



GUNSTER
PRIVATE WEALTH SERVICES

I DO, ACT II: ESTATE PLANNING FOR SECOND MARRIAGES

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Planning Issues for Second Marriages

- Obligations to Former Spouse
- Children from Prior Marriage
- Wealth Disparity
- Marital Agreements
- Tax Considerations

Types of Marital Agreements

- Prenuptial Agreements (i.e., premarital agreements)

Agreements entered into by parties contemplating marriage. These agreements set forth the rights and obligations of each party in the event of death or divorce, as well as during the marriage.

- Postnuptial Agreements

Agreements entered into by the parties after marriage. Postnuptial agreements can be used when no divorce is contemplated or when divorce is not imminent. When divorce is imminent, postnuptial agreements are referred to as separation agreements.

Uniform Premarital Agreement Act

- Adopted by 26 states and the District of Columbia
- State statutes and case law may alter provisions
- Requirements under UPAA:
 1. Complete Financial Disclosure (include disclosure of lifetime taxable gifts)
 2. Consideration
 3. Formalities of Execution
 4. Separate Counsel

Estate Planning Issues to be Addressed

- Negotiating the prenuptial agreement:
 - Disclosure of Lifetime Taxable Gifts and Use of Deceased Spouse's Remaining Exemption
 - Portability.
 - The personal representative or executor of a deceased spouse makes the election for the deceased spouse's unused gift tax and estate tax exemption amounts (collectively, the DSUEA) to be available to the surviving spouse.
 - Client's \$11,400,000 exclusion amount + deceased spouse's unused \$11,400,000 exclusion amount = \$22,800,000 exclusion amount for surviving spouse.
 - \$22,800,000 exclusion amount can shelter lifetime taxable gifts or assets passing at death.

Waivers of Specific Property Rights

- Waiver of Alimony and Spousal Support
- No Waiver of Child Support, Custody, and Visitation
- Waiver of Equitable Distribution of Property
- Waiver of Interest in Homestead Property
- Waiver of Interests in Retirement Plans
- Waiver of Rights Under Will
- Waiver of Other Rights Upon Death

Waiver of Interest in Retirement Plans

- Federal Laws in connection with the waiver of rights under retirement plans:
 - The Employee Retirement Income Security Act of 1974 (“ERISA”) and The Retirement Equity Act of 1984 (“REA”) overrides state law and was enacted to protect employee retirement benefits.
 - Under REA, a surviving spouse must receive certain benefits from a qualified plan of a spouse who was a plan participant.
 - Individual Retirement Account (“IRA”) benefits are *not* subject to REA.

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- Internal Revenue Code of 1986, as amended
 - IRC § 401(a)(11)(A) requires that a surviving spouse receive: (1) a qualified pre-retirement survivor annuity benefit (if the participant spouse died before the annuity starting date) or (2) a qualified joint and survivor annuity benefit (if the participant died after the annuity starting date).
 - IRC § 417(a)(2) provides that a spouse may waive a right to a qualified plan benefit:
 - The waiver must be in writing;
 - The election must designate a beneficiary that may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse);
 - The spouse's consent must acknowledge the election's effect; and
 - The spouse's signature must be witnessed by a plan representative or a notary public.

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- An agreement entered into prior to marriage does not satisfy the applicable consent requirements of IRC § 401(a)(11) and IRC § 417.
 - The nuptial agreement should provide:
 - Parties agree to sign the applicable qualified benefit plan waivers after the parties are married.
 - Nonparticipant spouse releases all claims to the retirement plan benefits.

Waiver of Interest under Will

- Not intended to limit either party's discretion to make voluntary transfers.
- Review any and all preexisting estate planning documents that could provide a benefit to a surviving spouse inconsistent with nuptial agreement.
- Applicable state law may, by default, construe a waiver in a nuptial agreement of “all rights” to the property of the other spouse to include a waiver of any rights or benefits under preexisting estate planning documents.

