

DIVORCE AND THE ESTATE PLAN

Estate Planning Council for Southwest Washington

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Most likely if you have worked with married couples, whether you are an attorney, a CPA, financial or insurance advisor, or trust officer, some of them have or will divorce.

Alternatively, you may end up representing a new client who is going through a divorce.

Both circumstances can present their own challenges.

1. Married couples getting divorced.
 - a. Community property issues
 - i. Washington has a presumption that assets acquired after marriage are presumptively the community property of the spouses regardless of whose name is on title.
 - ii. Washington has a presumption that assets given to or inherited by one spouse are the separate property of the inheriting spouse.
 - iii. These presumptions can be altered by agreement and actions of the spouses.
 - b. Property Status Agreements
 - i. The divorce attorney must ask the client if he/she had executed an agreement regarding the status of property. This might be called a Community Property Agreement, a Separate Property Agreement, perhaps a Pre or Post Nuptial Agreement.
 - ii. Community Property Agreement
 1. Traditionally the Community Property Agreement has three prongs:
 - a. Character of current property
 - b. Character of future property
 - c. What happens to the deceased spouse's share of community property upon death
 2. The Community Property Agreement can be written to be revoked by either spouse or only by both spouses BUT IF SILENT ON THAT ISSUE IT CAN ONLY BE REVOKED WITH MUTUAL CONSENT. How is that treated in a divorce?
 - c. Does the client have other estate planning documents?
 - i. Wills
 - ii. Durable Powers of Attorney for financial and/or health
 - iii. Revocable Trust
 - iv. Irrevocable Trust

- v. Beneficiary designations
 - d. Life Insurance
 - i. Whole Life or Term?
 - ii. Whole Life insurance may be a blend of separate property and community property depending on the character of the funds used to pay the premiums,
 - iii. For term insurance, the nature of last premium governs character of death benefits
 - e. Temporary orders
 - i. Quite often at the initial stages of the divorce, the court will enter an order prohibiting the couple from changing their estate plan during the pendency of the divorce.
 - ii. The risk is that one spouse will die during the process and his/her estate may pass to the surviving spouse
 - iii. The purpose is to keep the “status quo”
 - iv. Question – does that mean you cannot change the fiduciary appointments in your power of attorney?
 - f. Fiduciary changes
 - i. Durable Power of Attorney
 - ii. Can provide that the filing for divorce revokes the spouse as attorney in fact
 - g. Is the client aware he/she has estate planning documents? Many clients won’t remember they executed a Community Property Agreement because the whole family was about to get on a plane. Or, they will think their Wills are obsolete just because their circumstances have changed.
2. Conflict issues
- a. For the divorce attorney
 - i. Typically the battle lines are drawn for the divorce attorney and it is very clear whose interests are adverse to whose
 - b. For the estate planning attorney
 - i. The estate planning attorney who has represented a married couple may now be faced with being asked to represent one or the other of them once divorce proceedings have begun.
 - 1. This is a clear conflict of interest for the attorney.
 - 2. The attorney may ask the clients at the beginning of the representation to waive potential conflicts explaining that the attorney represents them both and cannot chose sides or keep secrets.
 - 3. The choices are to ask the clients to waive potential conflicts during the divorce and open two separate files or to no longer represent either client.
 - ii. The attorney must provide copies of requested documents to the client requesting them.

1. What about joint documents like a Community Property Agreement?
 2. Does the attorney have to let the other spouse know if he/she has been asked for copies of the documents?
- c. For the CPA
- i. What information/files does the CPA have to provide at the request of one client?
 - ii. Can the CPA continue to represent both clients or either of them?
 - iii. How does the CPA handle a joint filing or married filing separately on an income tax return?
- d. For the financial advisor
- i. What information is the advisor allowed/obligated to provide?
 - ii. Can the advisor continue to represent either client?
3. Timing
- a. Filing for divorce
- i. Were documents such as Community Property Agreement, Powers of Attorney or Wills revoked?
 - ii. Look for language in the document itself. Statutes do not provide for automatic revocation.
- b. Divorce completed
- i. Are documents revoked by terms of document?
 - ii. Automatic revocation in certain documents
 1. Provisions for spouse in Will – both fiduciary appointment and as a beneficiary
 2. Revocable Trust as fiduciary and beneficiary
 3. As attorney in fact under Durable Power of Attorney both financial and health care
 4. Beneficiary designations
 - a. Life insurance. IF LIFE INSURANCE IS USED POST DIVORCE TO SECURED CHILD SUPPORT OF MAINTENANCE SPECIAL PRECAUTIONS SHOULD BE UTILIZED TO MAKE SURE IT IS IN FACT AVAILABLE FOR THAT PURPOSE.
 - b. Transfer on Death
 - iii. What is not revoked
 1. 401(k) beneficiary designation
 2. ERISA plans
 - iv. What if client wants the same plan to stay in place?
 1. Must re-execute plan
 - v. Asset transfers?

