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A PARTNERSHIP OF PROFESSIONAL LAW CORPORATIONS

NEWSLETTER

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IS YOUR PAPERWORK IN ORDER?

DeEtte L. Loeffler, J.D., LL.M. Taxation

Now that you have seen the attorney, and have signed your Will, Trust, Advance Health Care Directive, etc., you can stop thinking about estate planning, right? Not exactly. Getting your plan in place was a major step in the right direction, but there are still a few important things you need to do.

Fund the Trust. One critical step that may still need doing is to transfer your assets into the trust. Although some property can be transferred to a trust after your death using a simplified probate procedure, if you hold any real property or assets with an aggregate value of over $150,000, outside of a trust, a full blown probate will be required. Your attorney can assist you to do this, or you can do it yourself. Deeds must be prepared for any real property, while bank and brokerage accounts can often be transferred simply by contacting the entity and completing a short form. Interests in entities (corporations, limited liability companies and partnerships) may often be transferred by contacting the company to direct the transfer and providing an assignment for the interest.

Revise Beneficiary Designations. Life insurance, annuities, IRAs, pensions, and payable-on-death accounts are not normally transferred to your trust during lifetime (with the exception of life insurance trusts). Instead, these assets are usually transferred upon your death in the manner you designate on a "beneficiary" form. You should discuss these assets with your attorney to ensure your designations are consistent with the rest of your plan. Some assets are best left to a surviving spouse or children (such as IRAs, which can be "rolled over" into an account for such a beneficiary and taken out over the lifetime of the new owner as opposed to over a 5 year term). These assets can usually be transferred by contacting the company providing the benefit to request a new beneficiary designation form. Your attorney can also assist you to obtain and complete these forms.

Prepare a Memo to the Trustee. One extremely helpful thing you can do is to prepare a memorandum for your agent listing key information he or she may need. This includes your computer and cell phone passwords, as well as passwords for any internet sites you regularly visit, such as your bank, brokerage account, and retirement accounts, any shopping sites you participate in such as E-Bay, and for your social media sites such as Facebook and Twitter. It is also very helpful to make a list of your regular bills, along with their due dates. A list of all debts is also helpful, including your mortgage, lines of credit and credit cards. Finally, include information for your health care agent regarding your physicians and any current conditions of which they should be made aware.

We recommend you keep this memorandum, and the one to guardians, discussed below, with your trust and other important paperwork in a safe or other secure location. It is also helpful to keep copies of your insurance policies (property, auto, life) with these papers.

Prepare a Memo to the Guardian. If you have minor children, a memo to the guardian is also very helpful. It should list where your children go to school or day care, the names of their health care providers (doctors, dentists, orthodontist, ophthalmologist, etc.), any significant health issues such as severe allergies, sleeping and food preferences, and anything else that you think would be helpful to the guardian to know. If you have pets, information about their veterinarian, behavior issues, health problems, and food preferences can be helpful to the trustee. Sharing this information will reduce the stress and minimize transition problems for your children, pets and their new guardians.

Share Your Documents. We recommend you also consider sharing your documents with your named agents so that they know what you want and can ask any questions they have of you (or your attorney). Your agent should be given the name and contact information for your attorney and other agents (if you have more than one agent), and should know where and how to access your original documents should something happen to you.

Review Your Paperwork Periodically. Performing a quick annual review of your paperwork is also a good idea, as is reviewing documents more thoroughly whenever you experience a major life event (illness, marriage, birth of a child, divorce, retirement or long term unemployment, or the death of a loved one). Changes in your passwords, assets or debts, and the needs of your children, should be noted. Any changes requiring the assistance of your attorney should also be addressed (such as changing an agent or guardian).

Estate planning is a continual process but need not be especially time consuming or stressful once you put your plan in place. Having a complete plan, and keeping it current, can help to reduce stress for yourself and others in the event of your disability or death.

ESTATE PLANNING AND DIVORCE

DeEtte L. Loeffler, J.D., LL.M. Taxation

Divorce, and the legal process that couples go through to obtain one, can have an impact on the estate plans of not only the couple but others who intend to leave assets to one or both of them. This article explores the impact of a divorce and what you may (and may not) do to ensure your estate planning is not unintentionally changed by one.

