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### **REPORT OF COUNSEL**

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#### **SOME OF THE WAYS THAT COMMON ESTATE PLANNING DOCUMENTS AND DESIGNATIONS INTERACT**

This month we look at some of the ways that common estate planning techniques and documents treat the death of a beneficiary or the divorce of a spouse. Any time you or your family experience the death of a beneficiary of your estate, the death or incapacity of an agent under your power of attorney, the death of a beneficiary of a transfer on death designation, or the divorce of a spouse it is time to review these designations and perhaps update them.

#### **Documents in Effect During Your Lifetime**

##### *General Durable Financial Power of Attorney*

In a financial power of attorney the client [principal] appoints a person to act for him/her [agent] with regard to the principal's financial matters. A financial power of attorney is a better and more flexible way to handle the financial affairs of the client and is much more desirable than a court reviewed conservatorship. Clients' typically appoint their spouse as their primary agent under their financial power of attorney. The financial power of attorney terminates " Unless the power of attorney otherwise provides, an action is filed (I) for the divorce or annulment of the agent's marriage to the principal or their legal separation, (ii) by ether the agent or the

principal for separate maintenance from the other, or (iii) by either the agent or the principal for custody or visitation of a child in common with each other. [VA Code §64.2-1608(B)(3)]

In a divorce situation, the client [principal] should put the spouse [agent] on notice that they are no longer allowed to act as the agent for the client. If the spouse [agent] nevertheless acts for the spouse's own gain, the agent can be liable to the principal for the loss of the principal's property as well as attorney's fees and costs.

##### *The Virginia Health Care Decisions Act - Section 54.1-2981 of the Act*

The Act notes the two ways end of life care is addressed. In situations where the client/patient does not have an Advanced Medical Directive, the statue sets out a hierarch of decision makers. First on the list is the court appointed guardian and second is the patient's spouse "except where a divorce action has been filed and the divorce is not final."

Where a patient has an Advanced Medical Directive, the spouses' ability to act under an

Advanced Medical Directive does NOT automatically terminate when filing for divorce, separate maintenance or for custody of a child in common. or for custody of a child.

### **Beneficiary and Pay-on-Death Designations**

#### *Former Spouse Remains as Beneficiary on an IRA*

This issue has been litigated and decided by the U.S. Supreme Court. The paperwork of the financial institution controls at the death of the IRA account holder and preempts Virginia Code Section 20-111.1(A)

#### *Life Insurance*

Generally, a former spouse who remains as a beneficiary of a life insurance policy is treated as having predeceased the policy owner. If § 20-111.1(A) of the Virginia Code is preempted by federal law, then the former spouse who receives a death benefit from an insurance policy is personally liable to the person who would have been entitled to the policy proceeds were this section not preempted.

#### *Bank Accounts*

Divorce terminates the right of survivorship in multiple party accounts like a joint checking account and converts the account into a tenancy in common.

If a bank account has a pay-on-death designation, and the account owner and spouse are divorced, the former spouse is treated as having predeceased the account owner. The proceeds from the account are payable to either the estate of the decedent or the alternate named beneficiary.

### **Conclusion**

Major life events like the death of a beneficiary, divorce from a spouse or a change in your relationship with a beneficiary all require an examination of your beneficiary and pay-on-death designations. If you are assisting an older person with their financial matters, take the time to review their beneficiary and pay-on-death designations with insurance, brokerage and bank accounts while there is time to update them.

Your referrals are always welcome and appreciated.