

# **“Till Divorce Do Us Part”**

## **The Beneficiary Designation Legislation**

by

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**I. WHY?**

**Background:**

A. Florida Trust Law and Florida Probate Law provide that upon a dissolution of marriage a provision of the will or trust which affects the decedent’s spouse is void upon dissolution or annulment of marriage. Fla. Stat. § 732.5072 and Fla. Stat. § 736.1105.

B. No statute provides the same provision for non-probate or non-trust assets, such as individual retirement accounts (IRAs), life insurance policies, payable on death accounts (PODs).

C. Several cases have determined that when a beneficiary designation is not changed after a divorce, the beneficiary designation **is** still valid.

1. Crawford v. Barker, 64 So. 3d 1246 (Fla. 2011) provided that “[a]bsent the marital settlement agreement providing who is or is not to receive the death benefits or specifying who is to be the beneficiary, courts should look no further than the named beneficiary in the separate document of the policy, plan or account.” The court pointed out that general language in a marital settlement agreement (such as who is to receive ownership) is not specific enough. The decedent was free to name whomever they want and, if they don’t change the beneficiary designation, then it will be the named beneficiary.

2. Smith v. Smith, 919 So. 2d 525 (Fla. 5<sup>th</sup> DCA 2005) held that the former spouse was entitled to proceeds **even though** the marital settlement agreement identified the assets.

3. Cooper v. Mucitelli, 682 So. 2d 77 (Fla. 1996) held that a former spouse was not entitled to insurance proceeds even though general release clause in marital settlement agreement.

\* Thanks to my associate, Nicholas J. Grimaudo, Esquire, for his help in preparing this outline.

4. Luszcz v. Lavoie, 787 So. 2d 245 (Fla. 2d DCA 2001) the dissenter even pointed out that “the legislature may wish to consider enacting a law similar to sections 732.5072 and 737.1105 to cover assets passing outside an estate or trust.” *I.d.* at 250.

## II. **WHAT?**

### **New Fla. Stat § 732.703:**

Governs the effect of divorce, dissolution or invalidity of marriage on disposition of certain assets at death.

## III. **WHEN?**

**Effective July 1, 2012 to ALL designations made by or on behalf of decedents dying on or after July 1, 2012, regardless of when designation was made:**

- A. Check all beneficiary designations, especially if you **want** former spouse to be a beneficiary.
- B. Rest easy if you practice family law and the marital settlement agreement was not specific and you did not follow up on changes of beneficiary designations.

## IV. **HOW?**

- A. A designation made by decedent is void:
  1. As of time marriage is dissolved or declared invalid by court order;
  2. If designation is made **prior** to dissolution or court order; and
  3. Will pass as if former spouse predeceased decedent.
- B. Definitions are provided in the statute:
  1. “Assets” as described in Fla. Stat. § 732.703(1)(a) and (3)- life Insurance, qualified annuity and similar tax deferred contract held within employee benefit plan; employee benefit plan; IRA and Inherited IRA; P.O.D. Accounts; security held or T.O.D; and life Insurance, annuity or similar tax deferred contract **not** held with employee benefit plan.
  2. “Beneficiary” as described in Fla. Stat. § 732.703(1)(b)- “means any person designated in a governing instrument to receive an interest in an asset upon the death of the decedent.”

3. “Death Certificate” as described in Fla. Stat. § 732.703(1)(c)- “means a certified copy of a death certificate issued by an official or agency for the place where the decedent’s death occurred.”

4. “Employee Benefit Plan” as described in Fla. Stat. § 732.703(1)(d)- “means any funded or unfunded plan, program, or fund established by an employer to provide an employee’s beneficiaries with benefits that may be payable on the employee’s death.”

5. “Governing Instrument” as described in Fla. Stat. § 732.703(1)(e)- “means any writing or contract governing the disposition of all or any part of an asset upon the death of the decedent.”

6. “Payor” as described in Fla. Stat. § 732.703(1)(f)- “means any person obligated to make payment of the decedent’s interest in an asset upon the death of the decedent, and any other person who is in control or possession of an asset.”

7. “Primary Beneficiary” as described in Fla. Stat. § 732.703(1)(g)- “means a beneficiary designated under the governing instrument to receive an interest in an asset upon the death of the decedent who is not a secondary beneficiary. A person who receives an interest in the asset upon the death of the decedent due to the death of another beneficiary prior to the decedent’s death is also a primary beneficiary.”

8. “Secondary Beneficiary” as described in Fla. Stat. § 732.703(1)(h)- “means a beneficiary designated under the governing instrument who will receive an interest in an asset if the designation of the primary beneficiary is revoked or otherwise cannot be given effect.”

