

I'LL DIE BEFORE I GET A DIVORCE

*What Happens When A Party Dies While
A Divorce Is Pending*

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ACUÑA ❖ REGLI

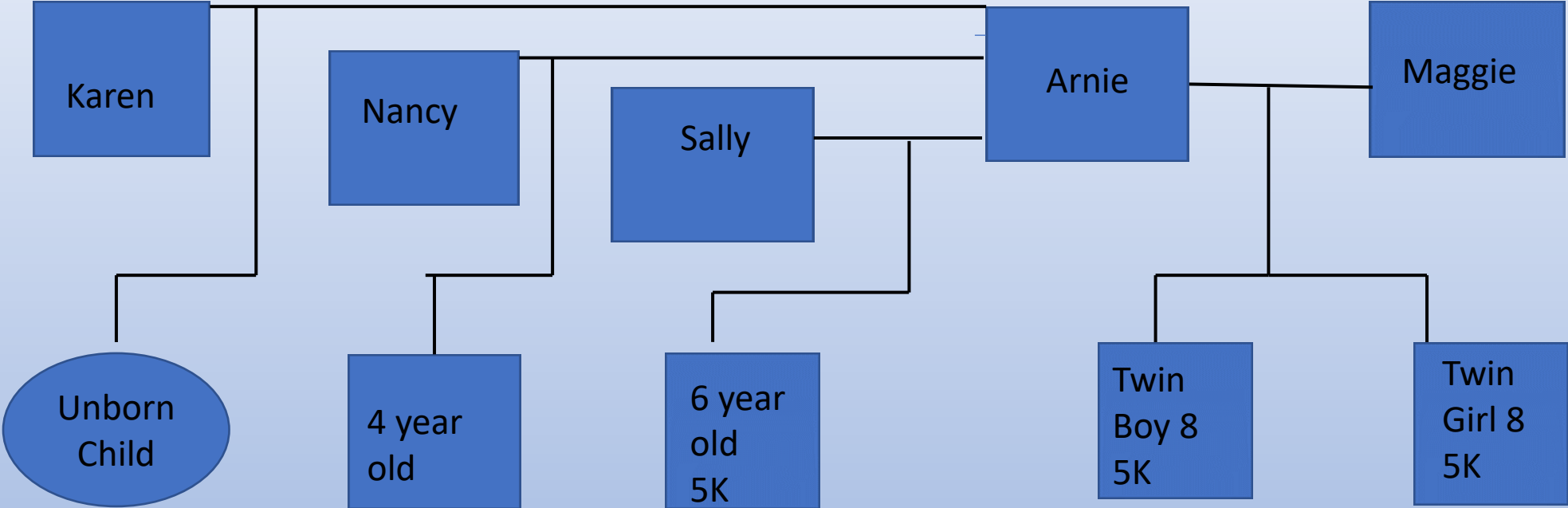
*Estate Planning ❖ Administration
Conservatorship ❖ Inheritance Litigation*

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ARNIE'S FAMILY TREE



Arnie's Assets / Debts

❖ Assets

- ❖ 2,000,000 Personal Injury Suit Before Marriage (SP)
- ❖ 2,000,000 Property Acquired During Marriage (CP)
- ❖ 1,000,000 Life Insurance Maggie Listed as Beneficiary
- ❖ 2,000,000 Possible Recovery from PI Suit After Separation (?)

❖ Debts

- ❖ \$500,000 Mortgage Debt on Marital Home
- ❖ \$5,000 Per Month Child Support for 6 year old (\$720,000)
- ❖ \$10,000 Per Month Child Support for 8 Year Old Twins (\$1,200,000)

ISSUE 1 – MAGGIE CONTESTING WILL AND TRUST

❖ Trust Contest (Probate Code §21310)

- ❖ Forgery
- ❖ Lack of due execution
- ❖ Lack of capacity
- ❖ Menace, duress, fraud, or undue influence

❖ Will Contest (Probate Code §8004) (Probate Code §8252)

- ❖ Lack of testamentary intent or capacity
- ❖ Undue influence
- ❖ Fraud
- ❖ Duress
- ❖ Mistake
- ❖ Revocation

ISSUE 2- WERE THE WILL & TRUST CREATED IN VIOLATION OF SFLRO'S/ATRO'S?

