

UNDERSTANDING THE IMPACT OF DIVORCE ON YOUR ESTATE PLAN

By Philip A. Hingson, The Hingson Law Firm, PC

My hope is that this brief article will help you better understand how your divorce might impact your estate plan, and what changes you need to consider. Everyone has an estate plan. Even if you do not have a Will or a Trust, there are laws that will determine who will receive your assets upon your death, and you may or may not like the outcome of those laws. This is a time in your life when you need to consider what might happen if you were ever incapacitated or passed away, and establish a comprehensive estate plan that will carry out your wishes and will name those you trust to make decisions for you. Below I will address several important considerations. Please keep in mind that the information below is based on Oregon laws at the time this article was written, is given for general information purposes only, and is not a substitution for seeking competent legal advice.

The Basic Estate Planning Documents You Should Have

The three key documents all adults should have are a Will, a Financial Power of Attorney, and an Advance Directive. If you already have a Will, your ex-spouse will be treated as having predeceased you. In other words, your ex-spouse would no longer be the personal representative (executor) under your Will even if he or she is named as such, and would not be a beneficiary of your estate, even if the Will said otherwise. You should carefully consider whether you should name different or additional personal representatives and beneficiaries. Your divorce decree may require that you include certain provisions in your Will, or that you have insurance policies with specific beneficiary provisions. Also, keep in mind that a subsequent marriage revokes your existing Will unless your contrary intent is clearly indicated.

A Financial Power of Attorney (“POA”) gives another person the right to handle your finances and deal with your assets, and is therefore an extremely powerful document. If you previously signed a POA naming your spouse as your agent, you will very likely want to revoke that POA and create a new one naming someone else you trust to handle such duties. It may even be wise to record the revocation of the POA in the deed records, and/or to send copies of it to the banks and other financial institutions where you have accounts.

The Oregon “Advance Directive” is a medical directive that allows you to name health care representatives to make medical decisions for you if you are unable to direct your health care, and to tell the doctors directly whether you do or do not want life support or tube feeding (or whether you want these as your physician recommends) in four very serious situations described in the form. If you have an Advance Directive naming your ex-spouse as your health care representative, you may want to revoke it and execute a new Advance Directive. In addition, if you have signed any HIPAA Authorizations or Releases at your doctors’ offices that allow your ex-spouse to have access to your medical records, you may want to replace those.

Beyond the Will

Many people think that if they have a Will, all of their assets will be distributed in accordance with that Will. Unfortunately, they do not realize that a beneficiary designation “trumps” a Will, meaning that if someone (i.e. your ex-spouse) is designated as the beneficiary of a particular asset (such as your 401k or life insurance), that asset will pass directly to that beneficiary upon your death (if they are still living), even if your Will says otherwise. So updating your beneficiary designations is crucial, and you should also name contingent beneficiaries in case your primary beneficiary does not survive you. Again, make sure your beneficiary designations comply with any requirements in your divorce decree.

Any assets that you own with another person “with right of survivorship” also bypass your Will and are owned by the survivor upon your death. The divorce decree should address any assets that were owned by you and your ex-spouse with right of survivorship, but you will want to check and make sure that your spouse has been taken off of the title of the assets that are passing to you in the divorce. Taking this step now can save significant hassles and expense in the future.

Other considerations include Trusts and taxes. Whether a Will or a Revocable Living Trust would better suit your needs is a discussion that is beyond the scope of this brief article. Tax planning is an even more involved discussion, but I will mention just one aspect of tax planning to keep in mind. Life insurance policies are often required in connection with a divorce, and could help push you over \$1 million in assets. In this situation, your estate may actually have grown even though you may feel that you are worse off financially. In Oregon, you have a \$1 million Oregon Inheritance Tax exemption (as of December 2008), and the excess over \$1 million (after taking into account certain deductions) is subject to Oregon Inheritance Tax. If you are in this situation, a skilled estate planning attorney may be able to assist you in minimizing or completely eliminating the potential Oregon Inheritance Tax. A discussion of the Federal Estate Tax is beyond the scope of this article, but a competent estate planning attorney can assist you with that as well.

Taking Care of Your Children

If you have children, attending to their needs is a top priority. If your children are young or have special needs or should not be given a substantial sum of money for some reason, you will probably want to include carefully worded trust language for them in your Will or Trust, and will want to carefully choose the trustee and the successor trustee who would administer those trust funds. Your ex-spouse may or may not be the best choice to handle such trustee duties. You should also indicate in your documents who you would want to be the guardian for your children if you were not able to care for them. The guardian is the person who would be appointed by a court to make decisions about your children’s health care and where they live, and to make sure that their non-financial needs are being met.

Summary

The estate planning considerations mentioned above are not meant to be a complete list. If these considerations, together with all of the other considerations mentioned in this guide, are a bit overwhelming, the good news is that you do not have to handle all of these changes alone. There are professionals who are trained to help you and guide you through these important tasks. A competent estate planning attorney, for example, can sit down with you and help you decide whether you should have a Will or Trust, who should be in charge of the children if something happened to you, and which of your estate planning documents should be updated given your wishes and given the existing law at the time. While attorneys are not cheap, their advice can be invaluable, and they can help you create an appropriate estate plan that will give you peace of mind and will help meet your wishes no matter what the future holds.

We at The Hingson Law Firm, PC, hope this information has been helpful. If you have further questions, please visit our website at www.oregontrustattorney.com or feel free to contact us at (503) 639-4800. Our office is located at 5285 Meadows Rd., Suite 377, Lake Oswego, OR 97035. Our practice focuses on Wills, Trusts, Powers of Attorney, Advance Directives, Tax Planning, Medicaid Planning, Probates, Trust Administration, Guardianships, Conservatorships, Business Matters and Residential Real Property Matters.