

ESTATE PLANNING AFTER DIVORCE

1. I have a Will and Powers of Attorney (for health care and a general durable for financial matters) made with my ex-husband BEFORE we were divorced. Now that the divorce is final, what happens if I die or become incapacitated before I can change anything?

A divorce decree causes some automatic changes in these papers. Your divorce attorney may have completed certain asset transfers that are required by the Divorce Decree. However, even if all transfers are not completed, there are several automatic changes.

2. What are these automatic changes?

- a. The law says that the ex-spouse is “considered” to either have died first, or is not a surviving spouse;
 - b. Thus, any provisions in a Will for the ex-spouse is automatically terminated (including transfers of assets and naming the Personal Representative or Executor);
 - c. 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;
 - d. If the ex-spouse is named as beneficiary on life insurance, IRA, annuity or other similar accounts (BUT NOT ERISA RETIREMENT ACCOUNTS such as 401(k) and pensions), the ex-spouse is treated as having predeceased so that the contingent beneficiary steps up to the primary beneficiary designation;
 - e. NOTE: for ERISA retirement accounts (401(k) and pension), the Divorce does not automatically terminate the ex-spouse’s beneficiary designation. The ex may have to sign the change – check with the Plan Administrator at work, or your divorce attorney, to see what needs to be done;
 - f. Pay on Death designations are cancelled;
 - g. Agency appointments under pre-divorce powers of attorney are also cancelled – the next-in-line successor (if named in the document) would take over;
- NOTE: What your Divorce Decree says takes precedence over any automatic changes.

3. Do these automatic changes take care of themselves?

No.

If the banks, investment companies, title insurance companies, or others do not know of the divorce and are not told by you, 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.

4. Please give me some ideas of what I should do after my divorce is final.

- a. **Review the Divorce Decree and Property Settlement** to see if you are required to include certain matters for your ex or your children. Sometimes life insurance must be continued for certain beneficiaries, a trust must be set up for certain beneficiaries, or other required matters;
- b. **Make a new Will** to give your assets to your children, other family members or others of your choosing. Your new Will also names the Personal Representative (sometimes called an Executor) to handle the transfer of your assets upon death;
- c. **Make a new Health Care Power of Attorney** to name someone other than your ex to make your health care decisions if you become incapacitated. It is a good idea to name a successor (back-up);
- d. **Make a new General Durable Power of Attorney** for financial matters, for same reasons you should have a new Health Care Power of Attorney;
- e. **Make a new 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.
- f. **Change Bank Accounts** to make proper designations either as owner, “pay-on-death” designee, or beneficiary;
- g. **Change Beneficiary Designations** on 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 ex-spouse to sign off. You should name someone else, such as children or a trust you set up, rather than your spouse, to receive these assets;
- h. **Set up a Trust for your Children:** If you have minor children, consider a trust where you name the adult who will be trustee (handle the assets for the children). Although the children’s surviving parent will most likely have custody of minor children if the other parent dies, you can restrict access to the children’s assets by naming someone else 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”. Even if your children are not minors (over 18 years old if Colorado resident), some clients set up such trusts for their children so they do not inherit a lump sum at a young age (perhaps hold funds until ages 25, 30 or 35),

SUMMARY:

Do not believe that your Divorce Decree and Separation Agreement take care of your assets if you become incapacitated or die. Take the initiative by contacting an estate planning attorney to be sure everything is set up properly. Your loved ones will greatly appreciate your thoughtfulness and planning.

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

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