❖ SFLRO's/ATRO's:

- ❖ Purpose is to maintain the status quo and protect integrity of the marital estate and parental rights and relationships pending adjudication.
- ❖ Set forth actions that are not permitted or permitted only under certain conditions.
- ❖ Examples include, prohibition against removing minor children from state, prohibition against selling/transferring/encumbering assets, changing insurance policies.

ATROS's/SFLRO's- When Applicable?

- ❖ a. Petitioner is bound upon filing the Petition, Respondent is bound upon being served with Petition and Summons- They remain in effect until the resolution of the case Fam. Code §233. Set forth in detail at Fam. Code §2040
- ❖ b. Whether Arnie was bound by ATROS at time of his death depends on whether Maggie had effectuated service of the Petition and Summons prior to his death.
- ❖ c. If Arnie had not been served before he went to see Larry Lawyer:
 - ❖ i. Limitations on estate planning prior to ATROS- cannot give away more than you have, thus Arnie could only plan as to his separate property and one-half of the community property- he cannot give away Maggie's half of the community property.

ESTATE PLANNING PURPOSES

- ❖ Estate planning actions fall into one of four categories under SFLRO's:
 - ❖ Permitted.
 - ❖ Permitted with notice.
 - ❖ Permitted with consent of other party.
 - ❖ Permitted by court order.

NO RESTRICTIONS

- ❖ Create, modify or revoke a will. (Fam. Code §2040 (b)(1).)
- ❖ Create • • but not fund • • a new revocable or irrevocable trust. (Fam. Code §2040 (b)(4), Fam. Code §2040 (a)(2).)

PERMISSIBLE WITH PRIOR NOTICE TO OTHER PARTY

- ❖ Create, modify or revoke a will. (Fam. Code §2040 (b)(1).)
- ❖ Create • • but not fund • • a new revocable or irrevocable trust. (Fam. Code §2040 (b)(4), Fam. Code §2040 (a)(2).)
- ❖ Revoke a revocable trust. Notice must be filed and served on a party before a change takes place. (Fam. Code §2040 (b)(2), (d)(1).)
- ❖ Eliminate a right of survivorship for property, e.g., joint tenancy or community property with right of survivorship. Notice must be filed and served before the changes take effect. (Fam. Code §2040 (b)(3), (d)(1).)
- ❖ Revoke the transfer to the beneficiary of a "nonprobate transfer." Notice must be filed and served before the changes take effect. (Fam. Code §2040 (b)(2), (d)(1).)

PERMISSIBLE WITH PRIOR WRITTEN CONSENT OF THE OTHER PARTY OR COURT ORDER

- ❖ Create or modify a nonprobate transfer in a manner that affects the disposition of property subject to the transfer. (Fam. Code §2040 (a)(4), (d)(1), Prob. Code §5000.)

- ❖ Fund a new revocable or non-revocable trust. (Fam. Code §2040 (a)(2), (a)(4).)

PERMISSIBLE ONLY WITH PRIOR COURT ORDER

- ❖ Cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage, including life, health, automobile, and disability, held for the benefit of the parties and their child or children for whom support may be ordered. (Fam. Code §2040 (a)(3).)
 - ❖ But keep in mind that the family court will allow parties to stipulate to nearly any order, so “permissible with prior court order” generally will extend to anything that the other party consents to.
- ❖ Funding or creating a nonprobate transfer if the other spouse does not consent. (Fam. Code §2040 (a)(4), (d)(1).)

