

The Forms That Outrank Your Will: Beneficiary Designations, Contingent Beneficiaries, and the ERISA Divorce Trap in North Carolina

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Key Takeaways

A beneficiary designation is a contract with the plan or insurer. It generally controls who receives the account or policy proceeds, regardless of what your will or trust says.

A missing or outdated contingent beneficiary can send retirement assets into probate, accelerate income taxes, and leave money to minors who cannot legally manage it.

North Carolina law treats a former spouse as having predeceased you under your will and revocable trust after an absolute divorce. No comparable North Carolina statute removes a former spouse from a beneficiary designation.

For an ERISA-governed plan, such as a private-employer 401(k), federal law requires the plan to pay the beneficiary named in the plan documents. A former spouse who is still on the form can collect the account, even if the divorce settlement said otherwise.

Introduction: The Largest Asset Your Will May Never Touch

For many North Carolina families, the most valuable assets are not the house or the bank accounts. They are the 401(k), the pension, the rollover IRA, and the life insurance policy. These assets share one feature that is often overlooked: they generally pass by **beneficiary designation**, outside the will and outside probate. A carefully drafted will or revocable trust can be undermined by a one-page form completed years ago during new-hire paperwork.

This article explains why primary and contingent beneficiary designations deserve the same attention as the will and trust. It also explains the legal difference between ERISA-governed plans and non-ERISA accounts, and shows how North Carolina divorce law interacts with federal law. That interaction can produce a result many clients find hard to believe: a former spouse can inherit an ERISA retirement plan after the divorce is final.

Why Beneficiary Designations Control

A beneficiary designation is part of the contract between the account owner and the plan, custodian, or insurer. At death, the administrator looks to its own records, not to the decedent's will, to determine who gets paid. Life insurance, 401(k) and 403(b) accounts, pensions, IRAs, Roth IRAs, annuities, and payable-on-death or transfer-on-death accounts all generally pass this way.

This has three practical consequences. First, a will that says "everything to my children" does not reach an IRA naming someone else. Second, the designation can bypass the protective provisions of a trust, such as a spendthrift clause, a special-needs provision, or a distribution age. Third, the designation decides who inherits and also how the asset is taxed, because inherited retirement accounts are subject to required distribution rules that depend on who or what is the beneficiary.¹

The Overlooked Contingent Beneficiary

Most people name a primary beneficiary. Far fewer give careful thought to the **contingent** (or secondary) beneficiary, who takes if the primary beneficiary dies first, dies at the same time, or disclaims. The contingent designation is the backup plan, and backup plans are needed more often than people expect.

When no living beneficiary is named, the plan document or custodial agreement supplies a default. That default is often the surviving spouse, if any, and otherwise the participant's estate. Payment to an estate can lead to several problems:

- **Probate exposure.** The asset becomes subject to estate administration, with its delay, cost, and public filings, and may become reachable by estate creditors.
- **Less favorable tax treatment.** An estate is not a "designated beneficiary" for retirement-distribution purposes. Individuals generally have at least ten years to withdraw an inherited account, and certain eligible designated beneficiaries may stretch withdrawals further. An estate is generally subject to less favorable payout rules.²
- **Loss of planning intent.** Assets pass under the will or the intestacy statutes, which may not match how the account owner would have divided a retirement account or insurance proceeds.

Minor beneficiaries create a separate problem. A minor cannot directly receive and manage a large account or policy. Without planning, a court-supervised guardianship of the estate may be required, and the child may receive the remaining funds outright at age eighteen. Better alternatives include naming a

¹Internal Revenue Service, Retirement Topics — Beneficiary (explaining the 10-year rule and eligible designated beneficiaries), <https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-beneficiary>

trust for the child or a custodian under the North Carolina Uniform Transfers to Minors Act, which can hold funds to a later age within statutory limits.³

Example: The Missing Backup

Linda names her husband, Tom, as primary beneficiary of her IRA and leaves the contingent line blank. Tom dies in an accident, and Linda dies eight months later without updating the form. The custodian's default sends the IRA to Linda's estate. The account goes through probate, becomes exposed to estate creditors, and may lose the longer payout her adult children could have had as named individual beneficiaries. Her ten-year-old grandson, whom she intended to benefit through her trust, receives nothing from the IRA because the trust was never named.

