



Non-Traditional Family Issues: Financial and Estate Clean-Up After Divorce

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The divorce is finally over, the decisions have been made, and now life proceeds anew for the client, and the attorney moves on to the next person in need of assistance. But it's never really that easy, is it? For the newly-divorced client, the legal work may be done, but there's often a long list of financial clean-up that lies ahead. There are the "big rock" items, such as home refinancing, re-titling of homes and cars, retirement asset division – all the stuff that's mentioned in the divorce documents themselves. And there are smaller, but also important, items such as removing the ex-spouse from credit cards, bank accounts, gym memberships, and so forth. But there is also an underlying category of items of equal, or perhaps greater, significance that often are forgotten – until it's too late. These items control where assets will go when a client passes away, and given the emotional turmoil accompanying most divorces, many clients and families alike will agree that the last person they want to bequeath assets after death would be the former spouse. Yet all too often, this is what happens as divorced individuals move ahead with their new lives, avoiding the pain of their recent divorce with that common enemy of resolution – procrastination.

First, let's list the important items a client may want to consider amending, and may benefit from the firm counsel of their family law attorney:

1. Beneficiary designations for the following financial instruments:
 - Employer Retirement plans
 - Individual Retirement Accounts (IRA)
 - Life insurance
 - Annuities
 - Health savings accounts
2. Transfer on Death (TOD) investment accounts
3. Payable on Death (POD) bank accounts
4. Will
5. Health care powers of attorney and living wills
6. Powers of Attorney
7. Revocable trusts
8. Advanced estate planning structures such as irrevocable trusts

Since the spouse is usually the individual selected to receive or inherit property controlled by these documents and instructions, many, if not all, of these items will need to be amended.

The items above are listed in the general order of difficulty to amend. A beneficiary designation can be very simple to change. Typically these changes simply involve the client obtaining the proper form, completing it, and putting it on file so their request is documented. The same is true for Transfer on Death (TOD) and Payable on Death (POD) accounts an individual may hold at an investment firm or a banking institution respectively. Having said that these arrangements are the easiest to amend, they are also the easiest to forget, since the assets controlled by these accounts may not have changed as a result of the divorce.

This danger applies particularly for retirement accounts – employer plans such as 401(k)'s and 403(b)'s, and Individual Retirement Accounts (IRA's). Retirement arrangements and employer plans often represent a significant portion, if not the majority, of a client's net worth and liquid assets. Since assets passed to a named beneficiary pass under operation of contract, this designation supercedes the client's will and state intestacy statutes. According to estate planning attorney C. Randolph Coleman of The Coleman Law Firm, "There usually are a half dozen cases during a typical year where someone will call and ask whether there is anything they can do to avoid the ex-spouse of their recently deceased spouse, parent, child or sibling, from taking the life insurance or retirement plan that the ex-spouse was still the beneficiary designated on the decedent's plans/policies. The short answer, there is nothing you can do. The beneficiary designation will trump the will or intestacy every time."

Wills, health care documents, and powers of attorney all require more time and expense to amend, as the client should likely seek legal counsel for assistance with these items. Despite the additional cost, these documents should be high on a priority list for a divorcee, particularly those who are parents of minors, as the will governs who will care for their children in the event of death, and the health care documents dictate how the clients are cared for in the event of incapacity.

Revocable trusts, often known as Living Trusts, are more complex in their drafting and may require further consideration, as the client may need to amend beneficiaries and/or trustee powers to eliminate the former spouse. Finally, advanced estate planning structures such as irrevocable life insurance trusts (ILIT's), Qualified Personal Residence Trusts (QPRT's), and charitable trusts may be very difficult, if not impossible to amend, since the original intent of creating these structures was to make an irrevocable election, usually structured to benefit both husband and wife together. Should the husband or wife assume the power to change the irrevocable election, the tax advantages gained by the structure may be undone. The client will need to work closely with his or her attorney, as well as trustees, to explore possible options.

Aside from clearing up the issue of outdated documents, the newly divorced individual has another problem to solve: who to leave their assets to now that the former spouse is most often not the desired heir. If a divorcee has adult children, this issue might be easily solved, as the parent often desires to leave any assets to their grown children. In the case of minor children, however, the choices can be confusing and problematic.

