

## ESTATE PLANNING PENDING DIVORCE

**1. My spouse and I have started a divorce, but it is not yet final. What effect does this have on our estate plans?**

There is no effect until the divorce is final. Thus, if a death occurs before a divorce is final, then under the law the two are still married, Wills are not affected, and if there is no Will, the survivor will inherit as though the parties are still married – as though they never even filed for divorce. Until the divorce is final, the parties are still married.

**2. What about our Powers of Attorney (for health care decisions, or financial matters – a durable general power of attorney)?**

These, too, are not affected by a divorce proceedings filed, but not yet made final. Thus, an incapacitated person may have their estranged, but still legally married, spouse making health care decisions pursuant to the still valid power of attorney.

**3. But doesn't the law provide that a divorce takes my ex-spouse out of my Will, or cancels their right to inherit or act under a power of attorney?**

Yes, it does. However, the law does not work until the divorce is final through a Court issued Decree. Until that happens, the parties are still married and nothing is automatically changed.

**4. Is there anything I can do before the divorce is final?**

Yes, within certain limits. The limitation is that a spouse cannot be completely disinherited. Generally, a spouse has a right to ½ of the property (depending on the length of the marriage). This right can be limited or cancelled by a prenup or marital agreement, or by a final divorce Decree (which will never be issued if a spouse dies before the Divorce is final).

**5. Give me some ideas of what can be done during the divorce proceeding, before it is final.**

- a. **First, check with your divorce attorney** to see if there are any court orders or laws that would either protect you, or would prevent you from changing your estate plan;
- b. **Joint tenancy assets:** Consider canceling joint tenancy so that if you pass away, ownership is not automatically transferred to your spouse;
- c. **Pay-on-death assets:** If you have assets, such as a Bank account or certificates of deposit, in your name which names your spouse to be paid the account on your passing away, change it to remove your spouse as the automatic owner;
- d. **Beneficiary Designations:** These are retirement accounts, IRA, life insurance, annuities, and other assets that name the person who is to be paid if you pass away. Some retirement accounts require the spouse to sign off. However, you may be able to name someone else, such as children or a trust you set up, rather than your spouse, to receive these assets if you pass away before the divorce is final;

- e. **Will:** Instead of giving everything to your spouse (which is what your Will probably says), make a Will to give to your spouse only what the law requires, and the rest goes to your children or others;
- f. **Trust for Children:** If you have minor children, consider a trust where you name an adult who will be trustee (handle the assets for the children). Although the children's surviving parent will most likely have custody of the minor children if the other parent dies, you can restrict access to the children's assets by naming someone else (other than the surviving parent) to be the trustee. You can set up a trust in your Will, or during lifetime in what is called a "Living Trust" or "Revocable Trust";
- g. **Health Care Power of Attorney:** Make a new power of attorney to name someone else to make your health care decisions if you become incapacitated. The law does not require a spouse to be the agent. It is a good idea to name a successor (back-up);
- h. **General Durable Power of Attorney:** This form is for financial/money matters. Make a new one for same reasons you should have a new Health Care Power of Attorney;
- i. **Living Will:** This is really a Declaration as to Medical or Surgical Treatment. It says we do not want to be kept alive by a machine if we are in a "terminal condition". This will help your "agent" make decisions if this situation arises.

**6. You said that when the divorce is final, the law provides some automatic changes. What are these?**

- a. Keep in mind that what the Divorce Decree says takes precedence over any automatic changes;
- b. The law says that the other spouse is "considered" to either have died first, or is not a surviving spouse;
- c. Thus, provisions in a Will for the ex-spouse are automatically terminated (including inheriting assets and naming the Personal Representative or Executor);
- d. Joint tenancy is changed to tenants in common so that the death of one owner will not automatically make the other person the sole owner;
- e. If the ex-spouse is named as beneficiary on life insurance, IRA, annuity or other similar accounts (BUT NOT ERISA RETIREMENT ACCOUNTS), the ex-spouse is treated as having predeceased so that the contingent beneficiary steps up to the primary beneficiary designation;
- f. NOTE: for ERISA retirement accounts such as 401(k) plans, the Divorce does not automatically terminate the ex-spouse's beneficiary designation. The ex may have to approve the change – check with the Plan Administrator at work (and perhaps your divorce attorney) to see what needs to be done;
- g. Pay on Death designations are cancelled;
- h. Agency appointments under pre-divorce powers of attorney are also cancelled – the successor would take over.

**7. Do these automatic changes take care of themselves?  
No.**

If the banks, investment companies, title insurance companies, or others who hold your assets do not know of the divorce and are not told by you of the divorce, then they will be

protected if they pay money to your ex under the pre-divorce papers. For example, if your life insurance was not changed by you to remove your ex as a beneficiary, then even though the law says the ex is not entitled to the insurance proceeds upon your passing away, the insurance company cannot be held liable for paying the proceeds to your ex. Of course, your heirs may have a right to go after the ex to get the money back - this is very difficult, expensive (more attorney's fees), and may not be successful.

**SUMMARY:**

Do not hesitate to talk to your divorce attorney or an estate planning attorney about revising your estate plan even before the divorce is final.

---

**MESSAGE:** This Information Sheet is intended to provide general information only. It is not intended to cover all of the legal issues that arise in each situation. It is suggested that none of the activities described above be done without first talking to an attorney who is knowledgeable about such matters. This material is dated and the enclosed information may change because of new laws, regulations, or other impacts.

**PREPARED BY:** Lawrence P. Hartlaub, P.C.  
Hartlaub & Boyle  
Attorneys and Counselors at Law  
  
E-Mail: [larryhartlaub@gmail.com](mailto:larryhartlaub@gmail.com)

**FrontRange Office:**  
Greenwood Executive Park, Bldg 5  
6464 S. Quebec St., Suite 490  
Centennial, CO 80111  
(720) 488-2771  
Fax: (720) 488-2774

**Mountain Office:**  
P.O. Box 468  
21 Kings Crossing Rd., #202  
Winter Park, CO 80482  
(970) 726-1131  
Fax: (720) 488-2774