

MARRIAGE

Estate Planning Checklist for Separation and Divorce

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Most published statistics indicate that about 4 in 10 American couples will divorce. The process is an emotional time. It's a stressful time. And it is a time when the to-do list seems longer than could ever have been imagined.

Separation and divorce have many legal implications. They do not, however, necessarily extinguish all spousal rights under estate laws. While an estranged spouse has certain rights under the law, an existing estate plan, or no estate plan at all, may provide that estranged or former spouse with more access or control than is understood, or legally required.

While a binding premarital agreement, separation agreement, or divorce decree will control, there may be instances where some specifics are not addressed and the law will dictate the result. The law will also dictate the result for the period of time before a separation agreement is signed. As such, it is advisable for separated or divorcing spouses to meet with estate planning attorneys in addition to their divorce attorneys to ensure that all legal needs are addressed.

Here's a common scenario. While married, Husband and Wife meet with their attorney to sign wills. Their wills provide that if something happens to one spouse, the surviving spouse inherits everything. As part of that estate planning process, Husband and Wife prepare other related documents such as trusts, powers of attorney, and health care powers of attorney. Husband and Wife also designate each other as beneficiaries for life insurance and retirement accounts (401k, 403b, IRA). Years later, Husband and Wife separate, intending to divorce. (Do you hear alarm bells sounding?)



Sue Haberberger concentrates her practice in the areas of estate planning and administration and wealth transfer. She assists clients in the preparation, revision and updating of estate planning documents including wills, revocable living trusts, irrevocable life insurance trusts, powers of attorney (for both asset management and health care), and living wills. Sue also advises individuals on planning for and minimizing estate taxes, and counsels clients on the development of gifting strategies, including annual exclusion gifting and charitable gift planning. Sue also counsels clients on asset protection issues.

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✓ Revise Will and Revocable Trust

In North Carolina, a legal separation has no effect on the provisions of a will or a revocable trust. As such, if a will or trust provides that an estate will pass to the spouse, and if the death of one spouse occurs before divorce, the estranged spouse will inherit. After divorce, all provisions in favor of a former spouse will be automatically revoked, however any provisions in favor of relatives or acquaintances of a former spouse remain valid. Irrevocable trusts are more complicated since they are similar to contracts. As such, provisions for an ex-spouse may remain effective despite separation or divorce.

✓ No Will? Make One. Take Control!

North Carolina law grants spouses rights to inherit from a deceased spouse. For intestate (dying without a will) purposes, legal separation does not preclude a separated spouse from inheriting from the other should one spouse die before divorce, unless some very specific circumstances exist. By preparing a will that will be effective during separation as well as after divorce, much more control can be exercised. While a spouse cannot be completely disinherited prior to divorce in North Carolina (unless one of those circumstances exist or unless a separation agreement specifically addresses inheritance rights), a properly drafted estate plan can limit the survivor's inheritance and can attach some strings to limit access and ensure that the inheritance will eventually pass to intended beneficiaries rather than beneficiaries selected by the survivor (hint, hint... ensure that it passes to the children of the first spouse to die rather than a paramour or new spouse).

✓ Estate Plans When Minor Children Are Involved

Unless otherwise provided, an inheritance of a minor child will most likely be held by the guardian of that child until he/she turns 18. Typically a court names the surviving parent as guardian (unless naming that parent is not in the best interest of the child) which would give that former spouse control over those funds. If there are reasons that an ex-spouse should not have access to or authority over that inheritance, someone other than the ex-spouse should be clearly designated to manage those funds – either a custodian (for management until age 18) or a trustee (who can manage the funds for a longer period of time).

✓ Update Financial Power of Attorney

In North Carolina, a legal separation has no effect on the provisions of a financial power of attorney. As such, if an estranged spouse has been named as an agent under a power of attorney, that estranged spouse will have authority over accounts, property, and all other assets subject to that power of attorney. To eliminate that authority prior to divorce, the power of attorney must be affirmatively revoked. An agent's authority under a financial power of attorney is automatically terminated though, when a court enters a divorce decree (unless the power of attorney provides otherwise).





✓ Update Health Care Power of Attorney

Imagine a situation where spouses are separated under less than amicable circumstances. One spouse is involved in a tragic accident and important life or death decisions are needed. The other spouse is named as health care agent under a health care power of attorney and has the legal authority to make life and death decisions for the injured spouse. Would that injured spouse want the other to make those decisions? In many circumstances, the answer would be no. Under North Carolina law, a health care power of attorney naming an estranged spouse is not revoked upon legal separation, only divorce.

✓ Evaluate Life Insurance Beneficiary Designations

Life insurance is sometimes one of those financial decisions where an application is made naming the spouse as the beneficiary, the premium gets paid every year, but no additional thought is ever given to the policy. In North Carolina, neither separation nor divorce will have any impact on the beneficiary designation of a life insurance policy. If the spouse is named as the beneficiary, the spouse (or former spouse as the case may be), will remain the beneficiary.

✓ Be Aware of Retirement Account Beneficiary Designations

Retirement accounts (401ks, IRAs, 403bs), like life insurance, pass to designated beneficiaries upon the death of the owner. Any change to an ERISA account beneficiary designation must receive the consent of the spouse, even if legally separated. In North Carolina, changes to non-ERISA accounts (for example, IRAs) may be made without the consent of the spouse. After divorce, beneficiary designations must be affirmatively changed and may be done without the consent of the former spouse. Failure to adequately address beneficiary designations could result in unintended consequences and costly litigation if an ex-spouse remains named as a beneficiary at the death of the account holder.

As is often said, the devil is in the details. Care must be taken during separation and after divorce to ensure that any estate plan is consistent with any premarital agreement, separation agreement, and/or a divorce decree. Fully understanding the implications of existing estate planning documents (or the lack thereof) is the first step in the post-separation estate planning process. An estate planning attorney can provide you with that understanding and guide you through the next steps in the process to help you maintain control.

The information contained in this article is of a general nature and is not intended as, nor should it be relied upon for, legal advice. No action should be taken in reliance upon the information contained in this article without obtaining the advice of an attorney for your specific situation.