

Divorce & Estate Planning.

Divorce is big business and unfortunately, business is a booming!

Individuals going through a divorce should immediately review and revise their estate plan because the law considers you to be legally married until the judge signs the divorce decree. In the event you were to die or become disabled prior to that moment, your estranged spouse may still have legal control over you and your estate, and may be entitled to most, if not all, of your estate. However, by reviewing and, if necessary, revising your estate planning documents, you can ensure that someone other than your spouse will have control over you (in the event of your incapacity) or your estate (in the event of your death), and you can limit your estranged spouse's rights as a beneficiary of your estate.

For example, if you do not have a will and you die or become disabled while you are going through a divorce, it is your estranged spouse who will automatically be entitled to control your estate. It will be your estranged spouse who will be entitled to at least half of your estate if you have children, and all of your estate if you have no children.

If you do have a will or similar estate planning document, such as a living trust, your spouse will typically be designated as the executor and/or trustee, and probably is named as the primary or sole beneficiary of your estate. Once again, if something were to happen to you, it will be your estranged spouse who will be in control of you and your estate.

Another very important consideration is your various beneficiary designations. Quite often, a large part of our estates consist of life insurance policies, retirement accounts and even jointly owned property. Joint assets and those assets which have named beneficiaries pass outside of your will directly to the designated beneficiary. Accordingly, it is imperative to review all of your beneficiary designations and to make appropriate changes.

Furthermore, if you have previously done estate planning, you have probably given your spouse a Durable Power of Attorney to handle your affairs and a Health Care Proxy to make health care decisions for you in case you can't make them for yourself. In the context of divorce, these advance directives are also subject to abuse. Accordingly, you should immediately consider revoking them so that they cannot be used in an unintended fashion.

Custody of your minor children is another critical issue worth consideration. Upon your death, custody of minor children normally passes to the children's surviving parent (in most cases, the person you are now in the process of divorcing). Although the law gives the surviving parent priority to be guardian for minor children, the final decision is always based upon the best interests of the child. In certain cases, when the surviving parent is not an appropriate guardian for the minor children, such as when there are issues of substance or physical abuse, you may want to name an alternate guardian in your will and clearly spell out your reasons why you believe your estranged spouse would not be an appropriate guardian for your minor children. Although the court is not obligated to honor your request, the court would certainly consider your wishes in determining what is in the best interests of the child.

In conclusion, if you are going through or even contemplating a divorce, the single most important step you can take to make sure that your desires are carried out is to execute a new will, power-of-attorney and health care proxy. Do not wait until the divorce is final to prepare these documents because if you die before the divorce is final, you will still be considered legally married and your pending divorce will have no effect on his or her inheritance.