

Divorce: Is Ex-Spouse Still in the Estate Plan?

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If a person gets a divorce, do estate planning provisions in favor of the ex-spouse remain in effect, or are they automatically revoked? The answer depends on the type of estate planning document involved.

Will Provisions: Revoked

Upon divorce, provisions in a will relating to an ex-spouse are to be read as if the ex-spouse predeceased the testator. The same holds true for will provisions in favor of children of the ex-spouse who are not also children of the testator. As a result, will provisions in favor of the ex-spouse and in favor of the testator's step children from that ex-spouse are automatically revoked. Probate Code, § 69.

Insurance Policies: Revoked

A divorce operates as an automatic revocation regarding life insurance benefits that would otherwise pass to the ex-spouse. Family Code, § 9.301.

Retirement Benefits: It Depends

The Family Code also has revocation provisions for retirement benefits. Family Code, § 9.302. However, these Family Code provisions are preempted by ERISA if a "qualified" employee plan is involved. *Keen v. Weaver*, 121 S.W.3d 721 (Tex. 2003), cert. denied, 124 S.Ct. 808 (2003).

The *Keen* court applied federal common law to find that the ex-spouse had waived her right to the proceeds of her ex-husband's ERISA plan by voluntarily agreeing to a divorce decree in which those proceeds were determined to be the husband's separate property. The designation of the ex-wife as the beneficiary was not automatically revoked, but was found to have been waived pursuant to the terms of the divorce decree.

Whether designations of an ex-spouse as the beneficiary of retirement benefits are automatically revoked will depend on whether an ERISA plan is involved, and if an ERISA plan is involved, then on the facts of the particular case.

Conclusion

The most prudent thing for a divorced spouse to do is to obtain a completely updated estate plan in which the ex-spouse is completely removed. While some designations in favor of an ex-spouse may automatically be revoked, others may not be.

If you have questions, click [here](#) to contact Steve Spitzer.

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