

In the Midst of a Divorce, Consider New Estate Planning Documents

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With all of the issues and emotions that accompany a divorce, it may be challenging to think about your estate planning documents. But there are scenarios that can bring about undesired consequences, particularly in the event of death or incapacity before a final judgment of divorce is entered. This article explains the potential scenarios that can occur during divorce proceedings and recommends connecting with a Trusts & Estates lawyer to review and possibly update particular documents during the [divorce process](#).

Potential Scenario: A Soon-to-be Ex-Spouse May Inherit Your Assets

A Last Will and Testament governs how a person's probate assets are distributed upon his or her death. Many married couples create wills that leave their assets to one another (i.e., a "sweetheart Will"). However, polls consistently show that more than one-half of American adults do not have a Will. If a New Jersey resident dies without creating a Will, then New Jersey's intestacy laws dictate who inherits the decedent's estate. A surviving spouse will inherit the majority, and possibly the entirety, of the estate depending upon the familial makeup.

Under New Jersey law, once you are divorced, any bequest under a preexisting Will to your former spouse is automatically deemed to be revoked and, of course, your former spouse will no longer inherit under intestacy. However, if you die prior to a final judgment of divorce being entered by the court, then the divorce proceeding is moot, meaning that there can be no divorce granted after death.

If you have a sweetheart Will, or even no Will, then your surviving spouse still stands to inherit as if there was no marital discord at all. This scenario is not often considered by divorcing couples, so

while it's common for a divorcing spouse to say, "I'll wait until the divorce is finalized to update my Will," this result is undoubtedly an outcome that a spouse may want to avoid.

Solution: Prepare and Execute a New Last Will and Testament Now

An easy solution to ensure a divorcing spouse's assets are distributed in accordance with his or her wishes is to prepare and properly execute a new [Last Will and Testament](#) prior to a judgment of divorce. By taking this more immediate action, a spouse can mitigate – and possibly eliminate – the amount of assets that a soon-to-be ex-spouse could inherit in the event of death prior to the divorce.

Additionally, while there can be no divorce after death, a person's estate may nevertheless be able to sue the surviving spouse for equitable distribution under certain circumstances. This could allow those assets which you would have received under equitable distribution had the divorce been finalized to pass to your intended beneficiaries.

Potential Scenario: A Soon-to-be Ex-Spouse May Make Important Financial and Medical Decisions on Your Behalf

While a Last Will and Testament contemplates death, a Power of Attorney and a [Living Will](#) contemplate what happens when an individual becomes incapacitated and cannot act on his or her own behalf. These documents designate the individual(s) who can act on a person's behalf with respect to medical decisions and financial decisions, among other things.

Generally, married couples who prepare these two estate planning documents together will designate each other as the initial attorney-in-fact and health care agent. In that case, until such documents are revoked and replaced, your spouse will be able to act in such capacities and make your financial and medical decisions. Moreover, depending upon the type of Power of Attorney you have, your spouse may be able to act on your behalf even if you were not incapacitated. This is true even if there is an ongoing divorce proceeding.

In a scenario where you have no Power of Attorney and Living Will, your spouse may still have legal

rights to act on your behalf and can even seek the court's permission to act as your guardian if you become incapacitated.

Solution: Prepare and Execute a New Power of Attorney and Living Will Now

By preparing and properly executing a new Power of Attorney and Living Will prior to a judgment of divorce, you can mitigate – and possibly eliminate – the risk that your spouse could make financial and medical decisions on your behalf. Moreover, a spouse would face significant hurdles in seeking a guardianship or other permission from the court. It's also important to put a spouse on notice that all prior documents have been revoked.

In conclusion, your existing estate planning documents, or lack thereof, can potentially harm you or your assets if they are not updated during the process of divorce. Speaking with a [Trusts & Estates attorney](#) can be the first step in safeguarding not only your assets but also important financial and medical decisions in the future.