Waiver of Other Rights Upon Death

- Rights to elect against the Will or any other testamentary instrument of the other spouse (i.e., elective share rights)
- Rights as intestate heir
- Rights as a pretermitted spouse (marriage after documents prepared)
- Exempt property rights
- Family allowance rights
- Homestead rights
- Right to qualify and serve as personal representative or executor of the soon to be spouse's estate or as trustee or trust protector of any trust created by the soon to be spouse

Income Tax Considerations

- Child support not taxable to recipient nor deductible by payor
- Alimony:
 - For divorces entered into prior to January 1, 2019: taxable to recipient and deductible by payor. IRC § 215
 - For divorces entered into on or after January 1, 2019 (or modification of any divorce finalized prior to January 1, 2019, so long as the modification documents specifically say so): not taxable to recipient and not deductible by payor – complete repeal of IRC § 215.

Income Tax Considerations

Post-Divorce Grantor Trust Rules

- For divorces entered into prior to January 1, 2019: Under § 682 of the Code, if a payor spouse created a grantor trust for the benefit of the recipient spouse, then on divorce, the recipient spouse was required to include any income (other than capital gains) earned by such trust in the recipient's income.
- For divorces entered into on or after January 1, 2019: After divorce, the payor spouse will remain liable for income tax for any grantor trust established by a payor spouse for the benefit of a recipient spouse.
-complete repeal of IRC § 682

Gift Tax Considerations for Alimony and Property Settlements

- IRC Section 2516
 - Deemed Full and Adequate Consideration
 - Written Agreement
 - Signed within 2 years before or 1 year after divorce
 - Payment can occur outside time period as long as Agreement signed within prescribed period
- Unlimited Gift Tax Marital Deduction (prior to divorce)
- Payments made pursuant to court order or decree
- Satisfaction of Legal Obligation of Support
- Annual Exclusion and Qualified Transfers

General Gift Tax Issues

- The nuptial agreement should provide consent to split gifts under IRC § 2513 of the Code upon the request of the wealthier spouse
- Benefits:
 - \$15,000 annually per donee, or \$30,000 annually per married couple per donee
 - Wealthier spouse able to gift up to \$22,800,000 during the marriage without gift tax

Estate Tax Issues

- DSUEA is available to a surviving spouse only if the deceased spouse's personal representatives or executors make an affirmative election on a timely filed estate tax return.
- Direct in nuptial agreement that personal representatives or executors make a DSUEA election in favor of the surviving spouse.
- Agree to consent to use an inter vivos trust to utilize a poorer spouse's estate tax exemption amount, rather than relying on portability.

The ink is barely dry...divorce!

Changes to Estate Plan

- Last Wills and Testaments
 - To the extent allowed by the Property Settlement Agreement, execute a Codicil revoking spouse's beneficial interest and appointment as fiduciary
 - UPC
 - § 2-804 of the UPC states a divorce revokes:
 - any revocable disposition of property made by a divorced individual to his or her former spouse or to a relative of a former spouse and any provision conferring a general or nongeneral power of appointment on former spouse or relative of the former spouse
 - nomination of former spouse or a relative of the former spouse to serve as personal representative executor

- Revocable Trusts

- To the extent allowed by the Property Settlement Agreement, execute an amendment revoking spouse's beneficial interest
 - UPC
 - § 2-804 of the UPC states a divorce revokes:
 - any revocable disposition of property to former spouse or relative of former spouse and any provision conferring a general or nongeneral power of appointment on the former spouse or on a relative of the former spouse.
 - any revocable nomination of former spouse or a relative of the former spouse.

