

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.

Conclusion

A divorced spouse should 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.



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