

First Supplement to Memorandum 2000-51

Estate Planning During Dissolution of Marriage: Comments of Marshal Oldman

Marshal Oldman, of Oldman, Cooley & Leighton (Encino), has previously suggested that the automatic temporary restraining order (ATRO) that is in effect during dissolution of marriage should restrain the transfer of property to fund a living trust, but should not restrain the creation of an *unfunded* living trust. So long as the trust remains unfunded, there is no risk of an unauthorized transfer of community property by operation of the trust.

Under the rule proposed by Mr. Oldman, a party could create an unfunded living trust during a dissolution proceeding. The party could then execute a will with a pour-over provision to fund the trust. The property would be transferred to the trust on the testator's death. This arrangement would be subject to probate administration. Considering that probate avoidance is a common goal when using a living trust, the staff was unsure of the purpose of Mr. Oldman's proposal. In Memorandum 2000-51, the staff asked for additional comment on the benefit of creating an unfunded living trust during dissolution of marriage.

Mr. Oldman has written to explain how creation of an unfunded living trust would benefit parties to a dissolution proceeding. His letter is attached. He makes three points:

(1) Gradual Funding of Trust as Assets Released

Mr. Oldman notes that an unfunded living trust created during a dissolution proceeding could be funded gradually, with property that is released from the jurisdiction of the family court by agreement of the parties (see Exhibit p. 1):

It is my understanding that the parties will often agree that property may be released from the jurisdiction of the family court while the matter is pending. If a trust may be established in the meantime, it may be funded upon release of the assets. This may be especially important where the parties remarry after dissolution but while the marital estate is still being divided. In some cases, years may pass while a portion of the estate is in the process of division and the ATRO may still be in effect.

Of course, in a proceeding that stretches on for years, a party should be able to obtain spousal consent or a court order authorizing creation of a trust. Still, there may be cases of shorter duration where it would be useful to create an unfunded trust as an eventual repository for property released from the ATRO.

(2) Greater Efficiency in Estate Planning

Mr. Oldman observes that modern estate planning typically employs one or more living trusts. If the only estate planning instrument that a party can create during a dissolution proceeding is a will, many parties will execute a will during the proceeding and then replace it with a more sophisticated plan (involving a trust) once the ATRO terminates. This would require the parties to engage in estate planning twice, imposing unnecessary costs (see Exhibit pp. 1-2):

Allowing the parties to engage in proper estate planning in the beginning will not increase the risks of estate dissipation while allowing the parties to proceed with a new estate plan in accordance with modern techniques and expectations.

(3) Greater Privacy

Finally, Mr. Oldman is concerned that an attempt to obtain court permission to create a living trust would compromise the privacy and confidentiality one expects with regard to the contents of a trust:

If a motion is required in order to obtain permission to create a trust while an ATRO is in effect, the other spouse will be notified of the intent to create a trust and probably will also be informed of its terms. In fact, the need to file a motion may make the entire trust instrument a matter of public record. This is not true of a will made during dissolution proceedings. Any party being required to obtain court permission to create a trust will be placed at a relative disadvantage compared to the creation of a will. Once again, this is contrary to normal estate planning procedures and expectations.

Discussion

Mr. Oldman's letter demonstrates that there are good reasons to create an unfunded living trust during a dissolution proceeding. **The staff is concerned about adding to the complexity of the proposed law, but believes that the suggested change may be appropriate.**

Mr. Oldman's suggestion could be implemented by revising the proposed amendment to Family Code Section 2040(b) to read as follows (see Exhibit p. 2):

(b) Notwithstanding subdivision (a), nothing in this section restrains any of the following:

(1) The creation, modification, or revocation of a will.

(2) Revocation of a nonprobate transfer.

(3) Elimination of a right of survivorship between owners of jointly-owned property.

(4) The creation of an unfunded living trust.

Comment. ... Subdivision (b)(4) provides that the ATRO does not restrain creation of an unfunded living trust. However, the transfer of property to fund a living trust would be restrained under subdivision (a)(2). An unfunded living trust created during a dissolution proceeding could serve as a receptacle for property subject to a pour-over provision in a will. Such a trust could also be funded by property that has been released from restraint by the ATRO.

The Commission should decide whether to make this change in the draft recommendation.

Respectfully submitted,

Brian Hebert
Staff Counsel

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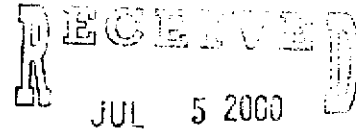
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Re: ATRO Proposal

Dear Mr. Hebert:

Thank you for sending me the tentative recommendation regarding the proposed ATRO legislation.

In regard to the question of being able to establish rather than establish and fund a living trust, I believe that the creation of an unfunded living trust will be a benefit to litigants in dissolution proceedings for the following reasons:

1. While a probate may not be avoided to the extent that the trust remains unfunded, the creation of a trust will allow the parties to fund their respective trusts as assets are released from the dissolution proceeding. It is my understanding that the parties will often agree that property may be released from the jurisdiction of the family court while the matter is pending. If a trust may be established in the meantime, it may be funded upon release of the assets. This may be especially important where the parties remarry after dissolution but while the marital estate is still being divided. In some cases, years may pass while a portion of the estate is in the process of division and the ATRO may still be in effect.

2. Modern estate planning almost invariably employs the creation of one or more living trusts. While many of the same objectives may be achieved by a will, a trust will normally be created after the completion of the estate planning process. Requiring litigants to be satisfied with a will during dissolution may force them to engage twice in estate planning and will be ultimately wasteful to the parties. Allowing the parties to engage in proper estate planning in the

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beginning, will not increase the risks of estate dissipation while allowing the parties to proceed with a new estate plan in accordance with modern techniques and expectations.

3. As with a will, the creation of a living trust is normally a private and confidential matter. If a motion is required in order to obtain permission to create a trust while an ATRO is in effect, the other spouse will be notified of the intent to create a trust and probably will also be informed of its terms. In fact, the need to file a motion may make the entire trust instrument a matter of public record. This is not true of a will made during dissolution proceedings. Any party being required to obtain court permission to create a trust will be placed at a relative disadvantage compared to the creation of a will. Once again, this is contrary to normal estate planning procedures and expectations.

Please let me know if you have any questions or comments.

Very truly yours,



MARSHAL A. OLDMAN

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