Planning Before a Divorce

In California, there are some limitations on a married person's use and disposition of his or her assets during a marriage. Married persons are required, for example, to provide their spouses with the basics necessities of living, such as food, clothing and shelter, and must use their separate property if there is insufficient community property for this purpose. Failure to support a spouse can give rise to a civil action by the spouse or third parties on behalf of the spouse, and spouses can be held legally responsible for each other's debts incurred in filling these basic needs.

In addition, because of the intimacy of the marital relationship, spouses are treated as fiduciaries toward each other. As a result, married persons are not permitted to gift, sell or otherwise transfer community property assets to a third party without the written consent of the other spouse. Such gifts can be set aside in the discretion of the other spouse, but can also be ratified by that spouse after the fact. There are no limitations on the ability to transfer one's separate property, however.

Spouses are permitted to make a Will or other estate planning device without the consent of the other intentionally failing to provide for the other after a death. This is because in California each spouse has an undivided interest in all of the community property assets.

If a married person fails to prepare a Will or other estate plan, the assets will be distributed according to the laws of intestate succession, which generally provide for the community property to be distributed to the surviving spouse, and the separate property of the deceased spouse to be distributed among the surviving spouse and the decedent's issue or parents.

Third parties are not restricted in their ability to transfer assets to one or both parties to a marriage. Such transferred assets will be the separate property of the spouse receiving them unless the gift is made to both spouses, in which case the property will be the community property of the married couple (or each will own a separate interest in the assets given to just him or her). Spouses do not have a claim on the separate property of the other spouse unless so granted in a transfer document from such spouse or, if the spouse has not Will, as provided under the rules for intestate succession.

Estate Planning During Divorce

Once a petition for divorce has been filed, certain restrictions apply to prevent spouses from disposing of property or disinheriting each other. These restrictions are contained in an automatic temporary restraining orders which are set forth on the back of the Petition for Dissolution and which go into effect on the Petitioner once the summons is issued and on the Respondent once he or she is served. These restraining orders generally remain in effect until entry of final judgment, although the court has the power to lift them sooner in appropriate cases.

The temporary restraining orders prohibit spouses from "transferring, encumbering, hypothecating, concealing or in any way disposing of any property, real or personal, whether community, quasi-community or separate" "except in the usual course of business or for the necessities of life." Family Code Section 2040. Since this restraining order effects separate as well as community and quasi-community property, it effectively stops all lifetime transfers unless both spouses agree in writing to the disposition of the asset.

In addition, spouses are prohibited from making changes to life, health and disability insurance policies.

Finally, spouses are prohibited from creating or modifying any "non-probate transfer." Non-probate transfers include trusts, and payable-on-death accounts. The prohibition regarding these non-probate transfers is not absolute, however, but applies only to changes that can effect the dispositive provisions of the trust. Accordingly, a change in the trustee or trustee succession is not prohibited, but a change to a trustee power may be, and a change to the named beneficiaries is most certainly prohibited. The written consent of the other spouse is required before any changes can be made. As a result, divorcing spouses occasionally inherit from each other before a divorce becomes final.

Although these restraining orders generally do not apply to third parties, and family law courts generally do not impose other restraints on third parties except in two situations. First, any third party holding assets belonging to one or both spouses is prohibited from making changes benefitting one spouse over the other, but must instead safeguard such assets pending final disposition by the court. Thus parents and other relatives can amend their own estate plans to remove the spouse of a child or grandchild (or the child/grandchild) as they see fit. Second, where a claim is made by one or both spouses against assets held by a third party, the third party may need to file an action to interplead in the divorce action to have the ownership of such assets determined.

Not all estate planning is prohibited. Spouses are permitted to terminate joint ownership of assets (such as joint tenancies or community property with rights of survivorship) to prevent a right of survivorship in the other spouse. The other spouse must be notified before such a severance can goes into effect. In addition, spouses are permitted to disclaim beneficial interests that would otherwise be acquired. For example, a spouse may disclaim in inheritance (as inherited assets generally become the separate property of the spouse inheriting them). Finally, each spouse is permitted to make a Will. However, if the couple's assets are held in trust, the making of a Will will likely not have much effect on the ultimate disposition of the assets at death.