The fix: Name contingent beneficiaries on every account, consider a properly drafted trust as a primary or contingent beneficiary, and specify "per stirpes" where you want a predeceased child's share to pass to that child's descendants.

ERISA Plans Versus Non-ERISA Plans

The Employee Retirement Income Security Act of 1974 (ERISA) is the federal law governing most private-sector employee benefit plans. Whether an account is subject to ERISA determines which body of law governs it, whether a spouse has federal survivor rights, and whether a state statute, including a divorce rule, can change who is paid.

ERISA generally does not cover plans established by governmental entities or churches.⁴ Individual retirement accounts are also generally outside ERISA's definition of an employee pension benefit plan.⁵ The table below gives common examples.

Category	Generally ERISA-Governed	Generally Not ERISA-Governed
Retirement accounts	401(k) and profit-sharing plans sponsored by private employers (for example, a Charlotte bank, manufacturer, or tech company)	Traditional, Roth, and rollover IRAs; inherited IRAs
Pensions	Private-employer defined benefit and cash balance pension plans	North Carolina governmental systems such as TSERS and LGERS

³N.C. Gen. Stat. ch. 33A (North Carolina Uniform Transfers to Minors Act), https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/ByChapter/Chapter_33A.html

⁴U.S. Department of Labor, Employee Retirement Income Security Act (ERISA) (noting that ERISA generally does not cover governmental or church plans), <https://www.dol.gov/general/topic/retirement/erisa>

⁵29 C.F.R. § 2510.3-2(d) (excluding individual retirement accounts and annuities from the definition of an "employee pension benefit plan" when the regulatory conditions are met), <https://www.law.cornell.edu/cfr/text/29/2510.3-2>

Category	Generally ERISA-Governed	Generally Not ERISA-Governed
403(b) and 457 plans	403(b) plans of many private, nonprofit hospitals and universities, depending on employer involvement	Public-school and state-university 403(b) programs; governmental 457 plans; church plans that have not elected ERISA coverage
Government defined contribution plans	—	NC 401(k) Plan and NC 457 Plan (state and local government plans); federal Thrift Savings Plan (governed by separate federal law)
Life insurance	Group term life insurance provided through a private employer's benefits plan	Individually owned term, whole, or universal life policies; FEGLI coverage for federal employees (governed by its own federal statute)

Coverage depends on the specific plan document, sponsor, and facts. A plan administrator or benefits counsel should confirm the status of any particular plan. Sources: U.S. Department of Labor; 29 C.F.R. § 2510.3-2(d); Congressional Research Service; N.C. Department of State Treasurer.

North Carolina public employees often participate in governmental plans, including the NC 401(k) Plan and NC 457 Plan, which are administered through the Department of State Treasurer rather than under ERISA.⁶ Church plans and many public-education 403(b) programs are likewise generally exempt.⁷ Rolling a private-employer 401(k) into an IRA moves the money from an ERISA plan to a non-ERISA account. That changes the governing law and requires a new beneficiary designation with the IRA custodian.

Two ERISA rules every planner must know

The plan documents rule. ERISA requires plan fiduciaries to administer the plan “in accordance with the documents and instruments governing the plan.”⁸ In practice, the beneficiary form on file with the plan is the starting point and usually the ending point.

Spousal survivor rights. ERISA protects a current spouse's survivor benefits in many plans. In a typical 401(k), the surviving spouse is generally entitled to the account unless the spouse has consented in writing, with the required formalities, to a different beneficiary.⁹ This means a married participant may not be able to name children or a trust without spousal consent. It also means a pending separation

⁶N.C. Department of State Treasurer, Guide for Drafting a Domestic Relations Order Acceptable to the Retirement Systems Division (addressing the NC 401(k) Plan, NC 457 Plan, and NC 403(b) Program), <https://www.mync Retirement.gov/documents/files/domestic-orders/guide-drafting-domestic-relations-order-acceptable-retirement-system-division/open>

⁷Congressional Research Service, Whether a 403(b) Plan Is Subject to ERISA (IF12518) (plans of public educational organizations and churches are generally exempt; church plans may elect coverage), https://www.congress.gov/crs_external_products/IF/HTML/IF12518.html

⁸29 U.S.C. § 1104(a)(1)(D) (fiduciary must act “in accordance with the documents and instruments governing the plan”), [https://uscode.house.gov/view.xhtml?req=\(title:29%20section:1104%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:29%20section:1104%20edition:prelim))

⁹29 U.S.C. § 1055 (survivor-benefit requirements and spousal-consent rules), <https://www.law.cornell.edu/uscode/text/29/1055>

does not, by itself, let a participant remove a spouse who is still legally married to the participant. IRAs carry no comparable federal spousal-consent requirement.

