PROTECTING YOUR ASSETS BEFORE, DURING AND AFTER A DIVORCE

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When someone is about to get married, they never think their marriage will end in divorce. If they did, no one would ever marry. Unfortunately, statistics still show that 40% of first marriages end in divorce, 60% of all second marriages end in divorce and more than 70% of all third marriages end in divorce. With odds like these, there are a number of things you can—and should—do to protect yourself and your assets from an estate planning perspective.

Before A Divorce.

With divorce rates high and more and more people marrying more than once, prenuptial agreements have become an important estate planning tool. Without a prenuptial agreement, your new spouse may be able to invalidate your existing estate plan. For example, if you have children from a prior relationship, you may wish for your assets to pass to those children notwithstanding your new nuptials. If your Will provides for those children and you subsequently marry, you may think that your children will receive your assets in accordance with the terms of your Will, notwithstanding your new marriage. However, absent a prenuptial agreement (or a post-nuptial agreement), your spouse can make an "election against" your Will and receive, roughly, one-third of your estate. This may not be what you want.

If, instead, you and your soon-to-be-spouse enter into a prenuptial agreement prior to marriage, you can specify that your existing estate planning documents should be respected so that your assets pass to your children as you intend for them to, rather than to your new spouse.

If you are already married, but have these same concerns about protecting assets for children of a prior relationship, it is not too late to enter into a "post-nuptial" agreement. A post-nuptial agreement is executed *during* (rather than before) the marriage, but serves the same purpose as a prenuptial agreement.

It is important to make sure your prenuptial agreement is valid. Following are the major factors needed to ensure this:

- **In writing**. To be valid, a prenuptial agreement must be in writing and signed by both spouses. A court will not enforce a verbal agreement.
- **No pressure**. A prenuptial agreement will be invalid if one spouse is pressured into signing it by the other spouse.
- **Reading**. Both spouses must read and understand the agreement. If a stack of papers is put in front of one spouse and he or she is asked to sign quickly without reading, the agreement can be invalidated. The spouse must be given time to read the document and

consider it before signing it.

- **Truthful**. Both spouses must fully disclose assets and liabilities. If either spouse lies or omits information about his or her finances, the agreement can be invalidated.
- **No invalid provisions**. While the spouses can agree to most financial arrangements, a prenuptial agreement that modifies child support obligations is illegal. If an agreement contains an invalid provision, the court can either throw out the entire agreement or strike the invalid provision. Similarly, if the terms of the agreement are grossly unfair to one spouse, the agreement may be invalid.
- **Independent counsel**. Some states require spouses to seek advice from separate attorneys before signing a prenuptial agreement. Regardless of whether it is required by state law, it is the best way to make sure each spouse's interest is protected.

If you think you might benefit from a prenuptial, or post-nuptial, agreement, call us to discuss your planning.

<u>During A Divorce</u>.

If you do not have a prenuptial (or post-nuptial) agreement in place and you subsequently divorce, there is a period of time when the divorce is pending (or imminent) but the divorce decree has not yet been signed. This is a particularly unsettling period of time. In most cases, you will have a Will which provides that your assets are all to pass to your soon-to-be-ex-spouse. If you pass away prior to the entry to the divorce decree, your assets will all pass to your spouse. In the alternative, if you don't have a Will, the intestacy laws would govern and would award most, if not all (depending on the circumstance), of your estate to your spouse if something were to happen to you. Additionally, your health care directives and financial powers of attorney likely appoint your soon-to-be-ex as your Agent to make medical and financial decisions for you and on your behalf. If a divorce is looming, you likely do not want your spouse making these decisions for you.

During this period, it is exceedingly important that you revise your estate planning documents to remove the references to your soon-to-be-ex. You should enter into new powers of attorney and health care directives wherein you appoint someone other than your spouse to make medical and financial decisions for you. Likewise, you should change the beneficiaries of your retirement accounts and life insurance policies to designate someone other than your spouse as beneficiary. And, perhaps most importantly, you should revise your estate planning documents to not provide for your current (but soon-to-be-ex) spouse.

By revising your estate planning documents and beneficiary designations to not provide for your spouse, you can greatly limit the assets which would pass to him/her in the event of your premature passing. Please call our office to schedule an appointment if you find yourself in this situation.

<u>After A Divorce</u>.

Whether or not you have a prenuptial (or post-nuptial) agreement in place, you may have a Will that provides for your spouse. Likewise, you may have specifically designated your spouse as

beneficiary of your life insurance and/or qualified retirement account assets. If you subsequently divorce, you may be under the mistaken impression that the references to your spouse in your Will and beneficiary designations are revoked by virtue of the divorce. In New Jersey, any references to your ex-spouse in a Will which was entered into during marriage will be nullified as a result of the divorce. The ex-spouse will be treated as if they predeceased you for distribution purposes and the assets will pass to the next-in-line beneficiary(ies). However, beneficiary designated assets trump the distribution provisions in your Will. Furthermore, any references to your now-ex-spouse in a trust or on a beneficiary designation form are not automatically revoked as a result of the divorce decree. Accordingly, in a divorce setting, it is imperative that you revise your Will and any revocable Trust(s), along with any and all beneficiary designations to no longer provide for your (ex-)spouse. We suggest that you call our office to schedule an appointment to review your estate planning documents if you are divorced and have not already revised your estate planning documents.