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## **Divorce & Estate Planning – Pitfalls to Avoid**

**By James S. Rizzo, Esq.\***

According to the majority of studies, 40-50% of first marriages will end in divorce. The divorce rates for subsequent marriages are even higher. Divorce has become an industry all its own, involving lawyers, judges, social workers, financial planners and banking and insurance professionals. While dealing with the many components of divorce, including the emotional upheaval of such matters as child custody and support, the essential component of estate and asset protection planning, post-divorce, is often lost.

In most divorces, the division of assets is nearly always reduced to a court order. Generally, the more contentious the divorce, the more specific the court order. For instance, when it comes to the division of pension assets (IRAs, 401Ks, 403Bs, 457 plans, etc.), courts in New York State will generally issue a Qualified Domestic Relations Order or QDRO, which specifically directs and details what percentage of pension assets are to be distributed or transferred after the divorce is final and/or what assets are to be left to an ex-spouse or children upon your death. In divorces involving minor children, many courts require ex-spouses to name each other as primary beneficiary on a life insurance policy unless and until such time as the children reach age 21 or are emancipated.

If your divorce attorney has not already done so, you should make sure all directives of the court are followed, which may include changing beneficiaries on life insurance policies, transferring your real property (including any mortgages in place) and/or the distribution of pension funds pursuant to the terms of the QDRO. Even if your assets are substantially reduced by the divorce, which is more often the case, it is critical to review and update your estate planning documents, including all of your asset information.

The essential estate planning documents all adults should have in place are a Will, Power of Attorney and Health Care Proxy. After divorce, the most common and obvious update is to excise the ex-spouse from these documents and replace him/her with trusted loved ones and individuals that will be part of your life going forward. While it sounds simple, avoiding or procrastinating such updates can have dire and unintended consequences as explained below.

With minor children (under age 18), care should be taken to update guardian designations in your Will in the event your ex-spouse predeceases you and to appoint a trustee over any assets a minor child may inherit upon your death. Without designating a trustee to hold and manage assets for your minor children either within a Will or a trust agreement, you run the risk of your

ex-spouse being appointed to oversee and control your assets, even if just for the benefit of your children. For many divorced individuals, this is far from a comforting thought.

There are instances, however rare, where individuals wish to keep their ex-spouse as a beneficiary under a Will or pension fund and/or as an agent for their Power of Attorney and Health Care Proxy. However, under New York State law, once a couple is divorced, beneficiary and/or agent designations still listing your now ex-spouse are considered automatically voided. Therefore, these documents must be explicitly updated to reflect your beneficiary or appointed agent is now your “ex-spouse” and should reference the date of divorce to be effective.

A quick example: an ex-husband promises his ex-wife he will leave her the marital residence when he dies even though he obtained same in the divorce. Both parties rely on the ex-husband’s pre-divorce Will which states his “spouse” will get the marital residence upon his death. With neither a court order nor an updated Will authorizing the bequest to an ex-spouse, the verbal promise is meaningless and, short of litigation, the ex-wife loses out on the residence upon the ex-husband’s death. Thus, if your intention is to leave your ex-spouse as a beneficiary under a Will or pension fund or as an agent under a Power of Attorney or Health Care Proxy, these documents need to be updated and/or should conform to a court order in effect as part of the divorce. Ex-spouses should get any such verbal promises formalized by seeking court approval to modify the original terms of the divorce decree.

Life insurance and pension companies are usually acutely aware of the dangers of getting involved in domestic matters and the potential for dishonesty, fraud and abuse. Thus, it is typical for such companies to require a copy of the estate planning documents and divorce decree to protect themselves when honoring beneficiary change requests and distributing funds. They will usually not honor an ex-spouse’s request for post-death benefits without a court order, decree and/or updated estate planning document specifically allowing such benefits.

Upon entering a marriage, especially at a young age, most couples will only list their spouse as getting everything under a Will and list them as the primary beneficiary on their pension(s) and life insurance policies. If, years later, a couple divorces and there have been no updates to these documents, including listing any post-marriage children as beneficiaries, the beneficiary designations listing the ex-spouse are voided and the rules of intestacy (dying without a Will) take effect, forcing the assets to be determined and distributed via the court system. Not updating these documents, especially with a lifetime of pension assets, is a recipe for costly and time consuming litigation.

Updating your Power of Attorney is also critical to appoint new agents to take care of your financial and other assets if you become incapacitated. Again, if you only listed your now ex-spouse as your agent on a Power of Attorney, such a designation is invalid after divorce. You then run the risk of your family having to undertake the expensive and time consuming process of obtaining a guardianship over you if you become incapacitated. Similarly, a Health Care Proxy, allowing your agent to enter a Do-Not-Resuscitate order on your behalf in an end of life situation, should be updated if/when that unfortunate decision needs to be made.

While the divorce process can be stressful and difficult, establishing and updating your estate planning documents and related beneficiary designations post-divorce is a productive, proactive and essential measure. Avoiding delay in making these vital changes will give you, your children and the ones you care for peace of mind, while avoiding uncertainty, discord and litigation going forward.

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