

ESTATE PLANNING WHEN CONTEMPLATING DIVORCE

by James K. Noel, IV

Estate plans are often one of the last things on the minds of couples contemplating divorce. Overwhelmed by issues like support, custody hearings and equitable distribution, estate plans typically are a low priority. But should they be? Estate plans often include a will, a trust, powers of attorney and an advanced health directive (living will), each important documents in their own right and worthy of attention.

These documents need to be amended whenever there is a life changing event, like divorce. For instance, during happier days of the marriage, it may have made sense to name in-laws and friends as executors, beneficiaries and trustees as well as guardians of minor children. These may not currently be the persons that the individual would entrust these important duties to during the course of or immediately following a divorce. This is particularly true if the person named as the executor, beneficiary or trustee is the individual's soon-to-be ex-spouse.

Depending on the depth and breadth of the estate, high net worth individuals may have additional concerns including:

- The loss or reduction in the ability to gift assets in accordance with a pre-existing estate plan;
- The effects of the separation and divorce on QTIP Trusts;
- The reduction or loss of the deferral of federal and state inheritance taxes;
- The effects of the divorce on exclusion amounts, as well as other possibly significant federal and state estate tax planning objectives previously achieved for the husband and wife's benefit during the marriage.

Another aspect to consider are other documents which transfer title to assets upon death, such as beneficiary designations for individual retirement accounts, brokerage accounts, insurance policies, and other similar assets and investments that provide a beneficiary designation to the owner of the account or policy. Be aware of limits however, when it comes to changes to beneficiary designations on 401(k)'s, pensions and similar qualified benefit retirement plans through employers that are covered by ERISA. Unfortunately, these changes cannot be made without spousal approval or court order.

In addition, business and corporate documents which will be reviewed as part of the divorce process, such as shareholder agreements, buy/sell agreements and other related documents controlling the distribution of power and assets, are particularly relevant when spouses are involved in a closely-held business and may have a significant effect on each of the parties' individual estate plans as they move forward with their separate lives.

ACT NOW: Avoid Windfall To (soon to be) Ex-Spouse

Consider the impact of the estate plan if a spouse dies before the divorce is final. Pennsylvania law provides that the divorce action "abates." In other words, the divorce action ceases and the surviving estranged spouse (more likely than not) receives the deceased spouse's estate pursuant to previously drafted wills; or, if no will was in existence at the time of death, passes in some form to the surviving spouse. Either way, the one who was the soon-to-be ex-spouse could receive a significant, if not majority portion of the deceased spouse's estate. This is quite a windfall to the surviving spouse who was previously the one on the way out.

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