How North Carolina Divorce Law Affects Inheritance

Wills: N.C. Gen. Stat. § 31-5.4

Under North Carolina law, unless the will expressly indicates a contrary intent, if the testator's marriage is dissolved by absolute divorce or annulment after the will is signed, the former spouse is "deemed to have predeceased the testator" for all purposes of the will. The rule reaches gifts and also the former spouse's appointment as executor, trustee, guardian, or other fiduciary, along with any power of appointment. The statute does not apply if the testator later signs a valid testamentary document that expressly refers to and modifies the will, or remarries the former spouse.¹⁰

Revocable trusts: N.C. Gen. Stat. § 36C-6-606

North Carolina applies a parallel rule to revocable trusts. Unless the trust expressly indicates otherwise, an absolute divorce or annulment after the trust is executed causes the former spouse to be treated as having predeceased the settlor. This includes the former spouse's roles as trustee or other fiduciary and any power of appointment.¹¹

Three limits are important. First, both statutes require an **absolute divorce** or annulment. During a period of separation, before the divorce judgment, the spouse remains a spouse under these statutes, and his or her inheritance rights depend largely on the terms of any separation agreement. Second, § 36C-6-606 addresses **revocable** trusts and does not, by its terms, reach irrevocable trusts such as an irrevocable life insurance trust. Third, these statutes govern wills and revocable trusts. They do not rewrite beneficiary designations.

Beneficiary designations: no automatic revocation in North Carolina

Some states have adopted statutes that automatically revoke a former spouse's designation as beneficiary of nonprobate assets upon divorce. North Carolina has not adopted such a statute for beneficiary designations. North Carolina courts follow the majority rule that divorce, by itself, does not revoke a former spouse's status as beneficiary of a life insurance policy. In *Daughtry v. McLamb*, the former wife received the life insurance proceeds because the insured never removed her during the four

¹⁰N.C. Gen. Stat. § 31-5.4 (Revocation by divorce or annulment; revival),
https://www.ncleg.gov/enactedlegislation/statutes/pdf/bysection/chapter_31/gs_31-5.4.pdf

¹¹N.C. Gen. Stat. § 36C-6-606 (Revocation of provisions in revocable trust by divorce or annulment; revival),
https://www.ncleg.net/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_36C/Article_6.pdf

years between the divorce and his death. Language in the divorce decree awarding the husband “any and all insurance” did not divest her of her interest as beneficiary.¹²

For a non-ERISA asset, such as an IRA or an individually owned life insurance policy, the former spouse’s claim is therefore governed by state law and by the contract. If the separation agreement or consent judgment contains a clear, specific waiver of the former spouse’s rights as beneficiary, the decedent’s estate or intended heirs may be able to enforce it. That usually requires litigation, and the outcome depends on the wording of the waiver.

The U.S. Supreme Court has confirmed that states may apply revocation-on-divorce statutes to non-ERISA assets. In *Sveen v. Melin*, the Court upheld Minnesota’s statute as applied to a life insurance policy purchased before the statute was enacted.¹³ That ruling matters to families with ties to other states, but it does not help a North Carolina resident whose own state has no such statute.

When Federal Law Overrides State Law: ERISA and the Former Spouse

ERISA contains a broad preemption clause that supersedes state laws relating to covered employee benefit plans. The Supreme Court has applied it squarely to divorce.

Egelhoff v. Egelhoff (2001)

Washington had a statute that automatically revoked a former spouse’s designation as beneficiary of nonprobate assets, expressly including employee benefit plans. David Egelhoff died two months after his divorce without changing the beneficiary of his employer-provided life insurance and pension. The Court held that ERISA preempts the Washington statute as applied to ERISA plans because it binds plan administrators to state-law rules for determining beneficiary status and conflicts with ERISA’s requirement that benefits be paid according to the plan documents.¹⁴ The former spouse kept her status as beneficiary.

