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MATSUMURA LAW FIRM

Wills, Trusts, Probate
And Estate Planning

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Divorce and Estate Planning: Update Your Estate Plan During the Dissolution Process

When a husband and wife prepare their estate planning documents, each spouse's Will and their joint Family Trust are drafted with the common goal to benefit one another in the event of incapacity or death. However, when a couple begins the process of divorce, they no longer have similar interests. As a result, action is required with regard to their estate plans to ensure that their assets will be used as they intend. This newsletter addresses the changing nature of a couple's

the other spouse is served with the petition, the respondent spouse becomes bound by the ATRO as well. The ATRO prevents each spouse from transferring assets from their estates or changing beneficiary designations on health or life insurance. The purpose of the ATRO is to maintain a family's financial status quo while the divorce is pending and to prevent one spouse from draining or absconding assets during the divorce proceedings.

Critical Estate Planning Steps Should Be Undertaken When a Divorce Proceeding Begins

legal rights regarding the management of their assets during the process of divorce.

The Problem: Divorcing Spouses are Still Legally Married. While a divorce is still pending, the law recognizes the divorcing spouses as still married. As a result, if one spouse were to pass away during the divorce proceedings, the law would provide for distribution of assets as if they were married. Therefore, changing the estate plan of a divorcing spouse becomes critical.

The Issue: Automatic Temporary Restraining Order. Changing an estate plan for a divorcing spouse is a delicate matter. When a spouse files a petition for dissolution of marriage, the petitioning spouse becomes bound by an Automatic Temporary Restraining Order (ATRO) on all assets (set forth in Family Code section 2040). When

Effect of the ATRO: Notice or Consent Required. The restrictions imposed by the ATRO means that before certain estate changes can be made, pre-requisite *notice* or *consent* may be required, or a *court order* obtained. The remainder of this newsletter addresses what can be changed with notice, consent or via court order.

Revoking an Existing Will and Creating a New Will Can Be Done Immediately. A divorcing spouse can revoke his or her Will without the consent or knowledge of the other spouse, and create a new Will that names children/others as beneficiaries and/or executors.

Revoking Existing Trust—Notice Required. Since a divorcing spouse would not want his or her estate to pass to his soon-to-be ex-spouse should death occur mid-proceeding, the existing revocable trust should be revoked. This revocation can be done only after filing notice of intent to do so, and then serving notice on the other spouse. The terms of the trust should be followed exactly to make sure that revocation is effective. With the trust revoked, a pro-

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Estate Planning Updates for Divorcing Spouses (continued)

bate will be required, but the new pour-over Will provides for the estate to pass to non-spouse beneficiaries, consistent with the divorcing spouse's wishes.

Creating a New Trust Can Be Done Immediately. A new trust can be created by a divorcing spouse without knowledge or consent of the other spouse.

Funding a New Trust—Court Order Required. Although a new trust can be created, *the new trust cannot be funded* (i.e., asset titles cannot be changed so that

ing spouse will need written, voluntary, informed and notarized consent of the other spouse before any beneficiary changes can be made.

IRA Beneficiary Can Be Revoked Unilaterally. Because IRA plans are not governed by ERISA, a divorcing spouse can revoke the existing spousal beneficiary on IRA plans. However, no new beneficiaries can be named until after the divorce is final.

New Durable Powers of Attorney Can Be Prepared Immediately. Without notice or consent, a divorcing spouse may execute a new Durable Powers of Attorney for Asset Man-

A New Will and New Durable Powers of Attorney Should be Prepared Immediately



the new trust owns the assets) unless the divorcing spouse petitions the Court to modify the ATRO. Normally, spouses will contest funding of a trust (due to denial of homestead or other spousal rights), so funding new trusts are usually done after the marital settlement agreement is finalized.

Changing Life Insurance Beneficiaries—Court Order Required. Typically, the insured's spouse is named as primary beneficiary of life insurance policies. A divorcing spouse will need a court order to change beneficiaries on life insurance on his or her own life. Normally, the court order will be denied so the policy will be available as security for any spousal support obligations.

Changing Retirement Account Beneficiaries on 401(k) Plan—Consent Required. Because 401(k) plans are governed by a federal law called ERISA, a divorc-

agement and new Advance Health Care Directives to name persons other than his or her spouse to act as agent for financial or medical matters.

Joint Tenancies Can Be Severed — Notice Required. The divorcing spouse may consider severing the tenancy and holding the property in tenants-in-common so that the other spouse will not cede to ownership. However, severance can work to the divorcing spouse's disadvantage if the other spouse were to pass away. Nevertheless, notice must be filed and served before the severance can occur.

Conclusion. An individual going through divorce proceedings should promptly address his or her existing estate plan, and make changes that do not violate the Family Law Code or Court Orders. Please note that the above rules apply even if the property is the divorcing spouse's sole and separate property. ☺

About Me & My Practice. I graduated cum laude from the University of the Pacific in Stockton, CA. I received my law degree from UC Davis and graduated from Golden Gate School of Law with honors with a Masters in Taxation. For the last 10 years, I have practiced exclusively in the area of estate planning, probate and trust administration. In my off hours, I support Pacific and Cal athletics, the SF Giants, the Sacramento Kings, and play (and watch) tennis! ☺