

How Divorce Can Impact Your Estate Plan

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With the increased divorce rate in today's society, many individuals experiencing a divorce focus on the issues directly involved in the divorce. For example, they may focus on spousal support, child support and the division of assets, but those same individuals forget that after a divorce or even during, there are additional considerations involving their estate plan. This article is the beginning of several articles that will highlight a number of those additional considerations. We begin with a discussion about property settlement agreements and the requirement to maintain life insurance.

As a result of most divorces, a *property or marital settlement agreement* ("PSA") is executed in an effort to dictate the obligations of each party to the other party. In most cases the focus is on finalizing the PSA and not the effect of the PSA on other aspects of an individual's life, such as his or her estate plan. However, during this phase of the divorce, it may be helpful to consult with an estate planning attorney to ensure that the PSA permits some level of flexibility from an estate planning perspective.

For example, if there are children from the marriage, very often the PSA will contain a provision requiring each party to maintain life insurance with a certain death benefit. Thus, one spouse may be required to maintain five hundred thousand dollars (\$500,000.00) of life insurance and name the other spouse as the beneficiary, name the children as beneficiaries or name the other spouse as trustee for the benefit of the children. The purpose of such a provision is to provide a substitution for child support in the event of the death of either parent. Very often the requirement to maintain the life insurance ceases when the obligation to pay child support ends.

But what happens if a death occurs and the life insurance proceeds are paid out to the former spouse directly or for the benefit of minor children? In the first instance, the former spouse can receive and use the monies without much oversight. Hopefully, the PSA specifies the permitted uses, but the PSA may be silent and/or the former spouse may disregard the PSA. If the minor children are named as direct beneficiaries, then a court proceeding requesting guardianship of the child's estate may be required and the court's oversight continues until the child reaches age 18, at which point the child has the ability to receive unfettered access to the funds. If the PSA simply states that the former spouse is to be named trustee for the benefit of the children, what are the provisions of the trust agreement? Does the so-called trust remain discretionary and then become available when the child reaches age 18?

The complexity surrounding the beneficiary designation and possible involvement of the court can be

resolved if the PSA permits the parties to name a revocable living trust that would include provisions for the benefit of the children. Therefore, the beneficiary designation is simpler since only the revocable living trust is named. Moreover, a properly drafted revocable living trust agreement would contain provisions specifically detailing the trustee, dispositive provisions for the funds and handling any 'what ifs.' For example, what if the named trustee (*i.e.*, former spouse) predeceases or what if a child predeceases, who will manage the funds and what happens to the funds in those circumstances?

In the case where complex estate planning exists, such as irrevocable life insurance trusts, the need to review the estate planning is important to prevent negative tax consequences and to ensure that the proper beneficiaries ultimately receive the assets. Ideally, the initial drafting of such complex estate planning will take into account the possibility of a future divorce. For example, the trust agreements can address what happens in the event of divorce with respect to a spouse continuing as a beneficiary and/or trustee. The PSA would then detail how the assets connected to the complex estate planning are handled or distributed, and by revisiting the estate plan post-divorce, any necessary adjustments can be made.

Therefore, for those who have experienced a divorce or are in the midst of a divorce, have you revisited your estate plan recently? What obligations to maintain life insurance do you have? Does the PSA have certain requirements for the creation of a trust, and if so, what are those requirements? It is better to begin to review all these issues sooner before an event, such as incapacity or death, makes it impossible to resolve later.

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