Kennedy v. Plan Administrator for DuPont (2009)

William Kennedy’s former wife waived her interest in his DuPont savings plan in their divorce decree, but he never changed the beneficiary form. The Court held that the plan administrator properly paid the former wife, because the administrator must follow the plan documents. A waiver that is not reflected

¹²UNC School of Government, North Carolina Trial Judges’ Bench Book, Divorce chapter (2019), discussing *Daughtry v. McLamb*, 132 N.C. App. 380, 512 S.E.2d 91 (1999), and *Devane v. Ins. Co.*, 8 N.C. App. 247, 174 S.E.2d 146 (1970), <https://www.sog.unc.edu/sites/www.sog.unc.edu/files/Bench%20Book%2005%20Divorce%202019.pdf>

¹³*Sveen v. Melin*, 584 U.S. 811 (2018), <https://www.law.cornell.edu/supremecourt/text/16-1432>

¹⁴*Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), <https://www.law.cornell.edu/supct/html/99-1529.ZO.html>

in the plan's own records, and is not a qualified domestic relations order, does not control what the plan pays.¹⁵

What this means in North Carolina

Together, these decisions mean the following for a North Carolina participant in an ERISA plan:

- North Carolina's will and trust revocation statutes do not reach the plan. A divorce that removes a former spouse from the will and revocable trust leaves the 401(k) or pension form unchanged.
- Even if North Carolina enacted a Washington-style beneficiary revocation statute, *Egelhoff* indicates it would be preempted as applied to ERISA plans.
- A waiver in a separation agreement or divorce judgment will not stop the plan from paying the named former spouse, under *Kennedy*.

North Carolina sits in the Fourth Circuit, which has allowed one route after payment. In *Andochick v. Byrd*, the court held that ERISA does not preempt a post-distribution lawsuit to enforce a former spouse's valid waiver against the money he received.¹⁶ That remedy is real but limited. It requires a clear waiver, a lawsuit against a former family member, legal fees, delay, and the risk that the money has been spent. Courts in other jurisdictions have not uniformly agreed. A lawsuit is a poor substitute for a correct one-page form.

Federal statutes outside ERISA can produce the same result. In *Hillman v. Maretta*, the Court held that the federal statute governing life insurance for federal employees (FEGLI) preempted a Virginia law that would have let the widow recover proceeds paid to the employee's former wife.¹⁷ Federal employees and military families should review FEGLI, TSP, and similar designations with the same care.

A qualified domestic relations order (QDRO) can divide an ERISA account in the divorce. A QDRO addresses the division of benefits between the spouses, but it does not automatically update the participant's beneficiary designation for the share the participant keeps. The beneficiary form still needs attention after the order is entered.

Example: The 401(k) That Went to the Former Spouse

Mark works for a private company in Charlotte. During his first marriage he named his wife, Karen, as beneficiary of his ERISA 401(k), his employer group life insurance, and his rollover IRA. Mark and Karen divorce, and the consent judgment states that each waives any interest in the other's retirement accounts and life insurance. Mark signs a new will leaving everything to his second wife and children, but he never updates his beneficiary forms. He dies three years later.

¹⁵Kennedy v. Plan Administrator for DuPont Savings & Investment Plan, 555 U.S. 285 (2009), <https://supreme.justia.com/cases/federal/us/555/285/>

¹⁶Andochick v. Byrd, 709 F.3d 296 (4th Cir. 2013), <https://www.ca4.uscourts.gov/Opinions/Published/121728.P.pdf>

¹⁷Hillman v. Maretta, 569 U.S. 483 (2013), <https://supreme.justia.com/cases/federal/us/569/483/>

The will and trust: Any gifts to Karen in Mark's pre-divorce will or revocable trust were already revoked by §§ 31-5.4 and 36C-6-606, and the new will controls probate assets.

The ERISA 401(k) and group life policy: Under *Egelhoff* and *Kennedy*, the plans generally pay Karen as the named beneficiary. Mark's family may try a post-distribution suit under *Andochick*, at significant expense. If Mark had remarried, his second wife may also assert federal spousal survivor rights in the 401(k), which adds more complexity.