NONPROBATE TRANSFER

- ❖ For the purposes of SFLROs, "nonprobate transfer" means an instrument, other than a will, that makes a transfer of property on death, including a revocable trust, pay on death account in a financial institution, Totten trust, transfer on death registration of personal property, or other instrument of a type described in Prob. Code §5000.
- ❖ Examples of these include, but are not limited to:
 - ❖ Changes in the beneficiaries of pension plans, employee benefit plans, individual retirement plans, and life insurance.

ISSUE 3- MAGGIE CLAIMS AS HIS WIFE, (THE DIVORCE IS NOT FINAL) SHE GETS EVERYTHING.

- ❖ There are three ways out of a marriage. Fam. Code §310: Marriage is dissolved only by one of the following:
 - ❖ The death of one of the parties.
 - ❖ A Judgment of Dissolution.
 - ❖ A Judgment of Nullity of marriage.

ARNIE'S DEATH DISSOLVES HIS MARRIAGE TO MAGGIE AS AN OPERATION OF LAW

- ❖ Divorce is a personal action that does not survive the death of a party. When one of the parties dies, dissolution occurs as a matter of law, and there is nothing left for a court to dissolve or annul. The dissolution is final, irrevocable, nonmodifiable, and nonappealable. *In re Marriage of Williams* (1980) 101 Cal.App.3d 507, at 510.

WHAT ABOUT LEGAL SEPARATION?

❖ A Judgment of Legal Separation leaves Marital Status intact, but not status as Surviving Spouse

--BUT--

❖ As to the right to intestate succession, a party with a Judgment for Legal Separation is not considered a surviving spouse for purposes of intestate succession. Prob. Code §78(d) and §6401, *Estate of Lahey [Lahey v. Bianchi]* (1999) 76 Cal.App.4th 1056

WHAT ABOUT A NULLITY?

- ❖ An Action for Nullity does survive the death of one of the parties, a nullity cause of action survives death of a party and the public administrator may properly substitute in as Petitioner in nullity action. *In re Marriage of Goldberg* (1994) 22 Cal.App.4th 265.
- ❖ If the action pending at the time of Arnie's death was one for nullity, and a Judgment of Nullity essentially is a finding that no marriage existed, then Judgment of Nullity after death of a party could defeat the surviving party's community property claims.

ISSUE 3 – DOES MAGGIE GET EVERYTHING AS HIS WIFE?

- ❖ The only scenario in which Maggie inherits 100% from Arnie is if their joint Trust is still valid.
 - ❖ Arnie left a Will (if valid) his separate property and his half of the community property will pass according to his Will regardless of the status of his marriage.
 - ❖ Arnie has a pour over will. What happens if the Will is valid, but the Trust is not?
 - ❖ Even if Arnie died intestate, he had separate property which would pass 1/3 to Maggie and 2/3 to his children. (Probate Code §6401)
 - ❖ Maggie would inherit ALL of the community property in an intestate scenario.

ISSUE 3 – DOES MAGGIE GET EVERYTHING AS HIS WIFE? Cont.

- ❖ Creating a new will is a permissible action under the ATROS, no problem there.
- ❖ Creating a new trust, permissible action under the ATROS, as long as the trust is not funded, so no problem there.
- ❖ Revocation of previous trust, permissible under the ATROS as long as Arnie gave notice to Maggie prior to revocation.
- ❖ Maggie is not likely to prevail on a contest under this theory, so long as revocation of prior trust was noticed by Arnie.

WHO DETERMINE WHAT IS COMMUNITY AND WHAT IS SEPARATE PROPERTY

- ❖ If the Family Court had adjudicated any issues prior to Arnie's death, those orders would stand.
 - ❖ Pre-trial award of any asset.
 - ❖ Pre-trial assignment of any obligation.
 - ❖ Spousal support paid prior to death.
 - ❖ Death terminates spousal support.
 - ❖ But not child support... more to come...

WHAT ABOUT MATTERS UNDER SUBMISSION?

