INTERSECTION OF ESTATE PLANNING AND FAMILY LAW

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Parties to dissolution matters transition quickly from "partners" to "adversaries." Much in the way married persons without prenuptial agreements perhaps unwittingly agree to be bound by the terms of the Family Code upon divorce, parties without estate planning documents have agreed to be bound by the Probate Code upon their death.

In essence, if one does not make an estate plan, the State has made an estate plan for you. As the rock band Rush said best in their song, *Freewill*: "If you choose not to decide, you still have made a choice."[1]

Probate Code section 6122 provides that dissolution or annulment revokes a disposition of property to a former spouse and any provision in a will nominating a former spouse as personal representative of the estate of the decedent; however, this revocation only occurs upon completion of a case and entry of judgment.

What should an attorney do when a spouse dies while the case is pending? We know that death will end a marriage under Family Code section 310, but questions arise. What happens to the decedent's property? Does the fact that a petition for divorce is pending make any difference? What do we need to advise our clients about these possibilities?

This article addresses some issues and potential pitfalls presenting during the process of a dissolution matter as they relate to the death or incapacity of a party during the pendency of the action. I also offer practical solutions to protect the client and their property, while remaining mindful of the "Standard Family Law Restraining Orders"[2] listed on page two of the Summons (FL-110) as set forth in Family Code section 2040. We start with a brief review of section 2040 as it relates to estate planning, or lack thereof.

Like the automatic stay imposed by section 362 of the United States Bankruptcy Code, the purpose of Family Code section 2040 is to maintain the status quo of the parties' estate while the issues relating to property are analyzed and resolved. Among other things, section 2040 restrains parties from: removing minor children from the state, selling or mortgaging property, and from changing the beneficiaries of insurance coverage.

While there are certain things a party is restrained from doing, Family Code section 2040(b) explicitly excludes from the restraining orders the creation, modification, or revocation of a will, the revocation of a non-probate transfer (such as a revocable trust), the elimination of a right of survivorship in property, and the creation of an unfunded revocable or irrevocable trust.

In this way, the legislature has permitted—if not encouraged—those in the midst of a divorce to revise their estate plans and to exclude their soon-to-be ex-spouse as a person who would inherit their property.

For reasons to follow, these are things that should be done at the start of every dissolution proceeding. Even if a client chooses to not revise or create an estate

plan, a prudent attorney will address the matter with each new client. One is well-advised to also document having advised the client of his or her options and having informed the client of the impact of taking no action. Once again, choosing not to decide is a choice.

The Standard Temporary Restraining Orders appear in the family law Summons, used in every case, but how many of us have taken the time to really *study* the orders?

The Summons contains a warning in capital letters reminding the parties that property acquired during marriage is community property, regardless of how title is held; however, if either party dies before property is divided, title will control. The community property presumption does not apply if a party dies before the judgment is entered. For example, if parties own a home titled as "community property with right of survivorship," a spouse may wish to sever title to ensure their share of the home does not end up in the hands of the surviving spouse.

The Standard Temporary Restraining Orders restrain some of our clients' actions while the case is pending. What *can* or *should* we advise our clients to do? First, the best practice is to advise clients they should review their estate plan, or create one, when commencing a dissolution action.

If the client has an estate plan, they should consider revising it, within the bounds of section 2040. If the client does not have an estate plan, they should consider making one that does not violate section 2040. Below are two examples of what could, or perhaps should, be done in either scenario.

SCENARIO 1: CLIENT WITH COMPREHENSIVE ESTATE PLANNING

In this case, you represent a client who created an estate plan with their spouse when divorce was not on the horizon.

Perhaps the estate plan included: a revocable trust, two pour over wills, and powers of attorney for health care and finance. While most people create revocable trusts as a method of avoiding probate, the trust is only operative as to the assets transferred to it. Transferring title of property to being held by a trust is known as "funding" a trust. A person may die owning, or being entitled to receive, assets outside of his or her trust. The pour-over will provides that the trust and its beneficiaries will benefit from the will. While a client dying with a revokable trust may still require a probate, at least the trust—and not the opposing party—will be the beneficiary.

