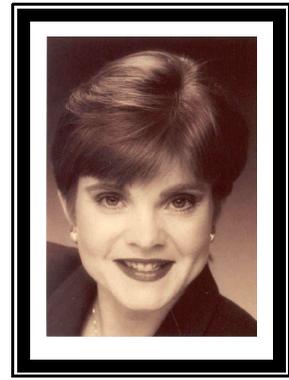


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## **Beneficiary Designations & Family Law**

October, 2007

Dear Colleagues:

For many years we relied on the provisions in the divorce decree to change all beneficiary designations of retirement benefits, life insurance, and wills. No longer. Sections 414(p) of the IRS Code and Section 206(d) of ERISA require that any retirement plan governed by ERISA, for instance 401K plans and company pensions, which are awarded in a divorce to both parties, must have a Qualified Domestic Relations Order (QDRO) approved by the plan administrator of that specific retirement fund and signed by the Court. The QDRO makes it possible for the non-employee spouse to control their awarded benefits without depending on the employed spouse. Note, that an Individual Retirement Account (IRA) does not require a QDRO to divide it, because it is not controlled by the ERISA statute.

Second, the United States Supreme Court held in *Egelhoff v. Egelhoff ex rel. Breiner*, (532 U.S. 141 (2001)) that any retirement covered by ERISA **must** have a new beneficiary designation post divorce. If this is not done, the existing beneficiary card continues to apply, even if it is the person's former spouse. This decision overruled prior Texas case law which held that beneficiary designations to a former spouse were void when parties divorced, unless a spouse signed a new beneficiary designation after the divorce naming the prior spouse.

Third, the Texas Supreme Court, in *Holmes v. Kent*, 221 S.W.3d 622, (Tex. 2007) upheld the Teachers Retirement System of Texas, (TRS) rules which require that (a) the prior spouse must sign the TRS's proprietary form waiving that former spouse's right to receive the survivor benefits and (b) that the divorce decree **must** specifically order the change in the beneficiary designation away from the former spouse.

Finally, it has long been accepted in Texas law that once the divorce decree is signed by the Court, a person's will is probated as though the former spouse died first, and the effective beneficiary of the will would be the next person named in the will. In the case, *In Re Estate of Nash*, 220 S.W.3d 914 (Tex. 2007) the putative heirs appealed the award of Nash's estate to the ex-wife's daughter, a contingent beneficiary in the ex-husband's will. The Supreme Court held that she received nothing and the other relatives of the deceased ex-husband received everything because none of the three conditions specified in the will were met since the ex-wife was still alive. The Supreme Court interpreted Probate Code 69 to apply only if the ex-wife benefits. The additional phrase 'or is otherwise unable to take under this provision of my will' would have resulted in an award to the ex-wife's daughter as Nash specified in his will.

All this goes to say, it is **very important after a divorce** to double check the beneficiary designation on all retirement benefits for any kind of asset that you own plus have a new will prepared as soon as possible after the decree is signed by the Court. You want the assets you have worked hard to obtain to be given to the people you want to receive them.

*If you, your client, friend or family member has a family law issue please call us. We strive for excellence in all things, and custom tailor every case to meet your needs, the facts and the law.*