

Foulston Siefkin Estate Planning: **WHAT CONSIDERATIONS ARE INVOLVED IN SECOND MARRIAGES?**

There are three goals that are often involved in marriages in which the husband and/or wife have been previously married: 1) protecting assets brought into the marriage from a claim of the other spouse in the event of a divorce decree, decree of separate maintenance or forced inheritance at death; 2) insuring that the surviving spouse has sufficient resources to provide for his or her needs; and 3) insuring that the property left at the predeceased spouse's death ultimately passes to his or her children rather than to the children of the surviving spouse or a subsequent spouse upon a remarriage. Achieving these goals requires comprehensive estate planning. For ease of reference, all marriages in which one or both spouses have been married previously will be referred to in this summary as "second marriages."

Legal Claims Resulting From the Marriage

During the marriage, each spouse has a legal obligation to support the other spouse. This is a common law right of long standing and extends to providing each other with the basic necessities. With respect to the rights of a spouse should there be dissolution of the marriage through a divorce or decree of separate maintenance, Kansas law and the laws of many other states give courts broad discretion in dividing all property in which spouses have an ownership interest. In Kansas and some other states, this includes property brought into the marriage or received by gift or inheritance during the marriage, although the court in its discretion may consider the source of the property in making the property division. Consequently, there is significant uncertainty as to how such property will be divided by a court. A substantial portion of such property may be set aside to the other spouse.

In addition, similar to the laws of other states, there is a statutory elective share inheritance right in Kansas given to a surviving spouse following the death of the predeceased spouse. This property right phases in over the period of the marriage. Basically, upon the completion of each year of the first ten years of the marriage a surviving spouse has a vested right to three percent for each year of the marriage of the combined assets of the couple. Thus, after ten years of marriage, the vested right is thirty percent. For the next five years of marriage, the vested right increases at an additional four percent per year. Consequently, the surviving spouse is fully vested as to a fifty percent property right as to the assets of the couple upon completing fifteen years of marriage. To the extent the surviving spouse does not possess such vested percentage of the total property of both spouses upon the death of the surviving spouse, and does not otherwise receive any deficiency in such amount by virtue of the predeceased spouse's death (e.g., under joint tenancy, as a beneficiary, or under the provisions of the predeceased spouse's Will or Revocable Trust), the surviving spouse can claim such deficiency from the estate of the predeceased spouse, irrespective of how it may pass to others at the time of the predeceased spouse's death. In addition, the surviving spouse is entitled to homestead rights, rights to certain personal property and a minimal spousal allowance.

Premarital Agreement

The foregoing spousal rights are subject to waiver under the provisions of a premarital agreement. A premarital agreement should be specific as to what spousal rights are being waived, the property which is subject to such waiver and what, if any, property or other rights are to be provided to the other spouse in the event of the dissolution of the marriage or at death. Support rights during the marriage and in the event of a divorce or decree of separate maintenance normally also may be waived. A waiver of support during the marriage in most circumstances normally should protect one spouse from being legally obligated to pay for the other spouse's health care or long-term nursing

home care under what is termed the "doctrine of necessities." Provided certain conditions are met, Kansas law is very favorable to the enforcement of premarital agreements.

Premarital agreements are not honored, however, with respect to a property division under a divorce decree or decree of separate maintenance if to do so would result in a spouse having limited assets so as to then qualify for Medicaid for long-term nursing home care. Nor are they honored with respect to any waiver of child support.

A premarital agreement should also address other issues affecting the rights and obligations of the parties, including the responsibility for income tax liabilities during the marriage, the definitions of separate property (not subject to spousal claims) and any marital property (subject to spousal claims), the specific separate or marital property, status of retirement plans and IRAs (including subsequent contributions after the marriage) as to whether they are to be treated as separate or marital property, the separate or marital property status of property received by gift or inheritance during the marriage, the responsibility for living costs during the marriage, whether income from property considered separate should also be considered separate property, as well as many other considerations. Both parties should retain independent counsel to advise them with respect to the agreement.

Post-Marital Agreement

In the event a premarital agreement was not entered into prior to marriage, provided certain conditions are met, a post-marital agreement should be valid to waive the rights which can be waived under a premarital agreement. If the only rights to be waived are spousal elective share rights at death (i.e., not divorce or separate maintenance claims), the execution of a valid written waiver to the other spouse's Revocable Trust and/or Will should be sufficient to protect the integrity of the instrument and estate plan.

