www.lawyersusaonline.com LawyersUSA

Practice makes perfect. Sub SIGN FREE E-ma

Wednesday, July 12, 2006 Law

From the June 06, 2005 Lawyers USA.

Order a REPRINT of this Story

Guest Article

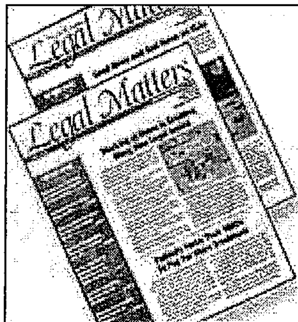
Every Divorce Client Needs Estate Planning

By Jeffrey A. Baskies

There's a seemingly untapped or at least underserved market - all divorcing clients need estate planning. I have written articles on this subject before, but it still baffles me that I am not overwhelmingly busy with referrals from divorce lawyers. It seems that I should be bombarded with divorcing clients calling to update their estate plans.

I think there is more education that needs to be done. Estate planners need to do more to tell our stories to colleagues who practice family law, so they will instantly grasp why all their clients should be calling us. Indeed, they may fear a malpractice claim if they have not advised their clients to do so.

ADVERTISEMENT



Get client newsletters tailored to your practice areas!

Click here for more information.

So why does every divorce client need estate planning? There are several key reasons.

Clients With No Existing Estate Plan

For divorcing clients who have no existing estate planning documents (i.e. no will), they need to consider what happens to their assets if they die during the pendency of the divorce. Such clients should be educated on the laws governing non-testamentary transfers (i.e. joint accounts and assets with beneficiary designations) and the laws of intestate succession.

If a client dies with a divorce pending but not final, the surviving spouse is usually entitled to his/her intestate share and his/her interests in non-testamentary transfers. In Florida, where I practice, it is the entry of a final divorce decree which causes a divorced spouse to be considered predeceased both for purposes of the intestacy statute and for most of the non-testamentary assets. However, the mere filing of a divorce action - no matter which spouse files it - does not cause the other spouse to forfeit his/her intestate share or his/her rights to inherit other non-testamentary transfers.

When someone dies owning individually titled assets but has no will, state law provides a statutory scheme for disposition. In Florida, for example, if the client spouse is still married and

has no children, then the other spouse receives 100 percent of the client spouse's assets - no matter how advanced or acrimonious the divorce proceeding may be. If the couple has children, the other spouse gets 50 percent of the client spouse's assets. But the laws of intestate succession only apply if the client has no will. The rules are very easily circumvented by simply creating a will. The ease with which these rights may be overcome highlights why it is essential for every divorcing client to immediately consider estate planning.

In addition to creating a will, divorcing clients also need to review the title to their assets. If assets are jointly titled with the spouse, then the client should talk with a divorce attorney before attempting to change title. At a minimum, clients should be made aware that if they die during the divorce proceeding, joint assets will pass to the spouse.

Also, clients must consider all assets with beneficiary designations. For certain assets, these cannot be changed without the divorcing spouse's consent - i.e. qualified pension plan benefits. Beneficiary designations for some other assets can be quickly and easily changed - for example, designations for IRAs and/or life insurance policies are easy to alter and the custodian of the IRA or the insurance carrier can provide standardized forms for the client's use. In virtually every case, clients involved in divorce proceedings will wish to change these beneficiary designations - it is rare for clients who address their estate planning with qualified attorneys to decide that they wish all their assets to pass to their former spouses.

Clients With Existing Estate Plans

As a result of the pending divorce, it is likely that the mutual goals and aspirations of the couple have been altered. Because prior estate planning documents likely expressed those goals, these documents probably need to be revised.

During happy times, many clients create estate planning documents leaving everything to their spouses. The vast majority of couples who create estate plans have such "I love you" or "sweetheart" estate plans. Such plans undoubtedly expressed the clients' intent at the time; however the clients' attitudes assuredly changed once the divorce began. If the couple does not want to spend the rest of their lives together (indeed, some don't want to be in a room for five minutes together), it is unlikely that either intends to leave all of his/her assets to the other. Yet unless the client takes action, that may well be what happens.

Therefore, it is imperative for divorcing clients with existing estate planning documents to meet with a competent estate planning attorney as soon after the divorce is initiated as possible to revise their plans. To facilitate this, clients should provide copies of any existing estate planning documents (wills and trusts - revocable or irrevocable) plus an accurate inventory of assets. Then the estate planning attorney can properly advise how the assets will pass on death. Assuming the client has new estate planning goals, the client and the attorney can address how to best achieve them. Most likely, the client will need completely new estate planning documents.

