

BREAKING UP IS HARD TO DO

ESPECIALLY WHEN IT COMES TO ESTATE PLANNING

By Robert Prior

One area of the law that tends to generate a lot of confusion is that of special needs planning. If an individual under age 65 is disabled and that disability qualifies them for government assistance, then special needs planning may be appropriate. The purpose of a special needs trust is to enhance the disabled individual's quality of life and, in many instances, lift them out of poverty. It generally allows them to keep an inheritance or settlement from a lawsuit without losing valuable government benefits.

While breaking up is hard to do, it is, sadly, a fact of life. Statistics are uncertain, but many believe that over 50% of marriages today end in divorce. While all divorces are emotional and difficult, the divorce of a long-married couple can be especially hard. Assets accumulated during the marriage, including real estate, business interests, and retirement accounts, have to be dealt with. And ensuring that children and possibly grandchildren are adequately protected and provided for usually requires the wholesale revision of estate plans. Updating your estate plan in the event of divorce is essential.

One complexity in divorce is how to divide the marital assets. Marriage takes separate assets and intertwines them into joint assets, making things hard to untangle. Generally, courts in Georgia seek to fairly divide marital property between the spouses. Marital property is typically any property that was acquired during the marriage, regardless of which spouse owns or holds title to the property. It is important to remember that marital property isn't just houses and cars. It includes things like pension plans, 401(k)s, IRAs, stock options, annuities, life insurance, brokerage accounts and closely held businesses.

Unlike marital property (which is equitably divided), the separate property of each spouse remains the property of that spouse after divorce. Separate property includes any property owned by either spouse prior to the marriage and any inheritances or gifts received by either spouse, before or after the marriage. Often, the difficulty in a divorce proceeding is identifying which property was intended to be the separate property

of one spouse. Separate property often becomes commingled with marital property (for example, an inheritance is deposited in a joint bank account) or there are other indications the spouses intend to treat it as marital property. A pre-nuptial or post-nuptial agreement that identifies separate property of each

spouse is used in some marriages and solves the problem, but these are rarely completed.

For divorced individuals and those in their second marriage, trusts are almost always an appropriate, if not necessary, step. Trusts can ensure that second spouses are not able to disinherit children from a previous marriage, for example. A commonly used tool, known as a "QTIP" trust (Qualified Terminal Interest Property trust) allows a surviving second spouse to receive all income generated by assets after death of the first spouse, but preserves the principal for children of a former marriage. When setting up any trusts, especially any irrevocable trusts, it's even more important to have pre-nuptial or post-nuptial agreements in place. These should clearly divide joint property into separate property, and then identify that property going into the trust.

Beneficiary designation forms govern the distribution of assets from life insurance and pension plans to annuities and



IRAs, and those designations override instructions in a will (often to the surprise of the family). This means that no matter how carefully you draft your will to provide for second spouses or children, if you ignore your beneficiary designations, your plan will have no effect. Leaving a former spouse as beneficiary of your life insurance policy and failing to add children as the primary beneficiary of your retirement plan can have unintended consequences and often disinherit those you intend to take care of. To ensure your estate plans are honored, make sure all your beneficiary forms are updated following marriage, divorce, or remarriage.

Review your retirement and estate planning documents every few years with your estate planning attorney to make sure designations are up to date and all assets are accounted for. If you are older, you've likely accumulated multiple retirement accounts and insurance policies, and it's easy for an account to go overlooked, especially in the event of a divorce or new relationship. Outdated information on wills, trusts and beneficiary forms can cause estate planning pitfalls that are easily avoided with proper planning.

Divorce can be a challenging time for everyone involved, but with proper planning and insight, it doesn't have to derail your retirement and estate plans. Talk to an estate planning attorney to ensure your plan is adequate and accomplishes your objectives.



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Estate Planning Elder Law

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