C. The statute does **not** apply to the following:

1. Extent federal law controls (ERISA);
2. If beneficiary designation is signed after divorce and explicitly provides former spouse as a beneficiary.
3. To the extent provisions of will (Fla. Stat. § 732.507(2)) or trust (Fla. Stat. § 736.1105) applies.

4. If order of dissolution or order declaring the marriage invalid **requires** the decedent to acquire or maintain the asset for the former spouse or children, **only if** other assets fulfilling such a requirement do not exist at death of decedent.
5. If order of dissolution or order declaring the marriage invalid states that the decedent **could not** have unilaterally terminated or modified ownership or disposition upon decedent's death.
6. If designation of former spouse is irrevocable (note that individual may not be able to make beneficiary of IRA irrevocable)
7. If instrument directly controlling disposition governed by laws other than Florida.
8. Assets held in 2 or more names when death vests ownership of asset in surviving co-owners (TBE, JTWROS).
9. If remarry former spouse and still married to such spouse at decedent's death.
10. State administered retirement plans.

D. The statute **does** apply to following assets of residents of Florida in which the resident had an interest at the time of resident's death:

1. "Liability Protection Assets" (LSG term)-
  - a) Life Insurance, qualified annuity and similar tax deferred contracts **held within an employee benefit plan.**
  - b) Employee benefit plan.
  - c) IRAs and Roth IRAs.
2. "Super Liability Protection Assets" (LSG term)-
  - a) P.O.D. Accounts.
  - b) Security or other account held as T.O.D.
  - c) Life Insurance, annuity or similar tax deferred contract **not held** within an employee benefit plan or qualified retirement account.

E. Liability Protection Assets (LSG term) - unless violation of court order, then the payor has no liability if payments are made as follows:

1. If no explicit language in governing instrument specifying relationship of beneficiary to decedent or if explicit and says beneficiary **not** a surviving spouse then no liability for payment to beneficiary.

a) Ex- "To my sister Joan" or "To Joan"

b) Ex- "To Joan"- who is a former spouse **but** not specified as such.

2. If explicit designation of primary beneficiary as decedent's spouse... "To my spouse, Bob."

a) If death certificate states married to that spouse, then no liability for payment to that spouse.

b) If death certificate states not married or married to someone other than spouse designated as beneficiary, then no liability if payment to the secondary beneficiary.

c) If death certificate is silent as to marital status, then payor is **not** liable for paying to primary beneficiary **if** affidavit by primary beneficiary:

(1) Statement regarding death;

(2) Statement that Affiant is primary beneficiary; and

(3) Date of marriage and the affiant and decedent were legally married at death of decedent.

d) If death certificate is silent as to marital status, then payor is **not** liable for payment to secondary beneficiary **if** affidavit by secondary beneficiary:

(1) Statement regarding death;

(2) Statement that Affiant is secondary beneficiary; and

(3) At decedent's date of death decedent was not legally married to spouse designated as primary beneficiary.

F. Super Liability Protection Assets (LSG term) - no liability if payor makes payment on account of, or transferring any interest in, the asset to **any** beneficiary.

G. Super Super Liability Protection (LSG term) – protection by payor of any distribution of Liability Protection Assets and Super Liability Protection Assets as described above applies, **even if** payor has knowledge the person to whom the asset is transferred is different from the person whom would own the interest pursuant to the statute.

V. Affidavits Forms from Fla. Stat. § 732.703

A. Fla. Stat. § 732.703(5)(b)(3):

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

Before me, the undersigned authority, personally appeared ...(type or print affiant's name)...("Affiant"), who swore or affirmed that:

1. ...(Type or print name of decedent)..("Decedent") died on ...(type or print the date of the Decedent's death)....

2. Affiant is a "primary beneficiary" as that term is defined in Section 732.703, Florida Statutes. Affiant and Decedent were married on ...(type or print the date of marriage )..., and were legally married to one another on the date of the Decedent's death.

\_\_\_\_\_  
...( Affiant)...

Sworn to or affirmed before me by the affiant who is personally known to me or who has produced...(state type of identification)... as identification this .... day of ...(month)..., ...(year)....

(Signature of Officer)...

(Print, Type, or Stamp Commissioned name of Notary Public)...

B. Fla. Stat. § 732.703(5)(b)(4):

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

Before me, the undersigned authority, personally appeared ...(type or print affiant's name)...("Affiant"), who swore or affirmed that:

1. ...(Type or print name of decedent)..("Decedent") died on ...(type or print the date of the Decedent's death)....