The Estate Plan

There is also normally the aforesaid goal of a couple in a second marriage of providing adequate resources to the surviving spouse under the estate plan for his or her support and maintenance needs. At the same time, each spouse will typically want to ensure that their assets not needed for such purposes ultimately pass in a certain manner to their descendants. This goal could be thwarted by the predeceased spouse leaving assets outright to the surviving spouse. For example, property given outright to a surviving spouse may be spent unnecessarily, mismanaged, claimed by the surviving spouse's subsequent spouse through a divorce or forced inheritance, claimed by the surviving spouse's creditors, or given by the surviving spouse to his or her subsequent spouse or descendants. This result is why the intended estate plan often goes awry in a second marriage situation.

There are three basic scenarios involving these goals. The simplest scenario is where both spouses have brought sufficient property into the marriage to adequately provide for their separate needs. Under this scenario, normally each spouse will want his or her separate property to pass directly to his or her children at death. Written consents by each spouse to the other spouse's estate plan are desirable so that the integrity of the plan is preserved by the waiver of spousal elective share rights. It also is important that each spouse not name the other spouse as a beneficiary on assets or hold any assets in joint tenancy with the other spouse that they do wish to pass under the provisions of their Will or Revocable Trust to their descendants upon their death.

The second scenario is where one or both spouses have insufficient assets in their own right to adequately satisfy their anticipated needs should their spouse predecease them. Under this scenario, normally some or all of the property of the predeceased spouse is left in a trust (either under the provisions of a Will or Revocable Trust) to provide for the surviving spouse's health, support and maintenance needs. At the surviving spouse's death, the remaining trust assets pass either outright or in trust to the predeceased spouse's children. The issues which must be addressed under this scenario are many, including: 1) should the surviving spouse be a sole or co-Trustee of the trust; 2) are the trust assets to be supplemental to those of the surviving spouse or to primarily provide for his or her needs; 3) are there to be secondary beneficiaries to such trust during the surviving spouse's lifetime, e.g., children of the predeceased spouse; and 4) is the surviving spouse to be given the right (by what is termed a "limited power of appointment") to alter how remaining trust assets are to be distributed to the predeceased spouse's children or other lineal descendants of the predeceased spouse upon the surviving spouse's death. In the event the predeceased spouse's assets exceed the remaining federal estate tax applicable exclusion amount, in order to avoid estate tax at the first spouse's death, it will often be desirable to also create a marital deduction trust (under the Will or Revocable Trust) to hold such excess so that such excess amount will be deductible for federal estate tax purposes. A marital deduction trust normally must require that all income be paid at least annually to the surviving spouse to be entitled to the marital estate tax deduction. Any assets remaining in the marital deduction trust at the surviving spouse's death will be includible in the

surviving spouse's estate for federal estate tax purposes. The provisions of the marital deduction trust may likewise provide for the remaining assets of the marital deduction trust to pass to the children of the predeceased spouse upon the death of the surviving spouse. Valid consents waiving spousal rights to the other spouse's estate plan also should be executed by each spouse under this scenario to insure that the integrity of the plan is not jeopardized by the surviving spouse electing his or her elective share rights to the other's property following the predeceased spouse's death.

The third scenario involves a married couple who wishes that all of their property pass in certain ratios to the children of both spouses upon the surviving spouse's death, e.g., one-half to each spouse's children or equally to the children of both. Consequently, the assets passing under the estate plan of both spouses must be taken into consideration upon the death of the surviving spouse if such ratios are to be maintained. Further, often the couple under this scenario will desire to place contractual restrictions on the surviving spouse to prevent any disposition of the surviving spouse's assets (e.g., making gifts to only the surviving spouse's children) or any other altering which could defeat the integrity of the mutually agreed estate plan. All of these factors and considerations make this scenario one of the most complicated and difficult faced by estate planners. Thus, only a very sophisticated estate plan drafted by a highly experienced estate planning attorney normally will meet the couple's objectives without unduly restricting desired flexibility in the estate plan.

