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Death, taxes and divorce: Why every ex-spouse needs a new estate plan

No one can escape the inevitable — death and taxes. And unfortunately, according to the U.S. Census Bureau nearly 50 percent of all marriages will end in divorce.

The divorce process is incredibly stressful. Clients are often so overwhelmed with emotional, financial and legal complexities, they fail to consider the estate planning implications of their separation and divorce. However, proactive planning can help ensure assets do not pass to a soon-to-be-ex or a former spouse.

Death during a pending divorce

If, for example, Jennifer dies during a pending divorce, her spouse will be treated as if they were still married. Filing a petition for divorce is not enough. Even if a judgment is entered orally, it is not considered “final” until the signed order is filed with the court.

Absent an estate plan, if Jennifer was an Illinois resident and died during her pending divorce to Brad, 50 to 100 percent of her estate would pass to him, depending on whether she died with or without children. If Jennifer had an existing estate plan in place, the terms of the estate plan would govern and likely identify Brad as the primary beneficiary.

Once clients realize how long the divorce process may take, they question whether estate planning can prevent assets from passing to a soon-to-be ex. Many clients experience panic over their soon-to-be-ex having power of attorney over property, and the thought of a soon-to-be-ex having the authority to pull the plug gives people going through divorce nightmares.

Powers of attorney for health-care and property are easy to update at anytime, regardless of a pending divorce. In contrast, updating wills and trusts during the divorce process is more complex, depending on how title to assets is held.

Retirement accounts and life insurance: Beneficiary designations on life insurance policies and individual retirement accounts can easily be updated. However, a special rule applies to “qualified plans,” which are governed by federal law and require spousal consent.

Jointly held assets: When a married couple holds title to virtually all of their assets jointly, regardless of the terms of their will or trust, those assets automatically pass to the surviving spouse by operation of law.

Assets in your individual name: For assets held in someone's individual name, or in the name of a revocable living trust, planning can be very effective, provided it does not violate any court orders restricting transfers or revisions to estate planning documents.

Marriage is considered to be a partnership by law and, absent a prenuptial agreement, the law allows the surviving spouse to claim a minimum amount of property, often referred to as an “elective share.” In Illinois, the spouse's elective share is either a third or a half of the estate of the decedent, depending on whether or not the decedent was survived by descendants.

- **Will:** If Jennifer only had a basic will which disinherited Brad and she died during the pending divorce, Brad could make a claim for his elective share of her estate.

- **Trust:** In Illinois, the estate of the decedent does not include trust assets. Thus, if Jennifer had a revocable living trust and all of her assets were properly titled in her trust, she could seamlessly disinherit Brad during their pending divorce to ensure no property would pass to him. Illinois courts recognize that the property owner has an absolute right to dispose of his or her property in any manner he or she sees fit — even for the sole purpose of minimizing or defeating the statutory marital interest of the surviving spouse.

Post-divorce planning: update



THE BUZZ

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estate plans and beneficiary designations

Every client who survives a divorce needs a new estate plan. If a client did not have an existing plan, she likely relied on various forms of joint ownership with her spouse to avoid probate, which is no longer an option. If a client had an existing plan in place, the documents need to be updated.

A divorce destroys an ex-spouse's interest under a will and takes effect as if the former spouse had predeceased the testator. However, if Jennifer and Brad had estate-planning documents drawn up together, an ex-brother-in-law or ex-mother-in-law may be named somewhere in the documents as executor, trustee or even a beneficiary.

Understand that regardless of what a will or trust might say, beneficiary designations on retirement plans and life insurance govern. For retirement plans, the Illinois courts previously held that a waiver to a spouse's property in a dissolution agreement must explicitly terminate the spouse's interest in the other's retirement plan.

In 2009, however, the U.S. Supreme Court held that even where a dissolution agreement explicitly revoked a spouse's interest in benefits, the beneficiary des-

ignation leaving a pension to a former spouse still governed. The same is true for life insurance. Namely, if the beneficiary designation is an ex, the money goes to the ex — regardless of what the estate plan or divorce decree provides.

Absent proper planning, for a divorcee with children, the estate may inadvertently pass to an ex-spouse. Imagine Brad and Jennifer had a child during their marriage. If Jennifer dies leaving her assets to their child, and that child subsequently dies, the money would ultimately revert back to Brad under the laws of intestate succession.

Furthermore, clients who survive a divorce often wish to make certain their children's inheritance cannot be reached by the child's creditors (including the child's possible ex-spouse).

Collaborative concerns

Clients who elect to pursue a collaborative divorce together should examine the following issues:

- What are the estate tax implications of the division of assets and life insurance policies?
- Where minor children are involved, who should act as guardian?
- What specific terms should be considered to protect their children from outside creditors and from their own devices?

Many divorce attorneys advise clients of the need to update beneficiary designations and estate-planning documents post-divorce. Unfortunately, in post-divorce, many clients feel they “need a break from the attorneys” and avoid the critical exercise of estate planning. Without proper documents in place, estate issues are controlled by the courts.

Unlike divorce, the estate planning process is controlled by the client — not the ex, nor the court. And, with the right attorney, the process is incredibly easy and empowering.

A special thanks to Chuhak & Tecson P.C. law clerk Evan Blewett for his contribution to this month's column.