



Aubrey M. Connatser
Managing Member

Estate Planning and Divorce

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Revocable Documents

Wills, Revocable Trusts, Insurance And Retirement

Last Will and Testament (*Texas Estates Code Section 123.001*) and **Revocable Trusts** (*Texas Estates Code Section 123.056*):

General Rule: When you divorce, your ex-spouse is generally considered to have predeceased you for beneficial; interest and fiduciary appointment purposes. Your ex-spouse's relatives are similarly treated (except of course your common children).

- Exceptions:
1. The Will says otherwise
 2. Court order - for a bequest or appointment to an irrevocable trust
 3. Contract between decedent and ex-spouse before, during, or after marriage

Insurance (*Texas Family Code Section 9.301*) and **Retirement Plans** (*Texas Family Code Section 9.302*) :

General Rule: When you divorce, your ex-spouse is eliminated as a beneficiary, but watch out for relatives of your spouse.

- Exceptions:
1. Divorce Decree says otherwise
 2. Redesignation of ex-spouse after divorce
 3. Ex-spouse receiving in trust for benefit of child

Wills and Revocable Trusts - Pending Divorce

WILLS AND REVOCABLE TRUSTS

A. Redefine Divorce in the documents:

1. Actually divorced, or
2. Either party has filed an outstanding divorce petition, or
3. Living apart due to marital difficulty

OR

B. Redraft Estate Planning Documents as Soon as You or Spouse Files

1. Very Easy to Forget
2. The Court Could Intervene

Powers of Attorney

POWERS OF ATTORNEY

Financial (Durable)

- A. Don't Forget About It
- B. Similar Rules to Wills and Revocable Trusts under *Texas Estates Code Section 751.132*
 - 1. Ex-Spouse automatically removed unless:
 - a. The power of attorney says otherwise
 - b. Declared void by a court
 - 2. Under Durable Power, even if it has been a long time between execution and exercise, power is still good unless terminated as provided above.
 - 3. Note that prior powers are not revoked by new powers unless specifically stated
 - a. You can provide otherwise in the document.

