ALL IN THE FAMILY

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Remember to Adjust Your Estate Plan During or After a Divorce

BY CHARLES R. HUNSINGER • AUGUST 23, 2024

Married couples often have wills naming one another as their primary beneficiary. People also often name their spouse as beneficiary of retirement accounts and life insurance policies. Upon commencing a divorce action, however, many people no longer want their spouse to benefit from their estate. So, what can a person do—either while a divorce is pending or after it is finalized—to ensure that their assets pass to the person of their choice?

During a Divorce Action

Some estate planning can take place during a divorce and some cannot. A person who is divorcing may change their will but cannot change the beneficiaries of any life insurance policies or retirement accounts. It is also not advisable to change the terms of any trust in which the divorcing person or the divorcing person's spouse has an interest, either as trustee or as beneficiary. To avoid a potential finding of contempt or other consequences in the divorce, these differences are important to know.

Upon the filing of a complaint for divorce, an automatic financial restraining order goes into effect. This automatic restraining order, Supplemental Probate and Family Court Rule 411, prohibits either party from changing the beneficiaries on life insurance, pensions, retirement plans, or investment accounts, "except with the written consent of the other party or by order of the court." Rule 411 becomes effective on the plaintiff as of the date of filing the complaint for divorce and on the defendant as of the date of service of the complaint. Pensions, life insurance, and retirement assets are generally referred to as non-probate assets because a person designates a beneficiary on the plan or account and the disposition of the account does not depend on the terms of a person's will.

A will stands on different footing and can be changed during the pendency of a divorce action. Generally, a person is entitled to benefit whomever they choose in their will, with one caveat. That caveat is that during a marriage, if a person has a will that does not name their spouse as a beneficiary or does not adequately provide for the spouse, the spouse is entitled to choose to receive what's generally referred to as the spousal elective share. This provision of Massachusetts law states that a surviving spouse is entitled to a certain portion of their deceased spouse's probate

estate, depending on the size of the estate and other relatives of the deceased. G. L. c. 191, § 15. Thus, if a person dies prior to a divorce becoming final but after having changed their will, the spouse will still be a beneficiary by law. However, changing the will prior to the divorce being final will ensure that a person who dies the day after their divorce becomes final does not inadvertently leave their entire estate to their former spouse.

Rule 411 also prohibits either party from selling, transferring, encumbering, concealing, assigning, removing, or disposing of property belonging to or acquired by either party other than for ordinary living expenses, payment of attorneys' fees, or by written agreement of the parties or order of the court. While technically a trust asset may not "belong" to either party, Massachusetts law permits the division of trusts in divorces, if the trusts are deemed to be includable in the marital estate. This is a fact-intensive inquiry that requires significant legal analysis of the terms of the trust, the history of the parties' use of the trust, and other case-specific information. Until a trust is deemed non-includable in the marital estate, there is a strong argument that changing the terms of a trust is a violation of Rule 411. For this reason, changing the terms of a trust during the pendency of a divorce is not advisable without consulting with an attorney.

Note that healthcare proxies or durable powers of attorney can also be changed during a divorce, and—particularly if the divorce is contentious—prioritizing these instruments might be wise.

After the Judgment of Divorce

If authorized by a separation agreement or the judgment of divorce, now is the time to change beneficiaries on retirement, life insurance, and other accounts. Many separation agreements or judgments of divorce require a divorced individual to retain their former spouse as a beneficiary on one or more life insurance policies in order to secure a child support or alimony obligation. It is essential to comply with any such obligation to avoid potential estate litigation, but as authorized, changing beneficiaries is now appropriate.

After the divorce, changing wills, trusts, and other estate planning instruments is also permitted, except as specifically required by the terms of the divorce judgment.

If someone forgets to change their estate planning documents or beneficiary designations after the divorce, Massachusetts law provides for automatic revocation of certain terms of a will or trust and some beneficiary designations after divorce. General Laws chapter 190B, section 2-804 provides that except as set forth in a divorce judgment or separation agreement, a divorce "revokes any revocable (i) disposition or appointment of property made by a divorced individual to the individual's former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse." In other words, a divorce automatically rewrites a will, life insurance policy, beneficiary designation on a retirement account, or other "governing instrument" to remove the person's former spouse and relatives of the former spouse as beneficiaries. See G. L. c. 190B, § 2-804(a)(4). A divorce also revokes the nomination of a former spouse or a relative of a former spouse as a fiduciary or representative, including as personal representative, trustee, conservator, agent, or guardian. G. L. c. 190B, § 2-804. A relative of a former spouse includes anyone who is related to the former spouse but not to the divorced individual, such as a child from a former marriage or a parent. G. L. c. 190B, § 2-804(a)(5). In this case, the other provisions of the will, life insurance policy, or other governing instrument are still in effect, and it is simply treated as if the former spouse had predeceased the divorced individual.

Conclusion

Estate planning during or after a divorce is an important step to setting one's financial path post-divorce. Generally, such estate planning should be performed in consultation with one's experienced divorce lawyer who can provide

guidance on navigating Rule 411 and other considerations. Please contact your Bowditch attorney for assistance.