

**PJG**

Patrick J. Gibbs, P.C.  
Attorney at Law  
Roswell, Georgia

**Wills, Trusts and Estates  
Corporate and Business Law**



## **Divorce and Estate Planning**

A divorce is almost always an emotionally traumatic experience and often the concluding event to troubled times. Worrying about estate planning after struggling through the legal system to obtain the divorce may seem like adding insult to injury. But like bitter medicine, as painful as it may be, people are not organized for the future without creating an estate plan that puts the past behind them.

I am not just talking about getting a new will. Under Georgia law any divorce automatically “re-writes” an existing will to treat the former spouse as if he or she had predeceased the person whose will is being probated. This was a dramatic change from the previous law which treated the divorced person’s will as automatically revoked by the divorce.

Having a valid, up-to-date will, however, is only a part of the estate planning process. What about the life insurance and the retirement accounts? They are normally covered by beneficiary designations and are non-probate assets. The children of David Egelhoff (from his first marriage) found this out the hard way after his second divorce in April, 1994 and his death two months later in an automobile accident. Those children were the only heirs of his estate, but their former step-mother (his ex-wife Donna) was still listed as the beneficiary of the life insurance and pension accounts at his employment at the Boeing Company, despite the recent divorce.

After seven years of litigation that ended up in the U.S. Supreme Court, Donna, the ex-wife, got both the \$46,000 of life insurance and the pension account for which she was still designated beneficiary. The Supreme Court ruled that the Employee Retirement Income Security Act (“ERISA”) pre-empted any attempt under state law to revoke the beneficiary designations by the fact of the divorce.

Determining who will be the recipients of a transfer of wealth in event of death is only part of the estate planning process. Who will control those assets is another essential feature. All those people who were picked to be executors, trustees and guardians before the divorce may be totally inappropriate choices after everybody in the extended family picked sides during the divorce. A deliberate review all of the “players” designated in the will and the powers of attorney should be conducted when the divorce decree is obtained. One practical lesson from the facts of the *Egelhoff* case is that there is no guarantee of many months, or years, to arrange one’s affairs before death.

One important legal rule that troubles many divorced parents of minor children is that any designation of a testamentary guardian for those children will not become effective if the ex-spouse and non-custodial parent outlives the custodial parent. It takes a termination of the parental rights of the non-custodial parent before the testamentary appointment of a guardian by the (deceased) custodial parent can control. If there are special circumstances, such as a history of abuse, one might insert a strongly worded provision into the will on the unsuitable nature of the surviving parent with instructions to a trustee to pay for any necessary lawsuit to protect the children.

That brings us to the role of the trustee. A well-drafted last will and testament can appoint a person to manage and distribute the inherited property to the child(ren) for their education and support in the years leading up to a complete distribution of the property. A trustee should be an honest, organized and financially savvy person who will look after the best interests of the child(ren). If there is sufficient

money in the trust to justify the expense, it is feasible to name a corporate fiduciary to serve as sole trustee or as a co-trustee. The accounting systems and investment expertise of a corporate fiduciary are advantages that could combine well with an individual trustee who has personal familiarity with the needs any children. Choosing the right trustee(s) can be crucial to a successful trust will.

Coordination of assets such a life insurance and retirement accounts with the trust is essential to any successful estate plan. For example, putting minor children down as beneficiaries of life insurance is counterproductive. That life insurance death benefit also could make the difference in funding the trust enough to make it feasible to pay for a professional trustee's annual fee (usually around 1.25%).

It is possible that relationship between a trustee and the ex-spouse who is raising the children could become strained. In that case the client might decide to include special provisions in the trust on how to make any expenditures for educating and raising the children. Make sure the legal documents reflect your current wishes. If you die, you are not going to get a second chance to re-visit the subject.

© Copyright 2005, 2006, 2008  
Patrick J. Gibbs, P.C.

Patrick J. Gibbs practices law in Roswell, Georgia with a concentration on Wills, Trusts and Estates. This article is intended to be educational. Legal advice should be obtained as to individual needs before taking any action.