- ❖ If Arnie and Maggie had submitted any issues to the court for adjudication, and Arnie dies after submission but before Statement of Decision, the court retains jurisdiction to adjudicate all submitted issues.
- ❖ "Upon the death of a party to a marriage dissolution or divorce proceeding, the court retains the power to enter judgment in conformity with matters already adjudicated before the death. But it can make no further adjudication of issues." *In re Marriage of Williams* (1980) 101 Cal.App.3d 507, at 510.

BACK TO MAGGIE -

- Maggie is not likely to prevail under a theory that as Arnie's legal wife, she gets it all.
- But keep in mind that she is still entitled to her half of any community property acquired during her marriage to Arnie, no matter what any will says.
 - Unless they had a pre-nup, but that is a discussion for another day.
 - She would have to bring the claim for her half of the community property in probate court, not the family court.

ISSUE 4 & 5 CREDITOR CLAIMS FOR CHILD SUPPORT

- ❖ The obligation of a father to support his minor children which is fixed by a divorce decree or property settlement agreement, does not cease on the father's death, but survives as a charge against his estate *Newman v. Bruwell* 216 Cal. 608 (1932) and *Taylor v. George* 34 Cal. 2d 552 (1949)
- ❖ Creditor Claims Totaling \$1,920,000.00 for Child Support
- ❖ Liability of (unfunded) trust

CHILD SUPPORT & DEATH OF A PARENT

- Child support order survives death of a parent. *In re Marriage of Drake* (1997) 53 Cal.App.4th 1139
- By operation of law, child support terminates upon the child's 18 birthday if they graduate high school prior to turning 18, or upon the earlier of high school graduation or their 19th birthday if they are enrolled in an accredited high school program.
- There are provisions for child support orders for adult disabled children who are incapable of self-support.

CHILD SUPPORT AS CREDITOR CLAIM

- Maggie and Sally's calculation of the amount of their creditor claim is correct, monthly ordered amount multiplied by the number of months until child support terminates by operation of law.
 - Any discount to present value?
- Is creditor claim modifiable?
 - General rule is that child support is always modifiable on a showing of a change in circumstances. Fam. Code §4055
 - IRMO Drake confirms.

NOTES ON DNA TESTS

- Note that a child support order for a child born outside of marriage would require a filing of a Petition to Establish Parental Relationship and ultimately a Judgment of Paternal Relationship. Arnie would have had the ability to contest paternity- court would not accept a DNA test from Jerry Springer unless Arnie agreed to it.
- Same would apply to the home DNA test administered to Nancy's child.

MODIFICATION OF CHILD SUPPORT

- What is changed circumstances for purposes of modification of child support?
 - Anything that changes the mathematical calculation of the guideline formula.
 - Examples: Change in timeshare, change in either parent's income.
- Death increases timeshare of surviving parent.
- If child support is enforceable as a creditor claim against the estate, how is "income" applied to the estate for purposes of modifying child support?

ISSUE 4 & 5 CREDITOR CLAIMS FOR CHILD SUPPORT (Cont)

❖ Will

- ❖ Testator made provision for his children which can fulfill his obligation of support (Taylor v. George)
- ❖ Who has standing to advance a creditor's claim?
- ❖ How to file the Claims: Once a probate administration is commenced Probate Code 9000 – 9300 comes into effect
- ❖ What if no probate is opened? A creditor may initiate a probate if there is property subject to administration. See [Prob C §8461\(q\)](#).

❖ Trust

- ❖ Testator made provision for his children which can fulfill his obligation of support (Kelly v. Bank of America Nat'l Trust 225 Cal.App. 2d 193)
- ❖ Liability of (unfunded) trust
- ❖ Discretionary claims procedure under [Prob C §§19000–19403](#)

❖ Intestate

- ❖ Creditor Claims Totaling \$1,920,000.00 for Child Support
- ❖ Need to continue support payments during administration
- ❖ Could result in substantial inequity among his children

CHILD SUPPORT OBLIGATION ALSO ENFORCEABLE AGAINST TRUST

- A child support obligation may also be enforced against the trustee of the deceased parent's living trust. *In re Marriage of Perry* (1997) 58 Cal.App.4th 1104

ISSUE 6- CLAIMS OF NANCY'S SON

- ❖ Nancy claims her 4-year old son as the biological son of Arnie but he is not listed as the father on the birth certificate.
- ❖ This is an incredibly complex situation.
- ❖ We don't know if there is any father listed on the birth certificate.

