



Estate Planning Considerations for the Divorcing Client



By: Alexandra S. Gadzo, J.D., LL.M.

We tell our clients during their initial estate planning consultation that incapacity, divorce and death will be discussed during our meeting. However, what happens when your prospective client is contemplating divorce, has filed for divorce or has just recently completed his/her divorce?

What if your client is contemplating divorce?

If your client has estate planning documents in place with the current spouse, your client may consider revoking and restating all of the estate planning documents prior to filing for divorce. The estate planning attorney must review the revocation provisions of the joint trust agreement to determine whether a notification is necessary to the other trustee (spouse). If there are no notification provisions in the trust instrument, the jurisdiction's probate code may state specific requirements regarding a valid revocation and notice requirements. In some cases a revocation is valid, even without a notification to the other trustee (spouse). This is important if your client wants to keep information private from the other spouse. In California, for example, the spouse who is contemplating divorce is not mandated to notify his/her spouse of any changes with the estate planning documents, life insurance beneficiary designations or retirement account beneficiary designations. If your client chooses not to revoke a joint trust or single person trust, the client should, at least, consider updating the will, financial power of attorney and medical directive.

What if your client is already in divorce proceedings?

Most jurisdictions provide for Automatic Temporary Restraining Orders ("ARTOs"), which do not permit the revocation of a trust, the changing of life insurance beneficiaries and the changing of other "non-probate" transfers, retirement plan beneficiaries, pension plans, employee benefit plans and individual retirement accounts. The intent of the ARTOs is to maintain the status quo of assets and ownership interests until the division of assets is complete.

If your client has already filed for divorce and is anticipating a lengthy divorce proceeding, your client should update his/her will, financial power of attorney and medical directive. Your divorcing client is not prohibited from revoking the joint trust, however, a formal notice of revocation must be filed and served on the other party before the revocation takes effect. Sometimes a written request by the other party is required for the revocation to be valid. In addition, any change to a joint tenancy and community property asset must be properly filed, noticed and served on the other spouse before the change takes effect. Your client needs to be informed that any revocation of a trust will result in probate proceedings if there is a death during this interim period until the divorce is finalized or until a single person trust can be funded. You should discuss the estate tax implications with your client when contemplating revoking a trust, because the marital deduction and any estate tax avoidance planning could be lost.

What if your client is recently divorced?

This client is considered a "single" person and should be treated similar to any other single client that comes to your office. The dispositive provisions are not different from any other single person who has never been married or who may be widowed.

What if your client is divorced and has a minor child?

The biggest concern for the divorced parent is who will take care of the minor child and who will take care of the estate that is left to the minor child.

Whether it was an acrimonious divorce or a pleasant separation, the child's guardians should be stated in your divorced client's will. You may discuss the roles of the person who will be in charge of the minor child's care versus who will be in charge of the minor child's inheritance. The will may provide for the "Guardian of the Person" and "Guardian of the Estate" for the minor child. The "Guard-

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ian of the Person” is usually the surviving parent. Note that appointing someone other than the surviving parent as guardian will unlikely be accepted by the court. Unless your client can prove during his or her life time that the other parent is unfit for parenting and a court of competent jurisdiction is willing to remove such parental rights after your client’s death, revoking parental rights is highly unlikely. Consequently, the surviving parent is usually listed as the surviving guardian of the minor child with secondary guardians as chosen by your divorced client.

On the other hand, the “Guardian of the Estate” should be a person, private fiduciary and/or corporate fiduciary of the choosing of your divorced client. This appointee is usually not the ex-spouse and the appointee will be in charge of the minor’s inherited assets. The Guardian of the Estate will be in charge of any life insurance proceeds, retirement plan proceeds and other non-probate assets.

Tips for the Recently Divorced Client:

1. Update the Life Insurance Beneficiary designation:
A divorced client needs to make sure that he/she updates the life insurance beneficiary designations following the completion of the divorce. If the divorced client nominates a minor, the minor’s guardian will receive the funds on behalf of the minor. Hence, it is imperative that the guardian of the estate is nominated in your client’s will.
2. Update the Retirement Plan Beneficiary designation:
A divorced client will also need to update the retirement plan beneficiary designation. If the minor child is designated as beneficiary, the minor’s legal guardian will take over the assets on behalf of the child, unless there is a “Guardian of the Estate” designation so that the retirement plan administrator has the proper designee.
3. Update the Trustee nominations of the Living Trust:
A divorced client should nominate the Trustee of the Revocable Living Trust (who will presumably also be in charge of the assets on behalf of the minor) as the Guardian of the Estate in the will. In case the Trust is

improperly funded, any assets which may pass outside of the trust (and would presumably be probated) are distributed to the Guardian of the Estate rather than the Guardian of the Person. In addition, carefully draft the removal of Trustee provisions so that the surviving parent is not empowered to file on behalf of the minor and petition to have your client’s designated Trustee removed.

Alexandra S. Gadzo is the founder and principal of the Gadzo Law Firm. Located in Palo Alto, California, Ms. Gadzo uses her legal expertise and knowledge to help families plan for present and future life challenges. The focus of Ms. Gadzo’s legal practice is estate planning, trust administration and probate proceedings. Ms. Gadzo earned her Bachelor of Arts from the University of Chicago in Political Science and her Juris Doctorate from University of California, Hastings College of Law. She also holds an LL.M. in Taxation from Golden Gate University School of Law where she graduated with honors, as well as, a real estate broker’s license. For further information or to contact Ms. Gadzo, please visit her website at www.gadzolaw.com.