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Section B Story

Every Divorce Client Needs Estate Planning

Every divorce client needs immediate estate planning advice in case something happens to them before the divorce is final, says Ft. Lauderdale, Fla., estate planning specialist Jeffrey A. Baskies.

Lawyers can provide this advice to the client themselves or refer the client to another lawyer in their firm. They can also refer the client to a specialist (and hopefully generate some referrals in the other direction).

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Lawyers Weekly USA's Michael M. Bowden recently spoke with Baskies about the aspects of estate planning about which family lawyers need to be concerned.

Why do you say that every divorce client needs estate planning?

Because of what can happen if they pass away before the final entry of the divorce decree.

If you die before your divorce is final and you don't plan, then your spouse will be deemed to survive you. If you have a will, they'll get whatever you gave them under the will. If you have an intestate circumstance, they'll get whatever their share is by intestacy.

Have the client look at what will happen if they die during the pendency of the action, and whether that's consistent with their current desires. My experience has been that 99 percent of the time, it's not. Usually they would like to limit what the divorcing spouse gets to the least amount necessary.

These are issues that have to be dealt with in the wake of a divorce anyway. Your advice is to get an early start and close the gap between the time a divorce is filed and the time it's finalized?

Exactly. Lawyers don't think about the possibility that something could happen during the pendency of the action, and consequently they leave their flank open. Fortunately, it doesn't happen all that often, but you could be doing your client a disservice if you don't prepare for the possibility.

Sometimes the client is going to set up trusts for the kids anyway, so why not do it while the divorce is pending instead of waiting until after? The management of funds after the death of the client is a very important issue, especially if there are minor children. I've never met a client who said, "Yeah, that person I'm divorcing is the person I want to be in charge of all my money after I'm dead!"

When should a family lawyer raise these issues?

During the first meeting with the client, assuming that the client has decided to move forward and file for a divorce.

If you're a family lawyer who's also knowledgeable about estate planning, can you do both jobs?

If you're a general practitioner who does family law and estate planning, or you're a specialist in those two fields, I don't think there's any inherent conflict in your performing both services.

Or, another lawyer in your firm might handle estate planning for your divorce clients. Every time you have a new divorce client, that estate planning lawyer should meet with them.

On the other hand, if I were in a small family law firm, or a sole practitioner just doing family law, I'd want a couple of estate planning attorneys with whom I had a relationship and a comfort level. You might want one lawyer referral for wealthier clients with complex estate issues, and another for less wealthy clients who might just need a simple revision to a will.

How much should a family lawyer explain about estate planning initially?

You need to be comfortable addressing the following:

1. Do you have an existing will and/or revocable living trust arrangement?

2. How is your property titled? Is it joint? Individual? Tenants by the entirety? Those things will be addressed during the divorce anyway, but they're relevant also to estate planning; and,

3. Do you have assets with beneficiary designations, such as life insurance, IRAs, pensions, annuities, etc.?

If the answer to any of those questions is, "Yes, I have those types of assets," or "Yes, I have an estate plan," then the next question becomes:

4. Is the person from whom you're seeking a divorce a beneficiary of any of those?

If the answer to that is yes, then the family lawyer must be prepared to ask, "In that case, do you want to alter the disposition?"

Is the answer usually yes?

Usually. Except for older, second-marriage couples or very wealthy clients with tax planning, the vast majority of married couples have a reciprocal, "leave-everything-to-my-spouse" type of plan. So if your client has an estate plan, it's very likely that it leaves everything to the spouse they're intending to divorce. Usually they want to change that.

Once you've impressed the importance of estate planning on your client, what happens next?

Things like, you don't want your money in a guardianship, because when the kid turns 18 he'll buy a Corvette (and if it's less than $50,000, he'll buy a Camaro) -- and that's the end of that. So

you'll want to plan trusts for the kids that go beyond the age of 18.

Also, a lot of people, especially moderately wealthy older women, typically have had no experience dealing with financial issues. The estate planning attorney can really help facilitate the learning process, help the client become comfortable with managing newfound wealth. It's something that happens all the time in the estates and trusts field.

How are trusts for the children of the marriage affected?

If your client has an estate plan, they've usually considered who the trustee will be who manages money for the kids, and who the guardian will be. Those are things they'd usually put in their will.

But now they're getting a divorce. Do they really want that sonofabitch to manage the money they leave for their kids? Probably not, because they may think the divorcing spouse will use the money for their own benefit and not necessarily for the kids.

You usually can't alter the guardian of the children, because in most states it's prevalent to have joint custody. In that circumstance, if a client should die, it's most likely that the spouse (even though divorcing) would get custody of the child as guardian.

But what if the spouse doesn't want custody, or something happens to them? So I still tell my clients to nominate an alternative guardian.

What if your client doesn't have an estate plan?

Then they're stuck under your state intestacy statutes, so the family lawyer should at least be semi-comfortable explaining how that would work. In most states, if there's a spouse and minor children, the intestate estate goes at least 50 percent to the spouse, and if there are no minor children it can all go to the spouse.

Those are pretty scary concepts! "Every penny that you have, if you die, is going to go to that person you're trying to divorce right now! And here you are, bitterly fighting over nickels and dimes and pots and pans. Is that what you want?" Well, the answer's going to be no.

What about things like elective share rights â€“ no amount of estate planning can get rid of that, can it?

That's an interesting issue. You still can't avoid the elective share rights, or dower and curtesy rights as they're called in some states, of the spouse. Because if you die and they're still your spouse, they're still entitled to those things.

But in some states there are ways that you can minimize those rights. In Florida, for example, if you own property jointly with somebody else or if it's in a revocable trust, it's not subject to an elective share.

I've been called into a case where a husband was going through a divorce, and he had the vast majority of the money. Well, there were lots of good reasons he didn't trust his wife, and he certainly wasn't very happy about having her take a large portion of his money in the divorce, let alone on his death. And he didn't feel she was the person he wanted to manage money for the kids. He felt she was a spendthrift and would live extravagantly, and not leave the money for the kids.

Yet all of the estate planning he had gave 100 percent of his assets to his wife. And the moment I met with him, he told me, "I want to give her zero if I should die before this thing's over." So we had to make dramatic changes, but we were able to accomplish everything he wanted.

Fortunately, he outlived the divorce. But if something had happened to him, we were able to put a plan in place that would have left nothing for her. That's the exact opposite of what would have happened if he hadn't come to me.

Of course, not everybody wants to cut their spouse out 100 percent. We do have clients who will provide for a spouse, even during the pendency of the divorce.

Are there tax issues as well?

A lot of divorce cases, especially where there's money involved, have tax and estate planning implications.

I've worked on many cases with divorce lawyers to structure settlements. I was originally brought in to meet the client and talk about revising their estate plan. And often I'm called back in when they're trying to resolve a settlement, because there are complicated income (not to mention estate and gift) tax consequences to structuring divorce settlements, and not all family lawyers are comfortable with that. If they bring an estate or tax planner into the process at an early stage, it may actually help them to reach a more favorable result for their client.

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