

**INDIVIDUAL RETIREMENT ACCOUNTS**  
**Where Do IRA's Fit in the Judgment Protocol under Family Code §2337?**

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IRA assets at early termination of marital status should be addressed under Family Code §§2337(c)(7) and 2337(c)(8), which contain two of several revisions made in 2008 under the umbrella of *discretionary* conditions the court may impose upon the bifurcation of marital status.

But why do anything with an IRA before the actual division of assets occurs? Isn't the court's reservation of jurisdiction over an IRA sufficient protection for the non-owner spouse's interest? NO.

Two reasons: An IRA is a non-probate transfer asset.

(1) FC §2040 (b)(2)<sup>1</sup> gives a party the right to revoke a non-probate transfer despite the ATROS; and

(2) Probate Code §5600 provides for the *automatic revocation* of a spousal beneficiary designation on a non-probate transfer asset at termination of marital status.<sup>2</sup>

Therefore, loss of beneficiary status on an IRA when marital status is terminated is automatic unless you do something to prevent that loss.

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<sup>1</sup> FC §2040 (b)(2) excludes from the ATROS a “[r] evocation of a nonprobate transfer, including a revocable trust, pursuant to the instrument, provided that notice of the change is filed and served on the other party before the change takes effect.” These revisions to FC §2040 and Probate Code §5600 were introduced in Bill No. 873, Ad Stats 2001, C417.

<sup>2</sup> The relevant portions of Probate Code §5600 read as follows:

(a) Except as provided in subdivision (b), a nonprobate transfer to the transferor's former spouse, in an instrument executed by the transferor before or during the marriage, fails if, at the time of the transferor's death, the former spouse is not the transferor's surviving spouse as defined in Section 78, as a result of the dissolution or annulment of the marriage. A judgment of legal separation that does not terminate the status of husband and wife is not a dissolution for purposes of this section.

(b) Subdivision (a) does not cause a nonprobate transfer to fail in any of the following cases:

(3) A court order that the nonprobate transfer be maintained on behalf of the former spouse is in effect at the time of the transferor's death.

**Two Approaches:** Family Code §2337(c)(7) and (c)(8) offer two approaches to protecting IRA interests at early termination of marital status:

1. **Order for Beneficiary Designation**

FC §2337(c)(7), reflected on FL-347 as item 5.g., reminds the user that the court may order the designation or continued designation of a party as a beneficiary on a non-probate transfer asset.<sup>3</sup>

**Family Code §2337(c)(7)(A) provides:**

... the court may make an order pursuant to paragraph (3) of subdivision (b) of Section 5600 of the Probate Code, if appropriate, that a party maintain a beneficiary designation for a non-probate transfer, as described in Section 5000 of the Probate Code, for a spouse or domestic partner for up to one-half of or, upon a showing of good cause, for all of a non-probate transfer asset until judgment has been entered with respect to the community ownership of that asset, and until the other party's interest therein has been distributed to him or her.

Practice tips:

An order is required. Do not simply check the box at FL-347 5.g.

- Address the order and sent it to the financial institution holding the IRA.
- Give the partial IRA account number for identification.
- State the full name of the party who is to remain a designated beneficiary.
- Describe the percentage of that designation and the duration of the order ( e.g., “Until further order of the Court...”).

The letter of transmittal to the Financial Institution (not the Order itself) should give each party’s social security number and the full IRA account number.

2. **Order to Divide the IRA**

Family Code §2337(c)(8) provides for the division of IRAs as part of the Judgment for early termination of marital status.

**QUESTION:** Why bother to prepare an order to divide the IRA?

**ANSWER:** Because of the tax consequences.

- A beneficiary of an IRA is forced to take a distribution either as a lump sum or an annuity in a fairly short period after the death of the owner. For example, Non-spousal IRA heirs may have to begin to take minimum taxable distributions each year based on that heir’s life expectancy by December 31 of the year after the IRA owner died.

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<sup>3</sup> Since 2002, the ATROs have contained a definition of non-probate transfer assets as follows: "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 Section 5000 of the Probate Code. FC §2040 (d)(1).

- But an ex-spouse who is an IRA owner has full discretion as to when to take distributions (other than the required minimum distributions after age 70-1/2). Therefore, where a lot of money is involved relative to the parties' circumstances, an ex-spouse is better off being an owner of an IRA under an IRA Transfer Order than a non-spouse beneficiary of an inherited IRA.

### **Preparing the IRA Transfer Order:**

Section 408(d)(6) of the Internal Revenue Code generally provides for the tax-free division of IRAs in connection with a marital dissolution, regardless of whether the IRA is separate or community property.

#### Practice Tips:

- IRA Transfer Orders can be tricky, and it is best to ask the Financial Institution about its requirements in preparing such a dissolution order. Note, the Financial Institution may refer to the Ira Transfer Order as a "QDRO." That is not technically correct but it does no harm.
- Judgment form FL-347 5.h should reflect that an IRA Transfer Order was prepared to be filed separately and sent to the Financial Institution.
- Also send the Financial Institution a copy of the Notice of Entry of Judgment (to prove that a divorce did occur as required by IRC §408(d)(6)).