The powers of attorney the client had prepared during the marriage are likely what are known as "springing" powers of attorney under California Probate Code section 4030. That is, they become effective ("spring" into effect) upon the happening of a certain condition.

Most often, the condition is the incapacity of the principal. Usually, our clients have nominated their spouses as their primary agents. Therefore, if our client becomes incapacitated during the pendency of a divorce, the opposing party will be the manager of the incapacitated spouse's person and property. Now the spouse who has not lost capacity may manage the other's finances, sign their tax returns, choose to start or end litigation, and/or manage their health care. This may including the decision to withdraw life support. Of course, the death of a spouse ends the marriage under Family Code section 310.

When your client thought their love would stand the test of time and their preference may have been for their spouse to manage their health care and finances, things have undoubtably changed. For this reason alone, revising one's estate plan should be done almost immediately after filing for dissolution or being served with the summons.

In this scenario, the first step is to prepare and file notices of revocation of the trust and powers of attorney and serve those on the opposing party under Family Code section 2040(b)(2). Be mindful that the terms of the revocable trust will govern the method of revocation. If you are not comfortable advising your client regarding the terms of their trust, refer them to them to an estate planning attorney. Once the trust is revoked, any property held by the trust should be returned to the grantors of the trust, as though the trust never existed.

The client should create a new, unfunded revocable trust, pour-over will, and powers of attorney. While the client cannot transfer any assets to that trust, the new trust will serve as a receptacle for the client's share of community property if the client dies while the case is pending. Once the dissolution is complete, your client can transfer their separate property to the new trust.

SCENARIO 2: CLIENT WITH NO ESTATE PLANNING

In many cases our clients, particularly younger clients, have not created a comprehensive estate plan. While the client has nothing to revoke, they still need to take action if their marital estate includes any significant property because the absence of an estate plan means the Probate Code provides the plan.

Pursuant to Probate Code section 100, upon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent's estate. This means the potential decedent (your client) has the right to decide what should happen to their one-half of the community estate and their own separate property should they die during marriage or during a divorce. It is not in violation of the Standard Family Law Restraining Orders to designate someone other than one's spouse to inherit one's estate.

Under Probate Code section 6401, if your client dies intestate[3] the share owned by the surviving spouse is the one-half of the community property that belongs to the decedent under Probate Code section 100. During divorce, the "surviving spouse" is otherwise known as the opposing party. In this scenario, the opposing party will receive one hundred percent of the community estate, unless your client makes other arrangements while alive.

To understand what the client should do in this case we begin with what happens if they take no action. If the client dies pendente lite then the marital dissolution action is abated and the opposing party is the "surviving spouse." The Probate Code's provisions for surviving spouses will govern. Absent an estate plan to the contrary, dying intestate means the surviving spouse receives all of the decedent's community property.

What happens to the share of the decedent's separate property, if any, is determined under Probate Code section 6401(c). Division of the separate property estate depends on whether the decedent left any issue, parents, or issue of parents. If the client does not have any children, living parents, or siblings, then the surviving spouse will receive all of the decedent's separate property.

As family law practitioners know, it is unlikely your client intends to leave their share of the community estate and possibly all of their separate property to the spouse whom they are divorcing. To prevent this outcome, counsel for a client without an estate plan should advise the client to create a new unfunded revocable trust much like in the scenario above. The client should also create a pour over will.

If the client's estate does not merit the creation of a revocable trust, the client may choose instead a simple will leaving their share of community property and any separate property to the beneficiaries of their choice.

As the client is contemplating life as an unmarried person, they should always obtain a springing power of attorney for finance and one for health care. These documents will ensure that if they are incapacitated, someone they trust will make decisions for them.

Some clients may choose not to take any action, as is their prerogative. A careful family law practitioner will spot this issue, document the client's decision, and then proceed with the case.

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1 Rush, Freewill (Mercury Records 1980) (Lyrics; Neil Peart).

2 The "Standard Family Law Restraining" orders were formerly known as "Automatic Temporary Restraining Orders", colloquially referred to among practitioners as "ATROS".

3 *Intestate*, Barron's Law Dictionary (3d ed.1991) (To die without leaving a valid will).