The typical desire a parent expresses is to leave assets directly to the minor child. Unfortunately, should the parent pass away while the child is still a minor, this choice will result in the court appointing a guardian to oversee and dispose of the assets, costing both time and money the parent likely did not plan for. Another problem with this choice is the issue that the guardian, with extensive court oversight, now must determine how the assets will be managed, and what will or will not be purchased with those funds. These decisions may or may not be in alignment with the choices the parent might have made. Many times a divorced parent, looking for the path of least resistance, will simply say, “Won’t the courts choose (their choice of guardian) to manage the asset?” assuming inherently that the court would make the same choice he or she would make. The short answer is, not necessarily. Just because a person seems to be the best choice to the parent, does not mean the courts will see things the same way. If a parent has a wish for who will manage an asset, the parent needs to specify it in legal documents.

A single or divorced parent might then say – if I cannot leave the assets to my child, I’ll just leave them directly to the adult I want to have manage them for my children -- my parents, sibling, aunt/uncle, or family friend. This decision could also prove to be problematic. Leaving the assets to the adult guardian causes that person to be entirely in control of those assets – with unrestricted rights to the assets – as well as potentially putting those assets up for grabs by that person’s creditors in the event of financial difficulty. If Jane Doe leaves a \$100,000 life insurance benefit to her brother, Jim, that money now belongs to Jim – and potentially, his spouse, children, and creditors. Jane may feel certain that Jim will use the assets for the care of her children, but there is no legal arrangement that requires him to do so. If Jane puts this arrangement in place and then does not die until her children are adults the situation may be even worse. Unless she amends her estate plan, she will have unintentionally disinherited her children.

Some parents might throw up their hands and decide just to leave their financial fate to the laws of intestacy, thinking that their children will end up with the assets, or their benefit, in the end. While this might be true in theory, the average probate proceeding lasts nine months. The children will receive some care in the meantime, but the caretaker will not have the benefit of the majority of the financial resources during that time. This shortfall may cause the child’s life and activities to be drastically altered, further compounding the loss of the parent.

Perhaps the newly divorced parent has a significant other in his or her life, and remarries. Here again, the parent may unintentionally disinherit a child, as without legal documentation to indicate otherwise, a spouse is generally entitled to one half of the deceased spouse’s estate. The second spouse may not be the resulting caretaker of the former step-children, yet has received half of the assets intended to provide for them.

The divorced parent may desire to leave assets to care for both the new spouse, and the children. In such a situation it may be very important for the parent to sit down with a financial advisor or their estate planning attorney to assess their options. An easy solution is the use of additional life insurance to assist the parent in their wishes to

provide for both the care of minor children and the new spouse. Term insurance can be a low-cost solution to provide these benefits until the children reach adulthood, assuming the parent is insurable.

As a family law attorney, this quagmire of follow-on hypothetical situations may seem overwhelming. So, what's the most streamlined approach to take to this situation? First, provide your client the list of follow-on items they should amend, emphasizing in particular those overriding beneficiary designations. Second, suggest the client seek assistance from a qualified estate planning attorney or financial advisor specializing in estate planning. The client can use these resources to get the detailed advice they need, and follow-on assistance to get the job done.

One benefit to the family law attorney for taking the extra time to provide this information to the client is the possibility for referred business – perhaps from the thankful client who takes the attorney's advice and discovers they would have inadvertently left money to their ex-spouse. Again from estate planning attorney, C. Randolph Coleman, "I probably see about 6 or 8 people a year who typically come in for estate planning 4 to 5 years after a divorce to 'finally get around' to updating their estate planning. Usually, during the course of our discussions I will suggest to them that they go back to their employer and check on the beneficiary designations for their life insurance and retirement plans. Invariably, about half of them will call back and tell me how much they appreciate the counsel to check because their ex-spouse remained their beneficiary."

The referral potential exists from the estate planning professional as well, who notices that this family law attorney went the extra mile to help the client tie up loose ends from the divorce. There is often a strong bond of trust that exists between an estate planning professional and their clients, since their work involves the sensitive and emotional topic of planning what's going to happen to the client's assets after death. Given the very nature of divorce, most estate planning work that has been done during the marriage no longer matches a clients' wishes once divorce ensues. Many times, a client calls the estate planning professional and relays two things – "we're going through a divorce and everything is going to change, and do you know a good divorce attorney?"

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