Elective Share Issues

While a client may wish to completely disinherit a spouse, in some cases that goal is unattainable. In all states, surviving spouses have a right to some portion of the deceased spouse's estate - by virtue of rights to community property, elective share, dower, courtesy or even usufruct. In some states, non-testamentary assets may not be included in these rights, so it may be possible to disinherit the spouse. In other states, that can't be done due to augmented estates or inherent rights such as community property. For example, in Florida, a surviving spouse has a right to elect to take 30 percent of the augmented estate of the deceased spouse, even if the surviving spouse is intentionally omitted from the estate plan and a divorce is pending.

That does not mean there are no opportunities for planning. For instance, clients should consider if the elective share can be satisfied with a disposition in trust. In some jurisdictions,

state law permits this, and then the client spouse can leave the minimum necessary in a trust for the other spouse, with the children, for example, being the ultimate beneficiaries at the other spouse's death. Such a plan may be preferable to completely disinheriting the other spouse, only to have him/her take a portion of the client spouse's estate via the elective share. Once the divorce is final, this provision can be eliminated.

A client who is seeking to minimize the other spouse's access to assets in the event of the client's death must have these concerns addressed at the outset of the representation. If a client is not introduced to an estate planner early in the divorce proceeding, very undesirable consequences could ensue if he or she dies prior to the entry of a final order or decree of divorce.

Guardianships And Trusts For Children

For a myriad of reasons, many clients are distrustful of the spouses they are divorcing, but almost all would do virtually anything for their children. Therefore, divorcing clients with minor children must revise their estate plans (or create new plans) to protect those children. In some cases, caring for the children is a concern and they want to know if their spouse must be appointed guardian. But in many cases, caring for the children's money is the bigger concern.

To some degree, the estate planner's ability to help in this arena is limited. In many cases, custody is awarded jointly. In those cases, if the client dies, the other spouse will undoubtedly be the children's guardian. In other cases, even if custody is not joint, the presumption in favor of appointing a natural parent as guardian is so overwhelming that, again, clients must understand that the other spouse will likely be the children's guardian no matter what the estate planner attempts to do. Moreover, in my experience, many clients are comfortable and satisfied with that being the case. Oftentimes, clients want the children to be with their natural parent if the client should die. However, I still advise clients to name alternate guardians in case the client and the other spouse die simultaneously, or in case the other spouse pre-deceases the client or declines to serve.

Regarding their property, however, most clients have very different feelings. They may be comfortable with the other spouse caring for their children, but they rarely want that spouse to have control over their money once they are gone. For many clients, it is equally as bad to leave the other spouse in control of the money as it would be to leave the money outright to that spouse. For that reason, clients must use estate planning vehicles to create trusts for the children and must nominate trustees - and successor trustees.

If the fear of having a former spouse manage the children's money is not enough to compel clients to create trusts for their children, then the ability to avoid guardianships should do the trick. Without trusts, any money left to the children will wind up in a court-directed guardianship. Guardianships are costly and time consuming. Moreover, a judge - who the client has never met and who usually never meets the children - becomes the arbiter of how the money will be spent for the children. No thanks! Furthermore, guardianships usually terminate at the age of 18. Should any child receive a large sum of money outright at the age of 18? Thus, trusts for the children should be established to protect the money from the other spouse, from guardianship proceedings and from the children themselves.

Conclusion

As addressed above, there are many good reasons why divorcing clients need estate planning. They need to consider and address their changed circumstances and their changed estate planning objectives. Any lawyer representing a client in a divorce should advise the client to see an estate planning attorney - indeed, it would be a shame to ignore the complicated legal issues relating to the client's estate planning that are made acute by the initiation of divorce proceedings.

Jeffrey A. Baskies, Esq., the former president and CEO of Lawyers Weekly, practices estate

planning at Ruden, McClosky, Smith, Schuster and Russell, P.A. in Fort Lauderdale, Fla., where he is board certified emeritus as a specialist in wills, estates and trusts law by the Florida Bar. His column runs regularly in Lawyers Weekly USA. If you have questions or issues relating to estate planning, please feel free to e-mail Jeff at jeffbaskies@hotmail.com. All questions are encouraged.

© 2005 Lawyers Weekly Inc., All Rights Reserved.

Order a REPRINT of this Story

6 weeks free LawyersUSA

User Agreement For Subscriber-Only Online Benefits | Help | Our Privacy Policy
Send any questions or comments to comments@lawyersweekly.com

Subscriber Services: 1-800-451-9998 **Technical Support**: 1-800-444-5297 ext. 8156
© Copyright 2006 Lawyers Weekly, Inc. All Rights Reserved

Lawyers Weekly does not use spyware; however, we link to a number of other sites and do not take responsibility for any spyware they ı

This site is best viewed with Internet Explorer 6 (click here to download) or Netscape 7 or higher (click here to download)

208.49.101.98/5.93