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Estate Planning Guidance in a Marital Dissolution

KNOWLEDGE OF FAMILY LAW AND ESTATE planning issues are essential to practitioners in either area due to the limitations placed on estate planning after a spouse files for divorce. Estate planning for marital dissolution is too often ignored especially as retirement age couples filing for divorce continues to increase.[1] Every initial divorce consultation should cover the client's current estate plan and testamentary wishes; conversely, an estate planning consultation should involve questions regarding the couple's marital status.

Upon petitioning for marital dissolution or being served with the petition and summons, automatic temporary restraining orders (ATROs) take effect, and, in part, restrain both parties from transferring, encumbering, or disposing of any property, including separate, quasi-community, and community property, without mutual written consent or by court order.[2] The ATROs are intended to protect the parties' rights during the dissolution proceeding by maintaining the status quo. Postfiling spouses are restrained from "creating or modifying a nonprobate transfer in a manner that affects the disposition of property" but may do so with spousal consent or by court order.[3] A postfiling spouse is precluded from unilaterally amending the family trust to change the disposition of his or her half-interest in community property and separate property upon death. Often, trusts distribute the deceased spouse's estate to the surviving spouse, either outright or in trust, leaving the postfiling spouse unable to dispose of his or her trust estate in favor of minor children or otherwise. Therefore, it is imperative to understand the impact of ATROs on a client's estate planning objectives.

If a spouse dies before judgment is entered terminating the marital status, the marriage terminates by operation of law, and the spouse's property passes as if a petition for dissolution had never been filed, likely in favor of the surviving spouse. Postfiling spouses are restrained not only from modifying the family trust in a manner that affects the disposition of assets but also from changing beneficiary designations on life insurance policies, retirement plans (IRAs, 401ks, etc.), annuities, POD accounts, and other similar beneficiary designations.[4] These restraints also apply to the spouse's separate property, including separate property trusts and life insurance policies.

Postfiling spouses may create, modify, or revoke their wills without notice, spousal consent, or court approval.[5] A spouse may create a new will disposing of his or her estate upon death and nominate new executors and successor guardians for the minor children. If a spouse retained a general power of appointment over the family trust, he or she may be able to accomplish what was not possible through trust amendment by exercising the power of appointment in the new will. Alternatively, if a spouse reserved the right to revoke the family trust without the other settlor's consent, he or she may unilaterally revoke the trust by filing notice and serving it on the other party or with court order.[6] Concurrently, the spouse should create a pour-over will and establish a new trust, although he or she will be restrained from funding it even with his or her separate property. After the parties' respective property interests have been adjudicated and the judgments have been entered, the divorcee may transfer his or her property into the new trust.

In either case, an appropriately drafted pour-over will and a new revocable trust will enable the spouse to effectuate a transfer of assets to the new trust upon death. A spouse is permitted to create a new durable power of attorney (DPA) and advance health care directive (AHCD) without notice, spousal consent, or court approval.

With important exceptions, upon entry of judgment terminating marital status, nonprobate transfers to, and nominations of, the former spouse are revoked, including testamentary transfers in prior wills, family trusts, assets held in joint tenancy or community property with right of survivorship (CPWROS), and nominations under DPAs and AHCDs.[7] There are several exceptions to automatic revocation, including life insurance designations[8] and ERISA-governed plans.[9] Counsel must be proactive in revising the estate plans of clients, making the desired changes before, during, and after divorce.

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Spouses considering filing for divorce may modify their estate plans without court restriction, but the prefiling spouse remains limited by the fiduciary duty owed to the other spouse of the highest good faith and fair dealing.[10] With advice of counsel, a prefiling spouse may revoke an existing trust as to his or her interest, fund a new trust with the property, create a new will, and effect severance of assets held in joint tenancy and CPWROS, as well as changes to beneficiary designations on retirement accounts and life insurance policies. ■

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[1] *See, e.g.*, Kathleen Doheny, *Gray Divorce: Splitting Up At 65-Plus*, SENIOR PLANET (Apr. 17, 2013), http://seniorplanet.org./gray-divorce-splitting-up-at-65-plus.
[2] FAM. CODE §2040.
[3] FAM. CODE §2040(a)(4).
[4] A spouse may be able to change provisions of the family trust not pertaining to the disposition of property, such as provisions regarding successor trustees. *Id.*
[5] FAM. CODE §2040(b)(1).
[6] FAM. CODE §2040(b)(2).
[7] PROB. CODE §§4154, 4697, 5600 *et seq.*
[8] FAM. CODE §2024; PROB. CODE §5600(e).
[9] PROB. CODE §§5600(e), 6122.
[10] FAM. CODE §721.

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