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GETTING DIVORCED MAYBE IT'S TIME TO SEE AN ESTATE ATTORNEY

By Neil A. Derman, Esquire

What does estate planning have to do with divorce? Actually, a great deal. One of the main components of divorce is a division of the assets. This will have an effect on ones current assets and can impact ones current estate plan in numerous ways.

When it comes to married couples there are three possible scenarios: You can either be married, separated, or divorced. Each has a different effect on your estate and must be handled differently. When getting married or once the divorce decree is final, one often adjusts ones estate plan. But what about when you are separated? Should ones estate plan be adjusted then?

Married

Before we look at the effect of separation on an estate plan we need to consider two other alternatives, when you are married, and when you are divorced. Most married couples prepare an estate plan together. This combined estate plan is designed to benefit both spouses. It is also usually written with the general assumption that the couple will remain together, "till death do us part". This may involve setting up various types of trusts, adjusting beneficiary designation on various assets, and writing reciprocal wills. For the most part, the majority of married couples name their spouse as their primary beneficiary in their will and of their assets that do not pass via probate (such as life insurance policies, annuities or other retirement plans). Furthermore, married couples usually own property jointly. Therefore, when one spouse dies the surviving spouse would take full control of the jointly owned asset. In summary, when planning for a married couple, the surviving spouse usually inherits most, if not all of the deceased spouse's share of the assets.

Divorced

On the other end of the spectrum is a divorced couple. The law considers you to be legally married until the judge signs the final dissolution decree ending the marriage. As I stated in the previous paragraph, most married couples have their property titled jointly or name their spouse as primary beneficiary. It is important to make sure that all legal documents are updated when going through a divorce proceeding. The documents should be adjusted to reflect ones new circumstances. But what if this was not done? The good news is if you are legally divorced, your former spouse is not entitled to inherit under your will. However, assets passing outside of the will who designate the former spouse as the primary beneficiary are not afforded the same treatment. It is important to make sure the beneficiary designations are changed on these assets. So, reverting back to the first question asked, what happens if one is not yet divorced, but merely separated?

Separation

Separation is when married people live apart without any court order defining their rights. A legal separation is when married people utilize the court system to define their rights and responsibilities to each other but still desire to remain married. In this in-between stage, the estranged spouse may still have legal control over the other spouse and their estate, and may be entitled to most if not all of their former spouse's estate. What is important to note is that the law still considers the couple to be married. Therefore, unlike a divorce, upon death of one of the spouses, the surviving spouse (estranged spouse) would be treated as widow/widower, receiving full value of their entitled share.

By reviewing and adjusting your estate plan you can minimize, if not prevent your estranged spouse from receiving anything under your will. Estate planning is vital during the period of separation. Here are the most common areas to focus on

1. **Will:** typically your spouse is designated your primary beneficiary. Your spouse may also be your executor, which means they are responsible for your financial affairs during the administration of your estate. Merely eliminating the estranged spouse will not eliminate this problem. A spouse is entitled to an elective share from the deceased spouse equivalent to 1/3rd of the deceased spouses estate. An agreement must be drawn to prevent this from occurring
2. **Without a Will:** If you and your spouse do not have a will the new probate code is actually more beneficial to the estranged surviving spouse. Whereas previously the spouse was entitled to a portion of the estate, the surviving spouse may get the full value of the deceased spouse's estate now. It is imperative that an individual who is separated get a will drafted as soon as possible.
3. **Beneficiary Designation:** A large part of our estate passes outside of the realms of your will. Any property that is jointly owned, contractual or designates a beneficiary, such as life insurance, will pass to the named beneficiary of that entity. Changing the beneficiary of all of these policies prevents the estranged spouse from inheriting your assets when you pass away. Re-titling certain property interest from joint tenants to tenants in common can also assist in distinguishing the spouse's interest in jointly owned property and may be of assistance when valuing equitable distribution.
4. **Powers of Attorney:** If estate planning was implemented you likely have multiple powers of attorneys drafted, typically naming the estranged spouse as the primary agent in fact to act on your behalf. In the event you become disabled or incapacitated, or are in need of assistance with regards to health care decisions, it may be best to revoke your prior documents and re-name a more suitable agent to act on your behalf.
5. **Guardian of Minor Children:** If you have minor children, it would be best to nominate someone to serve as guardian of the children. Under most state laws (including New Jersey) the surviving spouse will have first right of custody of the children.



Begley & Bookbinder, P.C. is a law firm that specializes in Elder & Disabilities Law. We are based in Moorestown, NJ, with offices in Stone Harbor & Lawrenceville.

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