

COMMENTARY

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FAMILY LAW

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Until Death Do Us Part ... and Then What?

Most of us hope when we walk down the aisle with our partner it will be for life. However, in those instances when marriage ends in divorce, our hope changes to a desire to end the marriage and sever all ties.

But what if during your pursuit of a divorce your spouse dies? What happens next?

While parties are together in a happy marriage, they not only discuss their dreams of success and financial planning for retirement, they might even draft a will and discuss their plans after death, which include such details as who will take care of the children, how the couple's money will be invested and how their life insurance policy will be used.

But if the parties had been pursuing a divorce at the time of one spouse's death, what happens to those plans? Will the remaining parent now care for the children? What if during the divorce the parties had been in a heated custody battle, arguing about how to care for the children and what school the children would attend or even where the children would live? Now that one spouse is gone, where does the money get invested? Does it go to the children? What if the spouse had changed the beneficiary of the life insurance policy to exclude the soon to be ex-spouse? Or, for that matter, what if the policy's beneficiary was not changed?

An attorney must counsel his or her client not only in divorce but in the "what ifs," including what to do in the event that one spouse dies during the divorce. It is very

possible the remaining spouse may not carry out the wishes of the deceased spouse. As an attorney, it is advisable to put into place a backup plan so that most of your client's desires will be met even after his or her passing.

If your client is in a heated custody battle with his or her spouse, it is wise to counsel your client that all his or her desires for his or her children may not come to fruition if he or

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she dies. Perhaps your client should let one of his or her parents know of his or her desires so they may try to enforce those desires after your client's demise. Although a parent of your client can give directives with regard to which school your client wanted his or her children to attend and where the children should live, it is most likely that the wishes of the remaining spouse will prevail.

But under certain circumstances, grandparents have the right to step in and have limited custodial rights. In those cases, at least some contact may ensure that the wishes of the deceased parent are kept in place.

Likewise, if the parties have reached an agreement and the deceased spouse's estate is entitled to benefit, you may want to make sure someone in the family knows of your intention to invest the monies. If some of

the money was going to be put away for the children's education, your client should have another family member fulfill these wishes so that the remaining spouse does not benefit from that money.

Additionally, if your client did not change the beneficiary of his or her life insurance policy during the divorce, the remaining spouse may now receive an unexpected benefit. Your client's intentions for the money to be used for the children's future needs may have been thwarted if the proper planning was not in place. Again, this is an area in which you should counsel your client so that proper planning is in place.

Finally, what if the remaining spouse just doesn't want to fulfill your final wishes? Again, as in any divorce planning, it may be wise to counsel a client on his or her needs after death. Have your client prepare a final will outlining his or her beneficiaries and detailing his or her funeral arrangements and wishes with regard to care for the children. Having a document in writing and signed by the spouse is more powerful than spoken desires between a deceased spouse and family members. A written document may also alleviate some unwanted litigation between the survivors.

Divorce is often complicated, but when a spouse dies during the divorce, issues may arise that no one had anticipated. As a family law attorney, you must be able to counsel your client on many scenarios, including unexpected death. Raising the issues during the divorce will hopefully make things easier if your client dies before the case is finalized. Counseling your client might also help your client plan for alternatives. •

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