

· UPDATE ·

BREAKING UP IS HARD TO DO: THE IMPACT OF A DIVORCE DECREE ON ESTATE PLANNING

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As if going through a divorce is not painful enough, there are some potential landmines in the estate planning arena which I advise my clients to be on the watch for and to advise their relatives likewise. Below I have outlined two such areas, one in connection with naming beneficiary designations of estate and financial planning documents and the second involves the role of Medicaid planning.

First, New Jersey estate law, as amended in 2005, provides that a divorce decree or annulment revokes the disposition of property made by a divorced individual to his former spouse in a will or trust and also revokes nominations of the former spouse (or the relatives of the former spouse) to the position of an executor or trustee.

The divorce decree also revokes beneficiary designations of the former spouse in life insurance policies, retirement accounts and other accounts with named beneficiaries. It should be noted, however, that this New Jersey law would be preempted by federal ERISA law for those retirement accounts that are governed by ERISA, the federal pension laws.

Although this law has been in effect for five years in New Jersey, in my experience, few people are aware of it. The best planning for divorced individuals is to update their estate planning documents to ensure that their ex-spouse does not inherit from them or control any financial decisions subsequent to the divorce. For those divorced individuals who may become incapacitated or pass away before they update their estate planning documents and change the beneficiary designations on their non-probate assets, New Jersey probate law may be used to prevent a former spouse from inheriting their ex-spouse's estate or serving as an executor or power of attorney.

It should be noted that many banks and financial institutions are not aware of this law and may contest its enforcement when the ex-spouse beneficiary demands account funds. In addition, an ex-spouse may gain appointment as executor of the former spouse's estate if the County Surrogate is not aware of the divorce decree. This could lead to expensive and protracted litigation which would be avoided by simply changing the estate planning documents to exclude the former spouse from any role or proceeds in the estate.

A second area of concern when moving through a divorce is in the area of Medicaid planning. For example, some divorces may include an incapacitated spouse who will require long-term medical care, and it may be appropriate in that case for the healthy spouse to receive a greater than 50% share of the marital assets based on an analysis of the ages and comparable life expectancies of the spouses and other factors.

If the incapacitated spouse spends down their assets, including their share from the property settlement agreement enforced by the divorce decree, that spouse will often apply for Medicaid benefits to pay for nursing home care. The New Jersey Medicaid agency had for years taken the position that any divorce in which the Medicaid applicant spouse received less than 50% of the marital assets (assuming the absence of a pre-nuptial agreement) constituted a transfer of assets to the former spouse which could at least temporarily disqualify the incapacitated spouse from receiving Medicaid benefits under the Medicaid gifting rules.

In the case of *W.T. v. Ocean County Board of Social Services*, 391 N.J. Super. 25 (App. Div. 2007), the court held that a property settlement agreement in a bed and board divorce which distributed less than 40% of marital assets to an incapacitated spouse would not disqualify that spouse from receiving Medicaid benefits. The Appellate Division reversed the New Jersey Medicaid agency's finding that an equitable distribution of less than 50% to the Medicaid applicant spouse was designed to circumvent the Medicaid regulations. The court emphasized that the spouses in the divorce action had separate counsel who made a record with findings of fact that analyzed the equitable distribution factors to support the asset division.

As hard as breaking up is to do, be sure to avoid this extra layer of unnecessary unpleasantness by updating estate and financial planning documents as soon as the ink dries on the legal separation paper work.

Should you have questions or would like to discuss this new legal development, please contact Mr. Rice at 856.782.8450 or via email at trice@TimRiceElderLaw.com. To sign up to receive our periodic updates, please click-
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