

# Estate Planning and Divorce: What to Consider When You're Separating or Divorced



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May 2012

If you're planning to separate from or divorce your spouse you probably already know that it's critical to begin working with a good family law attorney, but you may not realize that it's also a good time to consult with an estate planning attorney. Divorce can throw an otherwise well-thought-out estate plan into turmoil, and divorcing couples are wise to consider updating their estate plans.

Following a divorce, there are often titling issues that need to be addressed. Assets that were once jointly-owned by both spouses are now owned by one spouse, individually. Beneficiaries and agents (who were more than likely your soon-to-be ex-spouse) should be changed and updated. If you own property in more than one state or have minor children, now may also be a good time to consider a trust.

To understand the types of changes that may be required during a divorce, first consider your will. Most married couples executed "I love you wills" during the course of their marriage, naming their spouse as the sole-beneficiary of their estate. It's highly unlikely that this matches your current intent now that you are separated or divorced. While it is true that the Commonwealth of Virginia (and several other states) has a law that voids most inheritances by an ex-spouse, this law only applies once your divorce is final. As long as you are still legally married to your spouse, even if you are in the process of divorcing or separated in advance of divorcing, your spouse may still make a legal claim for a portion of your estate.

If you don't have a will, now is a good time to consider drafting one. Dying without a will is called dying intestate. In Virginia, dying intestate means that some or all of your estate will go directly to your spouse. Again, until you are legally divorced, you are still married. Therefore, if you die without a will before your divorce is finalized, your spouse may inherit a large portion of your estate.

The good news is, most estate planning documents are fairly easy and relatively inexpensive to modify. The process of modifying your plan should begin as soon as separation or divorce is imminent. To update your will you may either request a codicil to your current will or a new will, destroying any past wills that you no longer wish to have legal force and effect.

In addition to updating your will, as soon as you decide to divorce you should also update any Advance Directive/Health Care Power of Attorneys or Durable General Power of Attorneys that you may have naming your spouse as your agent. Powers of

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Attorneys are powerful legal documents that grant decision-making authority to a third-party (your "Agent" or "Attorney in Fact"). A Health Care Power of Attorney addresses health care related decisions while a General Durable Power of Attorney generally deals with finances and real property. A Power of Attorney provides that in the event that you are unable to make your own decisions due to illness or incapacity, your agent can act on your behalf. Most married couples name their spouse as their agent. Such documents should be updated immediately upon separation or divorce; consider in the alternative naming as your agent a close trusted friend, a sibling or even an adult child.

Finally, if you don't already have a trust, ask your attorney to talk to you about the benefits of establishing one. A trust is especially appealing for divorcees with minor children because it allows for in-depth planning for future distributions to minor children and it can be very useful to have in place if you ever decide to remarry. A trust may be created through a will or "testamentary trust," or it may be a stand-alone document - a "revocable living trust." There are pros and cons to both options, and it is best to discuss with your attorney which one is best for you.

If following your divorce you're a single parent with sole custody of your children, a trust can be an excellent tool for planning for your children's future care if you should die or become incapacitated. A trust allows you to appoint a third-party to serve as Trustee and to administer funds to your children (if they have reached the age of majority) or to their guardian (if they are minors) in accordance with your instructions. Through a trust you can direct that the children only receive a portion of their full inheritance at certain ages to avoid a windfall of cash when they may be too young to manage it maturely. Through a trust you can also encourage certain behaviors like graduating from college or trade school or obtaining a graduate degree. Through a trust you can also plan for big life events like your children's wedding or helping them with the purchase of their first home. There is a great deal of flexibility in drafting a trust and contrary to popular belief, trusts are not just for the wealthy. Trusts serve as excellent planning tools if you do decide to remarry and particularly where there are two families with children coming together.

While it may be hard to imagine dealing with estate planning at the same time you're going through the difficult emotional process of seeking a divorce, you may be surprised to find out how empowering it can feel. There can be a tendency to put off planning until you're "back on your feet" and your divorce is behind you, but doing so can have unintended negative consequences which may be easily avoided with appropriate planning.