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Be sure to check designated beneficiaries on accounts

Many people have assets for which beneficiaries can be named, such as 401k or 403b retirement plans, Individual Retirement Accounts (IRAs), and life insurance to name some of the more common ones. Assets of this type, when beneficiaries are designated, are considered non-probate assets, or assets that pass outside of a Will or Trust. Many times the beneficiaries are chosen when the account is first established, and not reviewed periodically, even if important life changes have occurred.

One important aspect related to retirement accounts is how a surviving spouse is treated. Recently, Elder Law Answers (www.elderlawanswers.com) published an article on whether surviving spouses have a right to 401k or an IRA. Since a 401k (and a non-profit organization's 403b plan in some cases) are governed by the Employee Retirement Income Security Act of 1974 (ERISA), the surviving spouse is usually the automatic beneficiary of such a retirement plan. A beneficiary form should still be completed, naming the spouse. If the employee wishes to name someone other than the spouse, then, in most cases, the omitted spouse must consent to allow others to be named as primary beneficiaries. The rules for these types of accounts in the case of a divorce and/or second marriage are more complicated; an attorney versed in family law should be consulted.

However, the same rules regarding spouses mentioned above do not apply to IRAs. Individual Retirement Accounts are not governed by ERISA rules, even if the IRA is the result of a rollover from a 401k. It is permissible, and even recommended that the spouse be named as the primary beneficiary on an IRA also. Do not assume that the beneficiary designation on a 401k account will follow to the rollover IRA. Similarly, do not assume that the spouse will automatically become the primary beneficiary on the new IRA. There was a recent court case in the 9th Circuit where the husband rolled over his 401k into an IRA with Charles Schwab & Company when he retired. He named his children as the primary beneficiaries on the new account. After he died, his wife claimed that she should have been the primary beneficiary, since the account was originally a 401k. The Court disagreed, finding that IRAs are excluded from ERISA protection even if the funds originated in a 401k account.

It is important to regularly check beneficiary designations on all applicable accounts. In addition to the spouse, contingent beneficiaries should be named, hopefully to coordinate with your estate plan in your Will. Having designated beneficiaries avoids the necessity to cash in IRAs with unfavorable income tax consequences when the spouse has predeceased, and there are children who can take advantage of the relatively recent "rollover" rules. See your attorney for more information on this.

It can also be very helpful to periodically ask the financial institution who is administering your 401k or IRA for a copy of your beneficiary designation, and to keep that copy with your important papers. With the rapid turnover of ownership of some financial institutions, such as banks, information like this can become lost. It is vital to update this information before it is too late, or for your heirs to be able to provide written proof of your intentions after your death.