

Estate Planning and Divorce Mediation

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When a couple divorces, they will usually need to revise their estate plans. Under New Jersey Law, a divorce automatically revokes the former spouse's rights to the divorced person's estate, unless those rights are specifically retained by written agreement by the spouses. (New Jersey Statutes 3B:3-14). Alimony tends to be secured with life insurance. Most divorcing couples desire to establish or modify their estates to provide for their children rather than a former spouse.

There are some estate planning questions that can be explored and resolved during the mediation. To help mediators address estate planning questions, this article will give brief definitions of common estate plans and suggest some questions the mediator may want to raise with the couple. Clients are encouraged to consult with their respective attorneys before making legal decisions.

Basic Estate Planning:

There are three basic ways an estate can be settled: through intestate succession, by a will, or by a trust:

1. Intestate succession results when a person dies without an estate plan, such as a will or a trust. New Jersey's Intestate Succession law governs the distribution of the estate. In this situation, decedents have no control over how their assets will be distributed or who will be appointed as guardian of their minor children. The court could appoint a guardian the parents would not have chosen. There may be fees and extra expenses with a court appointed guardian that are paid with money taken from the estate.

2. A will is a legal document that directs how the decedent's assets

should be distributed by the executor. It can also designate guardians for minor children and disabled dependants. Unlike a trust, a will must go through probate which is the legal process the executor must follow in order to distribute the assets. Probate involves court hearings and is a matter of public record which can leave the estate exposed to claims by would-be creditors.

3. A trust is a legal entity created to distribute assets to specific beneficiaries. A trustee administers the trust and has a legal obligation to manage the assets for the benefit of the beneficiaries. Unlike a will, a trust is private entity and therefore can protect the assets from would-be creditors. A trust gives the grantor more flexibility in how, when and why the assets are distributed. A special needs trust provides support to children with long term disabilities after their parents have died.

Estate Planning Issues a Divorce Mediator May Want to Explore:

Surveys indicate that most people do not have an estate plan. A divorce mediator is likely to have clients in these circumstances. With these clients, the mediator can help them decide if they want to make estate plans and, after consulting with attorneys, whether to use wills and/or trusts.

The couple should also discuss how they want the assets to be distributed among their children. While most estate plans divide the assets equally among the children, there may be reasons why one child should get a larger share. For example, if the adult children have already completed their education, the younger children may need a larger share of the estate to pay for

their education. Conversely, if there is a child or children with special needs, it may make sense for them to receive a smaller share with the use of constructive trust, as discussed below, to ensure continuation of other benefits they may be receiving now or in the future.

If a trust has been or needs to be created to benefit the couple's children, such as a trust for education expenses or a special needs trust, the couple should discuss who the trustee should be. Funding for these trusts should also be discussed. They may want keep the current plan or agree on another method. They should also discuss the terms of the trust, such as what expenses the trustee will be able to pay and at what age their children should inherit their share.

Couples with minor children should discuss whom to appoint as guardians. After the death of one parent, the a surviving parent will usually get custody of the children unless there are special circumstances. Guardians should be appointed in case both parents die. While each parent can choose a guardian, the mediator may want to discuss agreeing on a mutually acceptable guardian.

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It is not the job of divorce mediators to plan their clients' estates but they should include estate issues in the mediation process. By doing this, divorce mediators can help their clients agree on how they want to protect their children's future.

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