms of production for Southeastern Wisconsin and has authored works in the Wisconsin Realtors Magazine. Tobolt has served several stints on her local planning commission and is very active in local community service activities.

THREE VIEWS: A “CROSSFIRE” CLE

Katheryn Knowlton

Angela M. Forzena

Megan A. Phillips

Liz Tobolt

1

Lois and Clark marked their 20th anniversary in February. They own a home, three vehicles, a cabin in northern Wisconsin, and an undeveloped lot in rural Brown County (worth less than \$50,000), as well as retirement and savings accounts.

They also had been at odds for months over whether to encourage their 15-year-old son, Jon, to follow in his dad’s footsteps. Tired of the drama, Lois filed for divorce in May.

2



Prior to the divorce, what should Lois and Clark have done regarding their assets?

3



In August, Clark suffered a severe brain injury. How does his incompetency affect dividing their assets?

4



In September, the Green Bay Packers announced plans for a new training facility – across from the Brown County lot. How does the resulting change in valuation of that asset affect what they own?

5



Clark died intestate on October 1. How should Lois proceed and what will happen to their assets?


6

John and Mary have been married for 20 years and have no children. John works as a school teacher and Mary as a nurse. They are both in their late 50's. Following what she described as a "mid-life crisis" a few years ago, Mary began impulsively spending large amounts of the couples' savings funds on shopping purchases. This has caused some significant credit card debt (nearly \$70,000 with interest accruing monthly) and draining of liquid savings for the couple (only about \$10,000 of liquid assets remain). There was significant strain in the parties' marriage after this.

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Luckily, they've managed to pay-off their mortgage over the years and jointly own a home worth about \$400,000 currently, which they bought together just after getting married. Additionally, they have retirement accounts through the State of Wisconsin, since both have been employed by the school system and state hospital system for their entire marriage.

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Unfortunately, John was recently diagnosed with frontotemporal dementia after he showed symptoms of confusion, personality changes and increasing memory loss. He will soon be forced into early retirement. The parties are extremely concerned about the costs of the memory care that John might need for years to come, especially because he has no long-term care insurance to help, especially given the credit card debt they now have in addition.

9




They've tried to brainstorm all sorts of options, including possibly drawing the equity out of their home to pay off credit card debt and pay upcoming medical bills. They've also discussed even possibly transferring assets to Mary in a divorce so John had no assets or income and might qualify for some government assisted memory care. They also thought about gifting money or property to relatives or to charity while staying married so they both might qualify for government assistance.

10




The couple calls your law firm jointly to request a consultation, although they are not sure whether they should meet with a lawyer who practices family law, estate planning, real estate, or some other practice area. Your firm has attorneys in all three of these areas.

11




Before scheduling any consultation, are there concerns about a conflict of interest between John and Mary, or the possibility of joint representation? Can they meet with anyone in your office jointly?

12



Which type of lawyer should one or both parties start with?

13



What could be some overall strategies that the parties could consider, either individually or jointly, under these circumstances?

14

2023 Wisconsin Solo and Small Firm Conference
Three Views: A “Crossfire” – Estate Planning
Angela M. Frozena, Frozena Law LLC

Note: This outline is a very high-level overview of estate planning documents and concepts related to the scenario(s) planned for discussion at the session.

Common estate planning documents:

- Revocable Trust (Chapter 701)
 - Offers management of property during lifetime, including incapacity, and at/after death.
 - Typically minimal gap between death and ability to move forward with administration – gap can be almost zero with a co-trustee in place prior to death of surviving/only grantor (creator) of trust.
 - Does not (usually) require Court involvement.
 - Generally considered more private than a will.
 - Does not require cooperation of interested persons/beneficiaries to begin administration.
 - Administration can be more economical than probate (will) administration in some cases.
- Will (Chapter 853)
 - Either used as a stand-alone document to provide the ultimate dispositive instructions for property or as a companion to a trust.
 - When used as companion to trust is generally referred to as a pour-over will and the trust, not the will, contains the ultimate dispositive provisions because the will’s dispositive provision is to direct all property to the trust.
 - Does not control property until after death and requires approval by Court/Register in Probate to be effective. Can result in delay in access to property of the decedent, particularly if all interested persons are not cooperative.
 - Will is filed with Circuit Court and is considered public record, so generally considered less private than a trust-centered plan.
- Marital Property Agreement including Washington Will provisions (for couples only) (Chapter 766)
 - In the estate planning context, this is a marital property agreement for estate planning/death purposes only. It is not intended to control in the case of divorce, annulment, or legal separation.
 - Classifies the property of the couple as individual, marital property, or survivorship marital property, or a combination of the three.
 - Can also be used in the Elder Law context for Medicaid planning.
- Durable Power of Attorney for Finances and Property (Chapter 244)
 - Delegates the principal’s power to an agent to make financial-related decisions.
 - Is effective immediately upon signing unless explicitly stated otherwise.
 - The document being effective does not impact the ability of the principal to continue to make decisions and manage own affairs.
 - If an individual becomes incapable of managing his/her own affairs and does not have a durable power of attorney for finances in place, a guardianship of the estate will be necessary. Wisconsin does not have a default decision maker statute for financial

matters. However, practically speaking, a spouse may be able to manage financial affairs for a period of time based on joint ownership of accounts.

- The Wisconsin statutory form has the principal initial broad categories of powers that he/she would like granted to the agent. The statutes need to be consulted for the full extent of the power granted in each category.
- Health Care Power of Attorney (Chapter 155)
 - Delegates the principal's power to an agent to make health-related decisions.
 - Typically is activated (meaning agent can act) upon a finding of incapacity by two health care professionals or a health care professional and psychologist. However, statute leaves open the possibility of being effective immediately or otherwise defining when the document will be active. (Note: other states' statutes explicitly provide the option of the document being active immediately.)
 - The statute does not explicitly provide instructions for how to "de-activate" a health care power of attorney, although from a practical perspective it appears health care providers use the same standard to "de-activate" as they do to activate it.
 - Wisconsin's Health Care Power of Attorney statute is known to be more restrictive than most other states.¹ Even if other documents are not updated when someone moves to Wisconsin, the Health Care Power of Attorney absolutely should be updated to conform with Wisconsin's more restrictive standards.
 - An agent must be provided explicit authority to admit the principal for longer than a short-term or respite stay in a nursing home or community-based residential facility. Many other states do not have that requirement, so health care powers of attorney from other states often do not allow for long-term admission to a nursing home or CBRF.
 - An agent must be provided explicit authority to withhold or withdrawal a feeding tube.
 - Health Care Powers of Attorney executed in Wisconsin must include a statutory required notice unless a certification is signed by the principal's lawyer. However, this requirement does not prevent the acceptance of a Health Care Power of Attorney validly executed in another state.
 - If an individual becomes incapable of managing his/her own health care matters and does not have a health care power of attorney in place, a guardianship of the person will be necessary. Regardless of the approach some health systems may be taking, Wisconsin does not have a default decision maker statute for health care matters. E.g. a spouse or other next of kin does not have authority to make health care decisions without a valid health care power of attorney or guardianship of the person.
- Declaration to Health Care Professionals (Living Will) (Chapter 154, Subchapter II)
 - Document that does or does not authorize the withholding or withdrawal of life-sustaining procedures or of feeding tubes when a person is in a terminal condition or persistent vegetative state.

¹ The American Bar Association includes Wisconsin in a list of "Forbidding Four;" along with New Hampshire, Ohio, and Texas; when it comes to the use of a national healthcare directive. [Giving Someone a Power of Attorney for Your Healthcare \(multi-state guide and form\) \(americanbar.org\):](https://www.americanbar.org/groups/law_aging/resources/health_care_decision_making/power_atty_guide_and_form_2011/)
https://www.americanbar.org/groups/law_aging/resources/health_care_decision_making/power_atty_guide_and_form_2011/