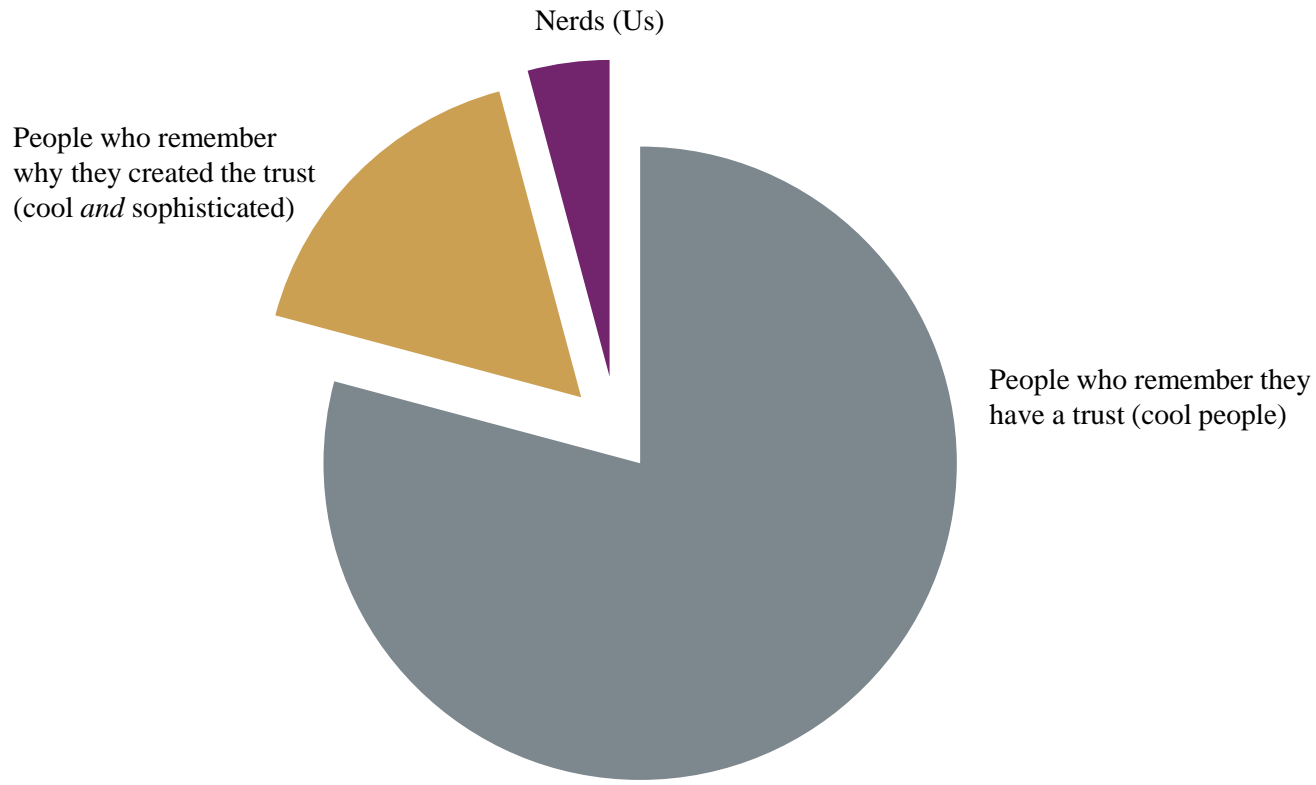
Medical

- A. Revoked by dissolution of marriage (*Health and Safety Code 166.155*)
 - 1. Unless stated otherwise in document
 - 2. Note you can limit agent's authority by time.
- B. Can be revoked orally, even if principal lacks capacity

Irrevocable Documents

Trust Me.

People Who Have a Trust



Non-SLAT Irrevocable Trusts – Divorce Pending

Distrust during the divorce proceeding is common, so even if we have an irrevocable trust where neither spouse is a beneficiary, the management and control of a trust can become a central issue, especially when exercise of powers can confer an indirect benefit.

Note the Texas state statutes focus on Wills, Revocable Trusts, Powers of Attorney, but Irrevocable Trusts are only addressed to the extent that the Irrevocable Trust is the destination of assets under a pour-over from a Will or Revocable Trust.

A. Trustee Lineup

1. Should there be a removal or should there be an addition?
2. Are there allies of one side or another in the lineup?

B. Power to Name Successors

C. Power to Remove Trustees

D. Trust Protector Powers

E. Trust Committees

F. Grantor Trust Status

G. Grantor Trust Powers

1. Power to Substitute
2. Power to Borrow Without Adequate Security
3. Power to Add Charitable Beneficiaries

SLATs – They're All the Rage

Spousal Lifetime Access Trusts are Most Popular:

1. When there is uncertainty surrounding the estate tax exemption
2. When we're not sure about how much is enough for the kids
3. As the exemption goes higher and higher
4. With couples holding assets with significant, but uncertain growth potential

Spousal Access Trusts are Perhaps Not the Greatest Idea For:

1. Newly Married Couples
2. Very Young Couples
3. Very Old Couples with Highly Appreciated Assets
4. Older Couples in Withdrawal Mode

Even in the Best of Marital Times, Fairness Issues That May Arise Later are Present at Time of Drafting

1. Reciprocal Trust Doctrine Avoidance
2. Trustee Choices

Don't Forget About What's In The Trust

Often family-created trusts hold family assets, whether that be a share of an operating family business, family partnership, LLC, or legacy real estate.

Control and management of these assets, including control over distributions, can be more consequential than control over the trust that owns an interest in the family business or other entity.

Look at governing documents the same way you would look at trust agreements:

1. Manager / General Partner Lineup
2. Voting thresholds for various types of decisions
3. Ability to exit the entity / buy-sell provisions

Should there be divorce provisions within the entity documents?

And Then There's Fraud...

TEN THINGS TO LOOK OUT FOR

1. High Stakes
2. Asymmetric Knowledge of Assets
3. One Spouse Much More Involved in Planning
4. Dates That Don't Make Perfect Sense
5. Signatures that Don't Match
6. Typeface That Doesn't Match
7. Headers and Footers That Don't Match
8. Schedules Without Page Numbers
9. Identity of Notary
10. Valuation Issues
11. (BONUS) One-Sided Trust Provisions

Thank You – Any Questions?

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