

TRUST AND ESTATE ISSUES ARISING DURING DIVORCE

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DEATH AND DIVORCE

SURVIVING SPOUSE OR FORMER SPOUSE

- At what point are parties divorced?
- Death during pendency of divorce
- Challenges for executor
- Life insurance, survivor benefits, and survivorship accounts
- Death during the appeal of a divorce case
- Effect of divorce on wills, trusts, and insurance

DIFFERENT COURTS, DIFFERENT ROLES

- Dividing the probate estate v. marital estate
- Impact of mediated settlement agreement on division of property at death
- Claims available in probate court
- Involvement of marital property laws of other jurisdictions

ESTATE PLANNING DURING DIVORCE

- Joint representation issues
- Beware of standing and temporary orders in divorce proceeding
- Changing wills during divorce
- Consider corporate fiduciary
- Testamentary provisions in premarital agreements
- Partition agreements or agreements as to treatment of assets in the event of death during divorce
- Contractual agreement regarding post-divorce wills

REVOCABLE TRUSTS

POTENTIAL ISSUES

- Marital property rules applied
- Requirement that both spouses agree to revoke
- Connections to other entities
- One spouse is trustee, both are beneficiaries
- Nature of assets and income in the trust and transfer upon revocation
- Language in the trust regarding effect of marital separation or divorce

IRREVOCABLE TRUSTS

OBSTACLES TO TERMINATION

- Remainder or other current beneficiaries
- Charitable or minor beneficiaries
- Interests in other entities
- Non-spouse trustee
- Potential claims associated with trust or trust assets
- Tax issues

INSTALLMENT SALES TO TRUSTS

- Joint representation of spouses issues
- Existence of premarital or marital property agreements
- Handling remaining payments on note
- Trustee and beneficiary issues

INTENTIONALLY DEFECTIVE GRANTOR TRUSTS

- Trust is “defective” for income tax purposes if the settlor retains certain rights under the IRC
- A commonly retained right is the power to substitute assets held in trust
- Causes trust income to be taxed to the settlor
- Issues with release of retained rights

**ALTERING AN IRREVOCABLE TRUST
IN A DIVORCE PROCEEDING**

COMMONLY USED METHODS

- Judicial modification
- Rescission/Reformation
- Trustee exercising power to distribute assets
- Beneficiary exercising power of appointment
- Decanting
- Payments in settlement of claims
- Consent to venue

THE TWO TRUSTS SOLUTION

TTC §112.057 permits trustee to create two or more separate trusts without a judicial proceeding if:

- Not expressly prohibited by the trust document;
- The result does not impair the rights of any beneficiary;
- The result does not adversely affect achievement of the purposes of the original trust.

THE TWO TRUSTS SOLUTION

- Two trusts are created out of one
- Each spouse given control of his/her trust
- Rights of contingent or remainder beneficiaries are not altered under the new trusts
- Preserves the tax benefits of the original trust
- Court approval not required, but may be advisable

**LITIGATION INVOLVING IRREVOCABLE
TRUSTS DURING DIVORCE**

THE COURT'S POWERS

- Interpret trust agreement
- Review trustee's abuse of discretion
- Modify/terminate trust
- Remove trustee
- Alter trustee's compensation
- Disgorge profits
- Appoint receiver/auditor
- Award money damages
- Temporary and permanent injunction
- Impose constructive/resulting trust
- Award attorney's fees (TTC § 114.064)
- Divorce property division

TRUST LITIGATION: MECHANICS

- What court?
- Capacity/standing
- Additional claims
- Separate trials (TRCP 40(b))
- Guardian/attorney ad litem
- Virtual representation
- Estate planner as fact witness
- Arbitration

TRUST LITIGATION: PARTIES

- TTC § 112.054(a): suit to replace trustee or modify, reform, or terminate a trust can be brought by a trustee or beneficiary (settlor is not included)
- TTC § 115.011: suit to intervene in the administration of a trust can be brought by “any interested person”
- Beneficiaries can be parties, and must be joined if “necessary parties” under TTC § 115.001
- Charitable trust (notice to Attorney General who can intervene)

LIMITED PARTNERSHIPS IN A
DIVORCE PROCEEDING

POTENTIAL ISSUES

- Joinder of LP
- Counsel for the LP
- GP is a community property LLC or company
- Other limited partners
- Characterization of LP property
- Transfer restrictions
- Disagreement over termination
- Claims
- Tax consequences of dissolution or termination

FAMILY COURT'S POWERS

- Jurisdiction and venue requirements
- Cannot award partnership assets
- Can award only a “assignee” interest
- Can award ownership of community property LLC or company that is GP
- Dissolution of partnership

**CHANGING PERSPECTIVES ON
FAMILY'S ESTATE PLAN**

GENERAL COMMENTS

- Who controls what?
- Support needs during lifetime
- Recovery to trust v. recovery to community
- Specialized drafting (should divorce provisions be included in wills, trusts, and LPs?)
- Need for estate planning/tax advice
- Rights & desires of next generation
- Intrafamily dynamics
- Jeopardizing estate plan
- Estate planner liability

THANK YOU!