The rollover IRA: North Carolina law does not automatically revoke Karen's designation. The family may be able to enforce the waiver in state court, but only through litigation.

The lesson: Every outcome above was avoidable with updated forms, coordinated with the divorce settlement and the new estate plan.

A Practical Checklist

1. **Inventory every beneficiary-driven asset.** Include current and former employer plans, IRAs, group and individual life insurance, annuities, deferred compensation, HSAs, and POD or TOD accounts.
2. **Request confirmation from each administrator.** Do not rely on memory or old paperwork. Obtain written confirmation of the primary and contingent beneficiaries actually on file.
3. **Name contingent beneficiaries everywhere.** Specify per stirpes or per capita, and avoid leaving the estate as the default.
4. **Use trusts where appropriate.** For minors, beneficiaries with special needs, spendthrift concerns, or blended families, a trust drafted to qualify under the retirement-distribution rules can protect the funds and preserve tax deferral.
5. **Coordinate divorce with estate planning.** During separation, understand what can and cannot be changed, including ERISA spousal-consent limits. Make sure any waiver is specific, implement any QDRO, and update every form promptly after the absolute divorce.
6. **Revisit after every life event.** Marriage, divorce, birth, death, a new job, a rollover, a move to or from another state, or a change in a beneficiary's circumstances should each prompt a review.

Estate Planning Is More Than Drafting Documents

Our clients often arrive with a will and trust already in a drawer, believing their planning is complete. In our experience, the most consequential planning failures happen in the gaps between documents: a beneficiary form that contradicts the trust, a retirement account that bypasses careful tax planning, an insurance policy still payable to a former spouse, or an account titled in a way no one reviewed.

At **North Carolina Estate Planning & Fiduciary Law**, we treat beneficiary designations as a core part of the estate plan.¹⁸ Our planning process typically includes:

- A review of every nonprobate asset and its current primary and contingent beneficiaries
- Coordinating designations with wills, revocable trusts, and irrevocable trusts, including trusts designed to receive retirement assets
- Analysis of income-tax and transfer-tax consequences of retirement and insurance beneficiary choices
- Coordination with divorce counsel on separation agreements, waivers, and QDROs, and post-divorce plan updates
- Guidance for families on ERISA and non-ERISA issues, special-needs planning, and blended-family planning
- Estate and trust administration and, where needed, fiduciary dispute resolution when beneficiary issues lead to conflict

James E. Hickmon, the firm's principal, has practiced law since 2001. He is a Board Certified Specialist in Estate Planning and Probate Law, certified by the North Carolina State Bar Board of Legal Specialization since 2015, and has held the CERTIFIED FINANCIAL PLANNER™ designation since 1996, giving clients the benefit of 30 years of financial planning perspective alongside his legal practice. He holds a JD from Wake Forest University School of Law and an MBA in Finance from East Carolina University. He has taught Wealth Transfer and Fiduciary Income Taxation of Trusts and Estates as an adjunct professor at Wake Forest University School of Law.¹⁹ That combination allows us to evaluate a beneficiary designation as a legal instrument, a tax decision, and a financial planning choice at the same time.

Schedule a Consultation

If you have experienced a divorce, remarriage, the birth of a child or grandchild, a job change, or a rollover, or if you simply cannot remember the last time you reviewed your beneficiary designations, now is the time to act. A review today costs far less than litigation tomorrow, and your family should not have to sue a former spouse to receive what you intended for them.

Contact **North Carolina Estate Planning & Fiduciary Law** at **704-248-6325** or visit charlotteestatelawyer.com/contact to schedule a confidential consultation. Our office is located at 5605 Carnegie Blvd, Suite 420, in the SouthPark area of Charlotte. Learn more about our services at charlotteestatelawyer.com.

¹⁸North Carolina Estate Planning & Fiduciary Law, Beneficiary Designations, <https://charlotteestatelawyer.com/legal-services/estate-planning/pre-death-planning/>

¹⁹North Carolina Estate Planning & Fiduciary Law, About James E. Hickmon, <https://charlotteestatelawyer.com/our-team/attorneys/james-e-hickmon-jd-mba-cfp/>

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