WHO IS THE DADDY?

- ❖ CA has no statute of limitations for determination of biological paternity.
- ❖ CA presumes paternity based on any Voluntary Declaration of Paternity, Fam. Code §7573
- ❖ Arnie not listed on birth certificate, presume that means he did not sign voluntary declaration of paternity
- ❖ Fam. Code §7540 favors presumption that child is born within marriage.
- ❖ CA does have statute of limitations for challenging presumed parentage.

PRESUMED PARENTAGE

- ❖ If a baby is born to a married person, or within 300 days of date of separation, the spouse is considered the presumed parent.
- ❖ Presumed parent can exert rights to child even if they know child is not their biological offspring.
- ❖ The biological parent can challenge the presumed parent's paternity, but statutory time limits to do so. (two years).
- ❖ If Nancy was married at the time her son was born, her spouse and not Arnie is father, regardless of genetic testing- past the SOL to challenge presumed parentage.

NANCY'S CHALLENGES

- ❖ If Nancy's not married at time of birth, she does not have to deal with her spouse being presumed father.
- ❖ No SOL for child to be determined Arnie's biological offspring
- ❖ If the child is determined to be Arnie's child, the child entitled to claim against estate because he is a minor.
- ❖ But- How do you get DNA from a cremated body?
- ❖ And- How do you get order to dig up buried body?
- ❖ What about a family member of DNA testing website? Fam. Code § 7555 governs what degree of certainty is required for genetic testing

EQUITABLE?

- Public policy favors finding of paternity within marriage, but does that actually cause detriment in some circumstances?
- Children born of marriage less likely to have a court order for child support than a child born outside of marriage.
- Could have significant impact if parent dies during child's minority.

ISSUE 7- KAREN WANTS TO FILE A CREDITOR CLAIM ON BEHALF OF HER UNBORN CHILD

- Pregnant mother may bring action to determine paternity prior to child's birth, Fam. Code §7633.
- No genetic testing in utero, Fam. Code §7551
- Court can order genetic testing of a deceased person for good cause, Fam.Code§7562.
- Child support based on income, Arnie no longer has income after death, so no grounds for a child support order in Family Court, but his estate has assets that can be used to support his minor children.
- No child support = no creditor claim. Karen cannot get a child support order from deceased parent, but can claim against estate.
- Karen has same potential issue as Nancy re: establishing Arnie is biological father.

IS IT EQUITABLE?

- Consider equity issue –
 - Arnie's Estate = \$2,750,000
 - He wants to leave to his issue (possibly 5 children)
 - \$1,920,000 off the top for creditor claims to children with child support
 - \$830,000 for distribution
 - Twin 1 = \$600,000 creditor claim + \$166,000 inheritance (\$766,000)
 - Twin 2 = \$600,000 creditor claim + \$166,000 inheritance (\$766,000)
 - 6 Year Old = \$720,000 creditor claim + \$166,000 inheritance (\$886,000)
 - 4 Year Old = \$166,000
 - Unborn Child = \$166,000

ISSUE 8 – Does the ‘Float’ Accident Survive Arnie’s Death?

- ❖ All of Arnie’s pain and suffering (general damages) die with Arnie.
- ❖ Economic Loss Claims survive Arnie’s death IF
 - all heirs file a Common Law Survival Action rather than a California statutory wrongful death case
 - Is Maggie considered to be an heir?
 - Is Karen’s unborn child considered to be a heir?

The Common Survival Action

- If the heirs are fighting the trier of fact (jury and/or Judge) make the allocation to each party

Questions?



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