

Kimball, Tiley & St. John LLP

Estate Planning During Divorce

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See if you can correctly answer this hypothetical: Husband and Wife have been married for ten years. Husband has two children from a previous marriage. Wife has no children. Wife has an extramarital affair with Husband's best friend and subsequently moves into the best friend's home and files for divorce. Husband has substantial wealth, but never signed a premarital agreement when he married Wife. Wife seeks spousal support and one-half of the marital property. The divorce proceedings linger as the attorneys battle it out. During the course of the divorce litigation, Husband has a severe heart attack and dies. Husband has no estate planning documents. How much of Husband's estate is Wife entitled to? (a) all of it; (b) none of it; or (c) a portion of it?

Depending on how the assets are titled, wife may be entitled to all of the estate. If Husband had separate property (defined below), Wife will be entitled to a portion of that property.

Unfortunately, the above scenario is a common situation that highlights the overlap between family law (divorce law) and probate law. The first determination that must be made is whether wife qualifies as a "surviving spouse." California Probate Code §78 states that a "surviving spouse" does not include any of the following:

- (a) A person whose marriage to the decedent has been dissolved or annulled, unless, by virtue of a subsequent marriage, the person is married to the decedent at the time of death.
- (b) A person who obtains or consents to a final decree or judgment of dissolution of marriage from the decedent or a final decree or judgment of annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless they (1) subsequently participate in a marriage ceremony purporting to marry each to the other or (2) subsequently live together as husband and wife.
- (c) A person who, following a decree or judgment of dissolution or annulment of marriage obtained by the decedent, participates in a marriage ceremony with a third person.
- (d) A person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

Nowhere in this definition does it say "a person who has wronged the Decedent" or "a person who has filed for divorce from Decedent." In this situation, Wife is considered a surviving spouse because the divorce was not completed at the time of Husband's death.

The second determination that must be made is whether the property at issue is characterized as community property or as Husband's separate property. Community property is defined by California Family Code §760 as all property, whether real or personal, that is acquired during marriage. In our situation, because Husband and Wife bought their home during the marriage, it is presumed to be a community property asset. They also bought two BMWs during the marriage, which are also presumed to be community property.

Separate property is defined by California Family Code §770 and includes all of the following:

- (a) all property owned by the person before marriage,
- (b) all property acquired by the person after marriage by gift, bequest, devise or descent,
- (c) all rents, issues and profits of the property described in this section.

Husband owned a rental property in Arizona and a vacation property in Lake Tahoe, both of which he acquired prior to marriage. The Arizona property was kept in Husband's name but he deposited all the rents into a joint checking account held with Wife. During the marriage, Husband added Wife's name to the title of the Lake Tahoe property. California Family Code §850 provides that spouses can transmute or re-characterize separate property to community and vice versa. Thus, the Arizona rental property will be characterized as Husband's separate property, but the rental income he deposited into the joint account will now be community property. The Lake Tahoe property would have been separate property but was transmuted to community property when Husband added Wife's name to the deed.

So, how will the estate be distributed? Let's look at the assets and their characterizations:

Community Property

Marital Home

Rental Income from Arizona Rental Property

Lake Tahoe vacation home

Bank Accounts

Vehicles

Separate Property

Arizona Rental Property

As to Husband and Wife's community property, Wife is deemed to own one-half and Husband is deemed to own one-half. Thus, Husband's probate estate contains Husband's one-half of the community property and all of his separate property. In general, the wife should receive all of the decedent's share of the community property under Probate Code Section 6401, but there could be fights about whether it is community property or not.

As to Husband's separate property, Wife will receive one-third of the rental property and the children will receive two-thirds.

There are two cautionary tales here: First, be careful with transmutations of separate property during marriage, this is advice your family law attorney can give. Second, prepare an estate plan during your divorce.

During a divorce, certain automatic "restraining orders" go into effect that prohibit the transfer of property during the divorce proceeding (California Family Code §2040). However, these restraining orders do not prohibit you from making a Will (Cal. Fam. C §2040(b)(1)) or Trust (Cal. Fam. C §2040(b)(4)). You can also execute a Power of Attorney and Advanced Health Care Directive. In Husband's situation, he could have at least executed a Will devising his property to his children and they would have received the full one-half of his community property, instead of one-half of it, and all of Husband's separate property.

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