



# What Trusts and Estates Attorneys Want Family Law Attorneys to Know

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# What happens if a spouse dies before entry of judgment?

- Judgment dissolving the marriage or Registered Domestic Partnership will automatically revoke an existing Will/Trust
- Until entry of a judgment terminating the marital or Registered Domestic Partnership, the parties remain married or RDPs and the benefits conferred by law to spouses or RDPs at death remain in effect
- This means:
  - Existing estate planning documents apply or
  - Decedent dies intestate, the laws of intestate succession apply *Probate Code Sections 6400-6414*

# What does this mean practically?

## Unintended Consequences

- Named beneficiaries
- Laws of intestate succession

## Liability for family law attorney

- Advise client **in writing** of implications of will/trust or intestacy laws where no will or trust is in place.

# What changes can be made to an Estate Plan once party has filed for Divorce?

\*\*\*ATROS greatly limit the ability to make changes\*\*\*

## Changes that can be made unilaterally:

- Create, modify revoke a will
- Create an unfunded trust with a pour over will that names the trust so that assets can be transferred post entry of judgment-won't avoid probate
- Create modify or revoke a power of attorney or healthcare directive

## Changes that require NOTICE:

- Revoke a trust
- Revoke a non probate transfer (i.e. beneficiary designation on IRA or bank account)
- Sever joint tenancy or community property with right of survivorship to eliminate survivorship right

## Changes that require CONSENT/COURT ORDER:

- Transfer, encumber, dispose of property (SP or CP) unless for necessities of life
- Create or modify a non-probate transfer (i.e. changing beneficiaries on IRAs, bank accounts, life insurance)
- Fund a trust

# Should Joint Tenancy or Community Property with Right of Survivorship be severed?

- “Macabre gamble”
- If JT is severed, client needs to be sure to create a will addressing client’s interest in the CP- otherwise, by intestacy it will still go to the other spouse
- BEST PRACTICE:
  - Don’t just sever JT-follow through with a will
  - Don’t just create a will-JT and CP with ROS need to be severed if client wants to control his/her interest in that joint asset-otherwise it won’t be controlled by will

# What impact does divorce have on Powers of Attorney?

- Powers of attorney are an essential part of an estate plan and are necessary regardless of age, marital status or whether a person has a will or trust
- → 2 types of Powers of Attorney –health and finance
- When a divorce is finalized, it automatically terminates the appointment of a spouse as an agent under a POA
- You have the ability to unilaterally change who you have named as an agent under a Power of Attorney at any time after divorce has been filed. *Probate Code Section 4200*
- Consider giving notice of revocation to the spouse named as an agent-otherwise agents are protected from liability for actions taken when they were unaware that their authority had been revoked *Probate Code Sections 4151(b), 4153(b), 4300-4310*

## Is it sufficient to create only a Will during the pending divorce and wait until divorce is finalized to create a trust?

- FACTORS TO CONSIDER:
- Are their minor beneficiaries?
- Are the beneficiaries financially saavy?
- Do any of the beneficiaries have special needs?
- Does the couple have an existing trust? Has it been revoked?
- Are there assets held in JT or CP w/ ROS?
- Have non probate transfers been revoked?
  
- BOTTOM LINE:
- Creating a new will is not enough to give client control over disposition of all of client's interest in assets
- Encourage client to use EP attorney!!



# Can Retirement Plan Beneficiary Designations be Revoked without Spousal Consent?

- **It depends ->**
  - Qualified plan governed by ERISA –consent required (29 USC §§1001-1461) *Boggs v. Boggs (1997) 520 US 833, 117 S Ct 1754*
  - or
  - Non qualified plan, like an IRA –notice required *Family Code §2040(b)(2)*
- CHECK PLANS DEFAULT PROVISIONS BEFORE REVOKING-Client could end up in the same place

## What impact does bifurcation/termination of marital status have if a party dies after bifurcation?

- Potentially solves the problem of a spouse taking under intestacy laws or an existing will/trust if the other spouse dies mid divorce since the other party would no longer be considered a spouse for intestacy and gifts made in a will or trust created before or during marriage would be considered revoked
- Bifurcation can have a detrimental impact on the surviving spouse's ability to receive a probate homestead or family allowance since the probate court can't order those remedies after termination of status because the surviving spouse is no longer considered a "spouse"
- Considerations
  - Age/Health moving party
  - Court Jurisdiction
    - Impact on community property presumption (*Family Code §2581 v. Evidence Code §662*)

# Can a claim for spousal support be made against the estate of a former spouse?

- Spousal support obligation typically ends at death, absent a written agreement *Family Code §4337*

*Enforcement: creditors claim (in probate court) or civil action if no probate*

- Some exceptions

# Can a claim for child support be made against the estate of a former spouse?

- Obligation to provide child support under a court order or marital settlement agreement survives the death of the obligated parent  
*Family Code §3901*
- If a probate is initiated, a creditor's claim must be filed seeking recovery of the support (4 month window) *Probate Code §9000*
- If no probate, the assets in a trust are liable for the support obligation *Probate Code §19001*
- Life insurance can be a really important tool to ensure child support

## **The SECURE Act, which took effect Jan 1, 2020 places limitations on inherited IRAs. What impact does SECURE have in the context of divorce?**

- Only a spouse can take advantage of the tax deferral available to spouses.
  - SECURE Act eliminated the “stretch IRA” and requires payout within 10 years unless the beneficiary is an eligible designated beneficiary
- In order to maximize tax deferral, best to make sure retirement benefits are divided by a separate interest QDRO or, if in an IRA, a non taxable division of the IRA that qualifies under IRC Section 408(d)(6)
- **Very important to update beneficiary designations on ERISA plans**

Thanks for your time! Any Questions?

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