2. Affiant is a "secondary beneficiary" as that term is defined in Section 732.703, Florida Statutes. On the date of the Decedent's death, the Decedent was not

legally married to the spouse designated as the “primary beneficiary” as that term is defined in Section 732.703, Florida Statutes.

Sworn to or affirmed before me by the affiant who is personally known to me or who has produced...(state type of identification)... as identification this .... day of ...(month)..., ...(year)....

...(Signature of Officer)...

...(Print, Type, or Stamp Commissioned name of Notary Public)...

## CHAPTER 732.703

An act relating to effect of dissolution or annulment of marriage on certain designations; creating s. 732.703, F.S.; providing definitions; providing that a designation made by or on behalf of a decedent providing for the payment or transfer at death of an interest in an asset to or for the benefit of the decedent's former spouse shall become void if the decedent's marriage was judicially dissolved or declared invalid before the decedent's death, if the designation was made prior to the dissolution or order; providing for disposition of assets; providing for treatment of certain retirement plans; specifying assets subject to provisions; providing exceptions; providing that payors are not liable for payments or transfers to beneficiaries contrary to this provision in certain circumstances; specifying the form of an affidavit that may be used to relieve a payor of liability for a transfer if the death certificate is silent as to the decedent's marital status at the time of death; providing that the payor is not liable for making any payment on account of, or transferring any interest in, certain types of assets to a beneficiary; providing that certain provisions apply notwithstanding the payor's knowledge that the person to whom the asset is transferred is different from the person who would own the interest due to the dissolution of the decedent's marriage or declaration of the marriage's validity before the decedent's death; providing that the provisions do not affect specified interests and rights; providing applicability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 732.703, Florida Statutes, is created to read:

732.703 Effect of divorce, dissolution, or invalidity of marriage on disposition of certain assets at death.—

(1) As used in this section, unless the context requires otherwise, the term:

- (a) "Asset," when not modified by other words or phrases, means an asset described in subsection (3), except as provided in paragraph (4)(j).
- (b) "Beneficiary" means any person designated in a governing instrument to receive an interest in an asset upon the death of the decedent.
- (c) "Death certificate" means a certified copy of a death certificate issued by an official or agency for the place where the decedent's death occurred.
- (d) "Employee benefit plan" means any funded or unfunded plan, program, or fund established by an employer to provide an employee's beneficiaries with benefits that may be payable on the employee's death.
- (e) "Governing instrument" means any writing or contract governing the disposition of all or any part of an asset upon the death of the decedent.

(f) "Payor" means any person obligated to make payment of the decedent's interest in an asset upon the death of the decedent, and any other person who is in control or possession of an asset.

(g) "Primary beneficiary" means a beneficiary designated under the governing instrument to receive an interest in an asset upon the death of the decedent who is not a secondary beneficiary. A person who receives an interest in the asset upon the death of the decedent due to the death of another beneficiary prior to the decedent's death is also a primary beneficiary.

(h) "Secondary beneficiary" means a beneficiary designated under the governing instrument who will receive an interest in an asset if the designation of the primary beneficiary is revoked or otherwise cannot be given effect.

(2) A designation made by or on behalf of the decedent providing for the payment or transfer at death of an interest in an asset to or for the benefit of the decedent's former spouse is void as of the time the decedent's marriage was judicially dissolved or declared invalid by court order prior to the decedent's death, if the designation was made prior to the dissolution or court order. The decedent's interest in the asset shall pass as if the decedent's former spouse predeceased the decedent. An individual retirement account described in s. 408 81 or s. 408A of the Internal Revenue Code of 1986, or an employee benefit plan, may not be treated as a trust for purposes of this section.

(3) Subsection (2) applies to the following assets in which a resident of this state has an interest at the time of the resident's death:

(a) A life insurance policy, qualified annuity, or other similar tax-deferred contract held within an employee benefit plan.

(b) An employee benefit plan.

(c) An individual retirement account described in s. 408 92 or s. 408A of the Internal Revenue Code of 1986, including an individual retirement annuity described in s. 408(b) of the Internal Revenue Code of 1986.

(d) A payable-on-death account.

(e) A security or other account registered in a transfer-97 on-death form.

(f) A life insurance policy, annuity, or other similar contract that is not held within an employee benefit plan or a tax-qualified retirement account.