Planning for this final scenario involves most of the same considerations that are involved in the second scenario. For example, consideration would be given to placing assets in trust at the first death for the benefit of the surviving spouse and the possible creation of a marital deduction trust to the extent the assets exceeded the predeceased spouse's remaining applicable exclusion amount. However, it requires much more. A determination needs to be made of what, if any, contractual restrictions are to be imposed upon the actions of the surviving spouse to ensure that the surviving spouse does not destroy the estate plan following the predeceased spouse's death by gifting assets or changing the disposition of the surviving spouse's assets at death. As a general rule, contractual Wills or Revocable Trusts broadly restricting any altering of the dispositive plan by the surviving spouse should be strictly avoided. Contractual Wills and Revocable Trusts are often subject to protracted and expensive litigation and are usually overly broad, ambiguous, or both.

Consequently, rather than broadly restricting the surviving spouse, the couple should focus upon what estate planning objectives are desired and then only contractually bind or otherwise legally restrict themselves as a surviving spouse to the minimum extent necessary to accomplish these objectives. For example, if each spouse only intends to ensure that a certain portion of the marital property pass to his or her children, the couple should permit the surviving spouse to alter the disposition of that portion that would have gone to the surviving spouse's children. Another factor to consider is whether the contractual restrictions on disposition of assets by the surviving spouse should also encompass any property received by gift or inheritance by the surviving spouse following the predeceased spouse's death. The testamentary documents (Wills or Revocable Trusts) should further address whether the surviving spouse is to be permitted to make gifts following the death of the predeceased spouse to a charity or to his or her own children without making corresponding gifts in the same ratio as under the estate plan to the children of the predeceased spouse.

The plan should also specify whether the surviving spouse may alter administration provisions, such as who or what entity is to serve as fiduciary of the estate following the death of the surviving spouse. As an additional consideration, if there is to be no restriction on the manner in which the surviving spouse is to expend resources for his or her own benefit, the testamentary documents should explicitly so provide. This avoids a legal challenge by the children of the predeceased spouse that the surviving spouse is "spending their inheritance" in a manner not intended by the predeceased spouse. Finally, to ensure compliance with the estate plan, the couple should consider what accountings, if any, are to be given as to disposition of assets to the children of both spouses during the surviving spouse's lifetime. Such disclosures can be a highly divisive issue affecting family harmony on both sides of the family and well as creating possible legal challenges and emotional turmoil to the surviving spouse. Thus, often a couple will select an independent third party co-trustee (who can be replaced by the surviving spouse), e.g., a bank, trust company or certified public accountant, to ensure compliance with the estate plan while waiving any otherwise legally required divulging of the provisions of the estate plan or accountings to the descendants of either spouse until the death of the surviving spouse.

Conclusion

The foregoing are some of the major considerations involved in estate planning for second marriages. There are many variations on these three basic scenarios for which space does not permit discussion. To the extent contractual

restrictions on the surviving spouse are desired in estates subject to federal estate taxes, the testamentary documents must be carefully drafted to avoid the possible loss of the marital estate tax deduction or the creation of adverse gift tax consequences. Moreover, it should also be noted that there are many second marriages in which a spouse may not want to restrict the surviving spouse's disposition of assets of the predeceased spouse to any significant extent. This is frequently the case where neither spouse, or perhaps only one spouse, has any children.

Achieving estate planning goals in a second marriage scenario is quite perilous. It is perhaps the most risky and challenging of all estate planning situations and normally requires the assistance of a very sophisticated estate planning attorney if such goals are to be assured. Without a thoroughly thought out and well devised estate plan, particularly those in which both spouses have children prior to the marriage, there will be a substantial risk in a second marriage that: 1) assets may be lost to the surviving spouse in a divorce or forced inheritance claim; 2) assets may be dissipated as a result of unnecessary family squabbling and protracted, expensive litigation; 3) otherwise avoidable rancor may be incurred between different family factions or between the surviving spouse and step-children; 4) unnecessary or unwarranted legal challenges may be brought by step-children regarding the surviving spouse's spending of assets; 5) assets left by the predeceased spouse may either be improperly managed during the surviving spouse's lifetime or diverted disproportionately to persons (such as a subsequent spouse of the surviving spouse or the surviving spouse's descendants) other than the predeceased spouse's descendants; and 6) the joint estate planning wishes of both spouses as to disposition of property and estate administration issues will be jeopardized or excessively restricted by incomplete, ambiguous, or inflexible provisions in the Wills or Revocable Trusts of both spouses.

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