- Terminal condition for purposes of the statute is narrower than what some people may think of as a terminal condition. It is a condition that would cause death imminently, such that life-sustaining procedures are only postponing the moment of death.
- If there is a conflict between a health care power of attorney and declaration to health care professionals the statutory default is that the health care power of attorney will control.
- The living will has no effect during pregnancy by statute. (Wis. Stat. §154.0(2))
- Authorization for Final Disposition (Chapter 154, Subchapter IV)
 - Allows individual to name who they would like to make decisions about the final disposition of their remains.
 - If no individual(s) names, default rules are generally as follows:
 - Surviving spouse
 - Surviving child or majority of surviving children
 - Surviving parent(s)
 - Surviving siblings or majority of surviving siblings
 - Other individuals related to decedent as specified in Wis. Stat. § 900.001(16)
 - Guardian of the decedent
 - Any other individual will to handle decisions who has been unable to find any of the individuals listed above after a good-faith effort
 - There are exceptions to the default rules under Wis. Stat. §154.30(3) including individuals charged with decedent's death, spouse when an action to terminate the marriage is pending, and individual that probate court determines was estranged from the decedent at time of death.
 - Also provides an opportunity to express wishes regarding final disposition, services, and potential source of funds to pay for final expenses.
 - Can be particularly beneficial when an individual has multiple people in a tier of default decision makers (e.g. multiple children, two surviving parents who are no longer together, multiple surviving siblings) or does not have close family he/she would want to make arrangements.

Sampling of other available estate planning tools (in no particular order):

- Designation of TOD Beneficiary (for real estate) (Wis. Stat. §705.15)
- Deed to Trust (Attorney preferences vary as to whether quit claim, warranty, or special warranty deed is used)
- Wisconsin Delegation of Parental Authority (Wis. Stat. §48.979)
- Beneficiary designations including Payable on Death (bank accounts) or Transfer on Death (investment accounts) (Chapter 705)

Impact of Dissolution of Marriage or Filing for Dissolution of Marriage² to Estate Planning Documents:

² Many of these rules (including spousal treatment in intestate succession) apply to domestic partnerships as well. However, given the relatively small number of domestic partnerships and the fact that no new domestic partnerships may be established in Wisconsin, they are not specifically addressed in this outline.

Regardless of the following default provisions, it is highly recommended that any individual who is currently a party to a marital dissolution action or is recently divorced, annulled, or legally separated review and likely revise their estate planning documents. A family law attorney will likely need to be consulted regarding changes to the disposition of property, if any, during the pendency of the action to make sure any changes comply with any court orders or statutory prohibitions.

DOCUMENT	EFFECT OF FILING OF DISSOLUTION ACTION	EFFECT OF TERMINATION OF MARRIAGE
Trust³	<p>No statutory impact upon the filing of dissolution action.</p> <p>Document can include language specifically addressing what happens in the event of filing a dissolution action, but validity would likely be impacted by court orders and other statutory provisions.</p>	<p>With some exceptions, termination of marriage revokes any revocable disposition made by the decedent to the former spouse or a relative of the former spouse under Wis. Stat. §854.15.</p> <p>Document can also include language specifically addressing what happens in the event of termination.</p>
Will⁴	<p>No statutory impact upon filing of dissolution action.</p> <p>Document can include language specifically addressing what happens in the event of filing a dissolution action, but validity would likely be impacted by court orders and other statutory provisions.</p>	<p>With some exceptions, termination of marriage revokes any revocable disposition made by the decedent to the former spouse or a relative of the former spouse under Wis. Stat. §854.15.</p> <p>Document can also include language specifically addressing what happens in the event of termination.</p>
Marital Property Agreement⁵	<p>No statutory impact upon the filing of dissolution action.</p> <p>Document can include language specifically addressing what happens in the event of filing a dissolution action, but validity would likely be impacted by court orders and other statutory provisions.</p>	<p>With some exceptions, termination of marriage revokes any revocable disposition made by the decedent to the former spouse or a relative of the former spouse under Wis. Stat. §854.15.</p>
Durable Power of Attorney for Finances⁶	<p>Authority of spouse named as Agent terminates upon filing, unless the document provides otherwise. (Some ambiguity if</p>	<p>Authority terminated at filing, so no additional action should be needed at termination.</p>

