

## **ESTATE PLANNING WITH DIVORCE, ANNULMENT OR LEGAL SEPARATION**

The disposition of property between married couples is greatly affected by both death and termination of the marital relationship.<sup>1</sup> Estate planning and divorce, annulment,<sup>2</sup> or legal separation are integrally related, but many going through the alteration of their marital status put on blinders and fail to consider the estate planning consequences as they relate to an estranged or former spouse. The interval between filing the family law petition and final judgment of all of the family law issues can be lengthy, depending on the complexity of your case. At a minimum, the marital relationship cannot be terminated earlier than six months from the date the respondent is served with the petition. Therefore, advance planning is advisable in the event you should die in the interim. Below are some tips to consider, depending upon the timeline into which your situation falls.

### **IF YOU ARE PLANNING ON GETTING DIVORCED/LEGALLY SEPARATED**

Once you file or are served with a petition for dissolution or legal separation, standard family law restraining orders prohibit you from transferring property interests in a way that would interfere with the court's ability to equitably divide the marital property. Such orders prohibit the following actions without notice to the other party and without consent from either the other party or the court, depending on the property interest:

- Modifying or revoking a revocable living trust;
- Eliminating a right of survivorship in the other spouse under property held as joint tenancy or community property with right of survivorship;
- Changing beneficiaries of life insurance policies, pension plans, employee benefit plans, IRAs, or other types of retirement contracts.

Therefore, you should consider taking such actions prior to a family law petition being filed. If property issues are complex in your case, you should consider bifurcating the marital status and property issues, so that the marital status is finally adjudicated after six months and the restraining orders applicable to estate planning will no longer apply.

You are *not* prohibited, however, from doing the following and need not give notice to the other party or seek court approval:

- Create, amend, or revoke a will;<sup>3</sup>
- Create a revocable living trust (but you *cannot fund* it yet);<sup>4</sup>

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<sup>1</sup> IMPORTANT NOTE: This article is written based on *California* law. If you reside in another jurisdiction, you should consult a local attorney.

<sup>2</sup> Although technically different, divorce (dissolution) and annulment will be treated similarly for the purposes of this article, and all future references to divorce or dissolution also will impliedly reference annulment.

<sup>3</sup> When you execute your Marital Settlement Agreement, review it to make sure it does not revoke all prior wills, as this would also revoke a will you made in anticipation of ending the marital relationship.

- Create, amend, or revoke a durable power of attorney or advance health care directive.

See the discussion below for the items you should consider in preparing these documents.

### IF YOU ARE RECENTLY DIVORCED

Once your divorce is final, certain rights your spouse previously would have had are revoked by *operation of law*; however, this is *not* true in the case of a *legal separation*, as the marital status has not technically been terminated. Therefore, it is *crucial* that you review your estate planning documents to ensure that your current wishes are protected.

- *Review your executor, guardianship, and beneficiary designations in your will.*
  - the executor under your will should mirror the trustee of your trust
  - a natural parent who is not deemed unfit will always have priority as guardian of a minor's *person*
  - the guardian of a minor's *estate* under your will, however, does *not* need to be the natural parent and should mirror the trustee of your trust
  - make sure you name alternate executors and guardians, as well
  - review your property disposition upon your death and make sure you also name contingent beneficiaries
- *Review your trustee and beneficiary designations in your revocable living trust.*
  - the guardian of a minor's estate under your will should mirror the trustee of your trust
  - you should expressly prohibit an ex-spouse from serving as trustee on behalf of a minor's estate (unless you desire otherwise) and from having the power to remove a trustee on behalf of a minor
  - make sure you name alternate trustees, as well
  - review your property disposition upon your death and make sure you also name contingent beneficiaries
- *Review your agent designations in your durable power of attorney and advance health care directive.*
  - make sure you name alternate agents, as well
- *Review beneficiary designations in your life insurance policies, annuities, Roth IRAs, and retirement accounts.*
  - request change of beneficiary forms from your life insurance companies and your plan administrators.
- *Review P.O.D. ("pay-on-death") & T.O.D. ("transfer-on-death") beneficiary designations on your bank and brokerage accounts, stock certificates, and bonds.*

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<sup>4</sup> If you die during the family law proceedings, the family court will lose jurisdiction over you. The probate court will now have jurisdiction over your estate, and probate law will control. Your will can now serve as a "pour-over" to fund your trust.

As you should now realize by reading the information in this article, it is advisable that you consult *both* a family law attorney *and* an estate planning attorney if you are going or have gone through a change in your marital status.<sup>5</sup>

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<sup>5</sup> *This article is intended to provide a general overview of the related law, which is subject to change. The information contained herein is not to be construed as "legal advice." If legal advice is required, you should seek the services of a competent estate planning and/or family law attorney.*