1. Real estate
 - a. Be aware of property titled in a trust
 2. Bank/brokerage accounts
 3. Retirement accounts/QDROs
 4. Life insurance policies
- vi. Beneficiary designations
 1. Critical to update after divorce
 2. What isn't automatically revoked
- c. Death during divorce
 - i. Follows the Will – estate may end up going to surviving spouse
 - ii. If intestate, community property goes to surviving spouse; separate property is divided between surviving spouse and children or other family members
4. Planning During Pendency of Divorce
 - a. Documents that can be changed depending on temporary order
 - i. Powers of Attorney
 - ii. Wills
 - iii. Revocable Trusts
 - b. Testamentary Dispositions of Non probate assets
 - i. Statute providing you can change certain beneficiary designations by Will
 1. What is included and what is not
5. Irrevocable Trusts
 - a. The divorce attorney needs to understand if the spouses have established irrevocable trusts
 - i. If they have, is there anything to be done?
 - ii. If they have been making gifts to these trusts, does that need to be negotiated as part of the divorce?
 - iii. Can they be separated?
 - b. What about CRTs?
 - i. Can the payments be split between the spouses?
6. Continuation of the estate plan
 - a. Negotiated during the divorce?
 - b. Provisions for ex spouse?
 - c. Provisions for children?
 - i. Establish a trust for children with proceeds of life insurance?
7. Support obligations
 - a. Backed up by life insurance?
 - i. Who owns?
 - ii. Who is beneficiary?
 - iii. Is it an enforceable debt of the estate?
8. Specific assets

- a. What to do with 529 plans?
 - b. Who should be owner?
 - c. Who should be successor owner?
9. Taxes
- a. Filing income tax returns during pendency of divorce
 - i. Negotiated during divorce?
 - ii. Transfers of assets not treated as sale
 - b. Gifts
 - i. Transfers between spouses not subject to gift tax
 - ii. Gift-splitting
 - 1. Can be done even during year of divorce
 - 2. Both spouses must file gift tax returns
 - c. Estate taxes
 - i. Unused exemption from deceased spouse
 - ii. Consider if would be lost on remarriage
10. The end of the cohabitation relationship
- a. Similarities to marriage
 - b. Differences to marriage
 - i. No support
 - ii. No attorney fees
 - iii. Less discretion in property division AS ALL SEPARATE PROPERTY MUST BE GIVEN TO THE OWNER. IN A DIVORCE THE COURT CAN GIVE ONE PARTY THE SEPARATE PROPERTY OWNED BY THE OTHER PARTY.
 - c. Do they even have a cohabitating relationship?
 - i. Parties' intent
 - ii. Statements about marriage
 - iii. Length of cohabitation
 - iv. Continuity of cohabitation
 - v. Commingling of assets
 - vi. Any estate planning?
 - vii. Common children
 - viii. Marriage ceremony
 - ix. Hold themselves out?
 - x. Contribute to each other's assets?
 - xi. Legally able to marry?
 - xii. Insure each other?
 - xiii. Share credit cards?
 - ~~xiii~~-xiv. OTHER RELATIONSHIPS DURING THE COHABITATION?

d. Estate planning for cohabitants

- i. No automatic revocation on breakup per statute
- ii. Cohabitants are not intestate heirs

Kathryn Holland is admitted to practice law in Washington and Oregon. She received her Undergraduate Degree in Finance from Texas Christian University, Magna Cum Laude. She earned her Juris Doctorate from University of Texas School of Law. Ms. Holland's practice emphasizes estate planning, trusts and probate, gift and estate taxation and charitable planning. Ms. Holland is a member of the Washington and Oregon State Bar Associations, the Clark County Bar Association, and the Legacy Health Allied Professionals Council. She has served as Treasurer of the St. Helen's Chapter of the Washington Women Lawyers Association; is past President of the YWCA of Clark County and is chair of their Planned Giving Committee; and is a board member of the Southwest Washington Estate Planning Council. In addition, she is a member of the Real Property, Probate and Trust and Elder Law Sections of the Washington State Bar; and the Estate Planning and Administration section of the Oregon State Bar. She has taught Estate Planning and Probate for Paralegals at Clark College in Vancouver and often speaks publicly to civic groups about estate planning and probate law.

Scott Horenstein is a family law lawyer practicing in Vancouver, Washington. He is a past member and chairperson of the Washington State Bar Association Family Law Executive Committee and a recipient of its Outstanding attorney of the year award and Outstanding Professional of the Year award. He is a member and past chairperson of the Washington Chapter of The American Academy of Matrimonial Lawyers and a co-recipient of its first outstanding member of the year award. He is an author and editor for the Washington State Bar Association Family Law Desk book. He is a former adjunct professor of community property law at Willamette Law School and Lewis and Clark Law School. He has written for and spoken at many continuing education programs on a national, state and local level.

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