³ Wis. Stat. §701.1204

⁴ Wis. Stat. §853.41

⁵ Wis. Stat. §766.58(3m)

⁶ Wis. Stat. § 244.19(2)(c)

	termination of authority applies at filing for legal separations.)	No ambiguity that authority of spouse agent is terminated upon legal separation, unless power of attorney provides otherwise.
Health Care Power of Attorney⁷	<p>No change at filing of dissolution action.</p> <p>Consider adding language to document to treat spouse named as agent as pre-deceasing principal upon filing of dissolution action.</p>	<p>If spouse is named as health care agent, the entire HCPOA is revoked and invalid upon termination of marriage. This can be a terrible result because people often have back-ups named who could serve.</p> <p>Removing the spouse as agent at time of or shortly after filing whether by executing a new HCPOA or language in the document removing spouse at filing of dissolution action should alleviate this concern.</p>
Declaration to Health Care Professionals	No change – no agent is named, so there is no practical impact for a dissolution action.	No change – no agent is named, so there is no practical impact for termination of marriage.
Authorization for Final Disposition⁸	Authority of spouse terminates if an action for dissolution had been filed and was pending at time of death.	<p>Statute is not explicit about authority of ex-spouse who was named. Given that authority of spouse is terminated upon filing of a dissolution action, it would seem to follow an ex-spouse doesn't have authority (unless authority re-established after termination), but best practice would be to execute a new Authorization of Final Disposition given the lack of clarity, particularly since statutes on filing says "was pending at the time of decedent's death"</p> <p>May also consider adding specific language to the document to cover termination of marriage.</p>

⁷ Wis. Stat. § 155.40(2)

⁸ Wis. Stat. § 154.30(3)(a)(3) and 154.30(9)

Rules of Intestacy or what happens to your property at death if you don't have a will or other valid testamentary instructions (Chapter 852):

- If married and...
 - Decedent has no surviving descendants⁹--
 - All to surviving spouse.
 - Decedent has surviving descendants, and all are in common with surviving spouse—
 - All to surviving spouse.
 - Decedent has surviving descendants with someone other than surviving spouse—
 - Surviving spouse receives one-half of the decedent's property other than the decedent's interest in marital property and the decedent's interest in property held equally with the surviving spouse as tenants in common.
 - Descendants *per stirpes* receive all of the decedent's property not passing to the surviving spouse.
- If unmarried and...
 - Decedent has no surviving descendants—
 - All to parents, if none then
 - All to siblings and descendants of deceased siblings *per stirpes*, if none then
 - One-half to maternal grandparents and one-half to paternal grandparents or more remote relatives in those family lines (see Wis. Stat. § 852.01(1)(f))
 - Decedent has surviving descendants—
 - All to descendants *per stirpes*
- Circumstances to be mindful of, but not covered here:
 - Half blood relatives (Wis. Stat. § 854.01(4))
 - Posthumous heirs (Wis. Stat. § 854.21(5))
 - Someone related through two lines of relationship (Wis. Stat. § 854.21.(6))
 - Child born to unmarried parents (Wis. Stat. § 852.05)
 - Parent who abandons a child (Wis. Stat. § 852.14)
 - Heir who kills the decedent (Wis. Stat. § 854.14)
 - Advancements made by decedent to an heir (Wis. Stat. § 854.09)
 - An heir that owes a debt to a decedent (Wis. Stat. § 854.12)

⁹ Statutes use the term “issue” instead of “descendants.”

Case Scenario

John and Mary have been married for 20 years and have no children. John works as a school teacher and Mary as a nurse. They are both in their late 50's. Following what she described as a "mid-life crisis" a few years ago, Mary began impulsively spending large amounts of the couples' savings funds on shopping purchases. This has caused some significant credit card debt (nearly \$70,000 with interest accruing monthly) and draining of liquid savings for the couple (only about \$10,000 of liquid assets remain). There was significant strain in the parties' marriage after this.

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