Finally, some trusts include provisions to automatically disinherit the spouse of a child or other beneficiary (other than the Trustor's spouse) in the event a Petition of Dissolution is filed (i.e., before the divorce is final). Such provisions can often be found in the definition of "spouse" in the trust. These automatic provisions are not prohibited since they exist in the trust and are not a prohibited modification of a non-probate transfer.

Planning After a Divorce is Final

Divorce in California automatically terminates the rights of former spouses to inherit from each other (unless their Wills specifically provide otherwise). Former spouses are also automatically removed as executors, trustees, conservators or guardians (although practically speaking, each parent will be appointed by the court to serve as sole guardian of any joint child unless proven unfit). General and/or special powers of appointment are also terminated.

Certain rights are not, however, terminated by divorce. These include contracts for life insurance and annuities, as well as pay-on-death accounts. In order to remove a former spouse as a beneficiary of such a contract, the owner must take positive steps to notify the third party of the intent to remove the former spouse. Failure to do so can result in unintentional benefits to the former spouse.

Conversely, former spouses who wish to leave assets to each other must make new Wills to name the other as a beneficiary or agent. It is also recommended that such former spouses complete new beneficiary designations after the divorce is final naming the other as a beneficiary in order to avoid confusion or argument later regarding whether or not the former spouse was intended as a beneficiary.

For extended family members who still want to leave gifts to former spouses of a beneficiary, they should check their estate plans to ensure such former spouses were not automatically excluded under the terms of their trust. In addition, executing new estate planning documents can insure there is no confusion later that the former spouse is an intended beneficiary.

Conclusion

Divorce, and divorce proceedings, can have an impact on the estate plans not only of the couple but of others who intend to leave assets to one or both of them. It is important to know what you are permitted, and not permitted, to do at every stage in the divorce process. When in doubt, you should ask questions before taking any action that may lead to a dispute at a later date.

State Tax News:

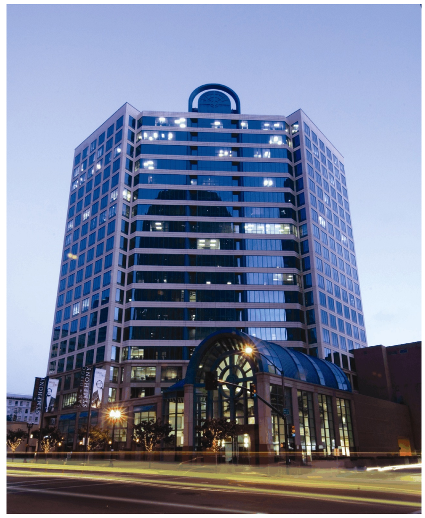
State legislators have proposed dozens of new taxes for California residents, covering such things as tripling the car tax to return it to 2004 levels, imposing a 5 cent tax on grocery bags, and imposing an increased tax on sugary drinks. At this time, none of the proposed tax increases appears likely to win approval in the legislature and be signed into law by Governor Brown. The Governor continues to urge fiscal restraint.

Legislative Update:

The Senate is considering legislation that would permit states to tax online retailers who have no physical presence within the state. Some large retailers are concerned this will cause them to raise prices to cover the cost of developing and implementing software to comply with the different tax laws in each state. Under current law, states can only tax businesses with a presence in the state.

The House and Senate have each passed budgets for the first time in 4 years, but the bills vary sharply so reconciliation may be difficult. Meanwhile, the sequestration continues to have an impact. Although federal budget cuts to military spending and the Department of Homeland Security have been postponed until October, sparing San Diego from significant immediate impacts from the furlough and/or lay off of government workers, the future of those contracting to provide services to the government remains unclear. Uncertainly may cause many of these contracts not to be renewed, or to be renewed for only a short duration as funding may not be provided in next year's budget. In addition, federal courthouses in some states have announced plans to impose furloughs and close on Fridays. These cuts mirror those made to California state courts in 2011 and 2012 due to lack of adequate funding. Assuming the federal courts in California follow suit, access to justice will become even more difficult to obtain.

If you would like to receive further information regarding the topics in this or past newsletter, or if you would like to let us know any issues or topics you would like to see addressed in future newsletters, please contact us at (619) 239-7777 or newsletter@mmpph.com.



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