Estate Planning and Divorce

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Divorce ruins estate planning. Almost fifty percent of marriages end in divorce and any spouse in Florida may file a Petition for Dissolution of Marriage based on irreconcilable differences. At that moment, your existing estate plan is in jeopardy and must change. If you do not have an estate plan, you should create one with an estate planning attorney.

For starters, all of your nominated agents should change in your estate planning documents, during the divorce process. Under Florida law, a Durable Power of Attorney automatically terminates the spouse's authority as attorney-in-fact upon the filing for dissolution or annulment, unless the Power of Attorney document provides otherwise. However, a Health Care Surrogate or Medical Power of Attorney does not automatically change. Hence, you should change your health care documents to name someone who cares about you and your health condition, if you cannot make medical decisions yourself. The updated Living Wills list the name of your Health Care Surrogate as the first person to contact; and you should eliminate your spouse from your Living Will. Your spouse should also be removed from any declaration naming a preneed guardian. Further, your spouse should no longer act as Personal Representative of your Will nor the Trustee of your Trust. Only someone who cares about you should be in a position to make important decisions affecting you or your estate. Updating these agents will give you peace of mind during the divorce process.

In addition to changing your agents, you should alter the amount of assets bequeathed to your spouse. You certainly would not want to give your entire estate and trust to a person that you are in the process of divorcing. Florida law only requires that your spouse receive about thirty percent of the value of your assets or the Elective Share. You should change your revocable trust to reflect the Elective Share amount. After the divorce, you most likely will change the amount for your ex-spouse, pursuant the terms of a marital settlement agreement.

There are certain laws that protect you from your ex-spouse, after the divorce is finalized. For instance, if a married person executes a will, any provision of that will affecting the testator's spouse generally becomes void when the testator gets divorced or the marriage is annulled. "After the dissolution, divorce, or annulment, the will shall be administered and construed as if the former spouse had died at the time of the dissolution, divorce, or annulment of the marriage, unless the will or the dissolution or divorce judgment expressly provides otherwise." - 732.507(2), Fla. Stat. (2018). Still, you should expressly amend your Last Will and Testament to remove your spouse as a beneficiary, unless your marital settlement agreement or divorce judgment provides otherwise.

After the marital settlement agreement is finalized, assets that have your spouse as a beneficiary and are not in your Trust should be reviewed and the beneficiary should be changed, with certain exceptions. Some examples of such assets include life insurance policies or payable–on-death accounts that designate the spouse as a beneficiary. Even though Florida law says such designations become "void as of the time the decedent's marriage was judicially dissolved or declared invalid by court order prior to the decedent's death, if the designation was made prior to the dissolution or court order," and the "decedent's interest in the asset shall pass as if the decedent's former spouse predeceased the decedent. – 732.703(2), Fla. Stat., it is important to change the beneficiary on these documents and accounts to ensure proper treatment. Section 732.703(3) lists several kinds of assets where designations of a spouse should be changed when you are getting divorced.

Another issue involves alimony. Traditionally, alimony has been granted to the spouse who earned less and was treated as taxable income for that payee, while the payer ex-spouse took a tax deduction. However, a Federal tax law that went into effect on January 1, 2019, Florida, changes income tax rules for payment and receipt of alimony for people divorced after December 31. 2018. For such divorcees, payment of alimony will not be deductible and receipt of alimony will not be treated as taxable income. The lack of a tax deduction may decrease the payer's ability to pay high amounts of alimony, but the payee spouse may end up with more net spendable income because the alimony will not be taxable. Such changes in tax laws are relevant to estate planning, and people getting divorced should consult an estate-planning lawyer to recommend any applicable adjustments.

In addition to having a family law attorney, it is important to have a team of professionals on your side during and after the divorce process, which is a difficult time for the couple and the children. An estate planning attorney, certified public accountant, therapist, financial advisor and real estate agent can provide critical guidance during this traumatic process. These professional including estate planning lawyers, are trained to help you understand your options and make decisions that will meet your unique needs and serve your best interests.