Estate Planning Challenges with Second Marriages

- Obligations to an Earlier Spouse and Existing Children
- Elective Share Issues
- Blended Families
- Wealth Disparity
- Age Disparity
- Different Domiciles
- Consider international aspects, if applicable

Initial Steps of Planning Engagement

- Joint Representation vs. Representation of One Spouse
- Engagement Letter
- Obtain Documents Relating to Prior Marriage
- Beneficiary Designations and Titling of Assets
- Tangible Personal Property

Consider Obligations to Prior Spouse

- Obtain and Review Any and All Marital Agreements for each Prior Marriage
 - Prenuptial or postnuptial agreements
 - Settlement agreements
 - Divorce decrees
 - Other court orders

Elective Share Planning

- Planning for the Elective Share
 - Percentage of the “elective estate”
 - Property possibly included in the elective estate
 - Probate Assets
 - Jointly Held Property
 - Revocable Trust Assets and other Revocable Transfers (subject to exception)
 - Irrevocable Transfers with Retained Interests
 - Beneficial interest of net cash surrender value of Life Insurance Policies
 - Pensions and Retirement Plans
 - Transfers and Gifts Made Within One Year of Death
 - Assets transferred as result of termination of Includable Rights or Interests
 - Transfers to Elective Share Trusts

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- Planning for the Elective Share
 - Use the elective share rules to client's advantage
 - Create an entity and provide for the distribution of interests in such entity to client's spouse upon death
 - Include a provision in Will or Revocable Trust that provides for the distribution of less desirable assets to the spouse if the spouse makes such election

Elective Share Concerns Specific to Second Marriages

- Pretermitted/Omitted Spouse
- UPC § 2-301
 - A person marries after making a Will and the spouse survives the testator
 - Surviving spouse is entitled to that which the surviving spouse would have received if the testator had died intestate, that neither is devised to a child of the testator who was born before the marriage and who is not a child of the surviving spouse nor is devised to a descendant of such a child, unless (1) it appears from the Will or other evidence that the Will was made in contemplation of marriage, (2) the Will discloses an intention not to make provision for the spouse, (3) the testator provided for the spouse by transfer outside of the will with the intent that such transfer be in lieu of a testamentary provision

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- Minimize the assets subject to the elective share and provide disincentives to its exercise
 - Nuptial Agreement
 - Include Provision in Testamentary Document Regarding Satisfaction of Elective Share
 - provision in Will or Revocable Trust that provides for the distribution of less desirable assets to the spouse if the spouse makes such election
 - Make gifts that are outside the elective estate

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- Insurance
 - Consider purchasing a life insurance policy to satisfy some or all of the elective share
 - Transfers to Trusts which satisfy elective share
 - State law varies wildly as to whether a QTIP or other trust eligible for the marital deduction can be used to satisfy the elective share, and in what amount

Gift and Estate Tax Planning

- Split gifts
- Utilizing Spouse's Full Estate Tax Exemption Amount
 - “portability”
 - credit shelter trust
 - appreciation not subject to estate taxation at the death of the surviving spouse
 - “decoupled” state that uses an exemption amount lower than the federal equivalent, state estate taxes may still be imposed
 - analysis of whether to utilize portability in the predeceased spouse's estate must consider the state estate tax consequences in states that have decoupled from the federal estate tax system
 - Intervivos QTIP Trust

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- Irrevocable Trusts and Divorce
 - provide in irrevocable trust that if the beneficiary spouse is no longer married to or is legally separated from the settlor spouse, the beneficiary spouse shall be treated as predeceased
 - Provide tax reimbursement provision to grantor spouse in light of repeal of IRC § 682
 - property settlement agreement and/or divorce decree should specifically provide that the spouse (and spouse's family members, if applicable) shall be treated as predeceased

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- Tax Apportionment
 - Be careful not to overburden one family for assets passing to the other family
 - Beneficiary Designations
 - If allowed by Property Settlement Agreement, revoke all beneficiary designations in connection with life insurance, retirement plans, annuities and similar assets that name the other spouse as beneficiary, and execute new beneficiary designations
 - Remember! Federal law requires a waiver to be executed for retirement plans, except in the context of an IRA

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- Planning from Above
 - Request that parents (and/or others) create Dynasty Trusts which prohibit access by the beneficiary/child's creditors, i.e., divorcing spouse

Tax Environment Update

- In light of current tax laws, it is appropriate to revisit and re-examine existing plans
- Significantly fewer families for whom transfer taxes are a significant concern
- Greater consideration of income tax and basis issues