(4) Subsection (2) does not apply:

(a) To the extent that controlling federal law provides otherwise;

(b) If the governing instrument is signed by the decedent, or on behalf of the decedent, after the order of dissolution or order declaring the marriage invalid and such governing instrument expressly provides that benefits will be payable to the decedent's former spouse;

(c) To the extent a will or trust governs the disposition of the assets and s. 732.507(2) or s. 736.1005 applies;

(d) If the order of dissolution or order declaring the marriage invalid requires that the decedent acquire or maintain the asset for the benefit of a former spouse or children of the marriage, payable upon the death of the decedent either outright or in trust, only if other assets of the decedent fulfilling such a requirement for the benefit of the former spouse or children of the marriage do not exist upon the death of the decedent;

(e) If, under the terms of the order of dissolution or order declaring the marriage invalid, the decedent could not have unilaterally terminated or modified the ownership of the asset, or its disposition upon the death of the decedent;

(f) If the designation of the decedent's former spouse as a beneficiary is irrevocable under applicable law;

(g) If the instrument directing the disposition of the asset at death is governed by the laws of a state other than this state;

(h) To an asset held in two or more names as to which the death of one coowner vests ownership of the asset in the surviving coowner or coowners;

(i) If the decedent remarries the person whose interest would otherwise have been revoked under this section and the decedent and that person are married to one another at the time of the decedent's death; or

(j) To state-administered retirement plans under chapter 121.

(5) In the case of an asset described in paragraph (3)(a), paragraph (3)(b), or paragraph (3)(c), unless payment or transfer would violate a court order directed to, and served as required by law on, the payor:

(a) If the governing instrument does not explicitly specify the relationship of the beneficiary to the decedent or if the governing instrument explicitly provides that the beneficiary is not the decedent's spouse, the payor is not liable for making any payment on account of, or transferring any interest in, the asset to the beneficiary.

(b) As to any portion of the asset required by the governing instrument to be paid after the decedent's death to a primary beneficiary explicitly designated in the governing instrument as the decedent's spouse:

1. If the death certificate states that the decedent was married at the time of his or her death to that spouse, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to such primary beneficiary.

2. If the death certificate states that the decedent was not married at the time of his or her death, or if the death certificate states that the decedent was married to a person other than the spouse designated as the primary beneficiary at the time of his or her death, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to a secondary beneficiary under the governing instrument.

3. If the death certificate is silent as to the decedent's marital status at the time of his or her death, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to the primary beneficiary upon delivery to the payor of an affidavit validly executed by the primary beneficiary in substantially the following form:

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

Before me, the undersigned authority, personally appeared ...(type or print affiant's name)... ("Affiant"), who swore or affirmed that:

1. ...(Type or print name of decedent)... ("Decedent") died on ...(type or print the date of the 179 Decedent's death)....

2. Affiant is a "primary beneficiary" as that term is defined in Section 732.703, Florida Statutes. Affiant and Decedent were married on ...(type or print the date of marriage )..., and were legally married to one another on the date of the Decedent's death.

\_\_\_\_\_  
...( Affiant)...

Sworn to or affirmed before me by the affiant who is personally known to me or who has produced ...(state type of identification)... as identification this .... day of ...(month)...., ...(year)....

...(Signature of Officer)...

...(Print, Type, or Stamp Commissioned name of Notary Public)...

4. If the death certificate is silent as to the decedent's marital status at the time of his or her death, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to the secondary beneficiary upon delivery to the payor of an affidavit validly executed by the secondary beneficiary affidavit in substantially the following form:

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

Before me, the undersigned authority, personally appeared ...(type or print affiant's name)... ("Affiant"), who swore or affirmed that:

1. ...(Type or print name of decedent)... ("Decedent") died on ...(type or print the date of the Decedent's death)....
2. Affiant is a "secondary beneficiary" as that term is defined in Section 732.703, Florida Statutes. On the date of the Decedent's death, the Decedent was not legally married to the spouse designated as the "primary beneficiary" as that term is defined in Section 732.703, Florida Statutes.

Sworn to or affirmed before me by the affiant who is personally known to me or who has produced...(state type of identification)... as identification this .... day of ...(month)...., ...(year)....

...(Signature of Officer)...

...(Print, Type, or Stamp Commissioned name of Notary Public)...

(6) In the case of an asset described in paragraph (3)(d), paragraph (3)(e), or paragraph (3)(f), the payor is not liable for making any payment on account of, or transferring any interest in, the asset to any beneficiary.

(7) Subsections (5) and (6) apply notwithstanding the payor's knowledge that the person to whom the asset is transferred is different from the person who would own the interest pursuant to subsection (2).

(8) This section does not affect the ownership of an interest in an asset as between the former spouse and any other person entitled to such interest by operation of this section, the rights of any purchaser for value of any such interest, the rights of any creditor of the former spouse or any other person entitled to such interest, or the rights and duties of any insurance company, financial institution, trustee, administrator, or other third party.

(9) This section applies to all designations made by or on behalf of decedents dying on or after July 1, 2012, regardless of when the designation was made.

Section 2. This act shall take effect July 1, 2012.

