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EXPERT OPINION

## The Keys to Estate Planning During and After Divorce

A divorce will not automatically change estate planning. The keys to making these changes are ensuring an ex-spouse cannot receive an unintended windfall or assert control over the other spouse's assets and adjusting who benefits from and controls the spouse's estate and the structures to govern that control.

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**By Paul Riekhof**

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Estate planning should be among the many important legal and financial matters that change due to a divorce. People in the process of getting a divorce or who have just become divorced need to address five main elements related to their estate plans: their last will and testaments or revocable trusts, financial powers of attorney, health care powers of attorney and medical directives, life insurance and retirement plan beneficiary designations, and jointly owned assets.

A divorce will not automatically change estate planning. The keys to making these changes are ensuring an ex-spouse cannot receive an unintended windfall or assert control over the other spouse's assets and adjusting who benefits from and controls the spouse's estate and the structures to govern that control.

The law provides some help to people who do not take the initiative to change their estate plans upon divorce. However, it is not wise to rely upon the law to address these matters. It does not do a very good job of it.

Divorce, estate and trust laws are largely state based and often differ substantially between states. More than 40 states have laws that automatically revoke provisions of pre-divorce estate planning documents that benefit or empower an ex-spouse upon divorce, according to Andrew Hatherley's April 2024 article in Kiplinger Personal

Finance, “Don’t Forget to Update Beneficiaries After a Gray Divorce.” But not every state has such laws, and the automatic revocation parameters that do exist can vary widely.

In some states, a divorce decree will revoke all provisions in a will that benefit or empower a person’s ex-spouse. Similarly, in certain states, the issuance of a divorce decree revokes such provisions in a revocable living trust. This means that any provisions benefiting an ex-spouse in a will or revocable living trust executed before the divorce will be read as if the surviving ex-spouse died before the deceased ex-spouse. In some states, determining who will serve as the personal representative pursuant to the will or as trustee of the revocable trust is also handled this way.

An important related concern is whether a divorce decree will produce a similar automatic impact on pre-divorce beneficiary designations, including transfer on death and similar clauses. Twenty-six states have laws containing that type of automatic revocation, Hatherly reports.

Many assets governed by beneficiary designations may also be subject to federal law, which generally preempts state law. With beneficiary designations, federal law will supersede the impact of such automatic revocation statutes on certain assets and benefits. In particular, the Employee Retirement Income Security Act (ERISA) preempts any conflicting provisions of state law for 401(k) accounts, pensions, employer-sponsored group life insurance and other benefits. Under ERISA, beneficiary designations made prior to divorce typically remain in place until changed by the plan participant. See *Egelhoff v. Egelhoff*, 532 U. S. 141 (2001); *Kennedy v. Plan Administrator for Dupont Savings and Investment Plan*, 555 U.S. 285 (2009). Accordingly, there is no automatic revocation of predivorce beneficiary designations of ERISA-governed assets, despite any state laws to the contrary.

Even if the relevant state laws include automatic revocation provisions, they will only remove the ex-spouse from the documents or beneficial

order. They do not ensure that the next person in line will be who the person wants to serve as a fiduciary or receive the benefits. For example, some couples will name each other as the primary fiduciaries under their respective estate planning documents. Their back-up fiduciaries may include each other's siblings or parents, especially when the couple is young. Even if the applicable state law removes the ex-spouse from the line of fiduciary succession, it does not replace them with a different primary fiduciary, nor would it typically remove the former in-laws from any such back-up fiduciary roles.

The key here is to recognize the need to promptly change all estate planning documents and beneficiary designations upon divorce, regardless of which state a person lives in. It is also wise to do the same with everything that can be changed unilaterally once the process of getting a divorce has begun. Too often, people who have spent substantial time and resources fighting with their soon-to-be ex over who will get what from their combined assets actually die before finalizing that process. If the deceased spouse did not update the estate planning documents and the beneficiary designations they could change without their spouse's consent, there is a good chance that many, if not all, of the deceased spouse's assets will flow to the surviving spouse, in spite of the decedent's wishes.

Spousal elective share laws are another issue to be mindful of. Those laws allow a spouse who believes they have not been provided sufficient benefit under their deceased spouse's estate plan to make a timely election to take a statutorily prescribed percentage of the estate in lieu of the benefit that such surviving spouse would receive under the estate plan. Such an election can be a difficult reality for the intended beneficiaries of a divorcing spouse who dies before a marital settlement agreement is in place. The key for a divorcing spouse is to enter into a marital settlement agreement that waives the right to make such an election, as well as the rights to otherwise benefit from or serve in fiduciary roles, and to do so as expeditiously as possible.

When making changes to an estate plan during and after divorce, it is also important to address what, if anything, is required pursuant to the terms of the divorce decree and marital settlement agreement. Assets that are part of the division of marital property may be required to be transferred to the ex-spouse in the event of the person's death prior to such division. There may also be a requirement to carry life insurance or other benefits for the ex-spouse. If so, the respective spouse's estate planning documents or beneficiary designations should provide for these benefits to avoid a contest within the deceased spouse's estate, which would delay distribution of the rest of the assets to the decedent's intended beneficiaries.

Planning for children or other beneficiaries is an important task to complete post-divorce. If minor children are involved, providing for the management of their assets if a divorced parent passes is critical. This involves determining who will manage the assets, whether the ex-spouse or their family will be involved, when the assets will be turned over to the children to become their own property, and numerous other issues that could result in substantial additional turmoil if left unaddressed. Including testamentary trusts within the estate plan to provide for the children is a good way to accomplish these goals and limit such turmoil. In many estate plans, it is important to consider any potential undue influence the ex-spouse might exert on the children related to the estate or trust's assets and include protective provisions.

Another key task is to update financial power of attorney documents, which authorize someone to handle all of a person's financial affairs if they are unable to do so themselves. Most married couples name their spouse as their agent for these purposes. Accordingly, it is important to replace an ex-spouse with someone else who can stand up to them if necessary and adjust the documents to remove any potential benefits that could be distributed to the former spouse other than those required in the divorce decree or settlement agreement.

Similarly, it is important to remove an ex-spouse from any decision-making role under the health care power of attorney and directive documents and replace them with someone who has the person's best interests at heart.

Finally, it is important to sever all property interests held jointly with the ex-spouse, especially those with right of survivorship, as soon as possible. Although a state's laws may do that, permanently dividing all assets between the spouses as soon as possible avoids confusion for the actual fiduciaries and beneficiaries, as well as any unwarranted presumptions about intentions if the assets are not actually separated. Parties sometimes creatively argue that the failure to sever the joint ownership was intentional to compensate the former spouse for some obligation. Attending to these matters can prevent a potentially difficult position for a deceased or disabled ex-spouse's representatives.

Following these key steps to changing the five important elements of an estate plan is a crucial part of fully severing the legal relationship with and avoiding unintentional benefits to a former spouse to the greatest extent possible. The newly adjusted elements should match the new circumstances for the divorced (or divorcing) spouse and provide peace of mind and security for them and their intended beneficiaries.

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