

# **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 28 states and the District of Columbia (two additional states have adopted Uniform Premarital and Marital Agreements Act)
- 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

# 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

# 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.

# 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

# Estate/Gift Tax Planning Considerations

- For 2021, Estate/Gift Tax Exclusion Amount is \$11,700,000 (per person)
- Exclusion Amount Indexed for Inflation
- Spouses Can Elect to “Split Gifts”
- Transfer and GST tax rates are 40%
- Consideration of state estate taxes



# Estate/Gift Tax Planning Continued

- Unused exclusion amount of one spouse is portable to the surviving spouse:
  - Only estate/gift tax exclusion is portable
  - GST Exemption is not portable
  - No post-death inflation adjustments
  - Ported exclusion of multiple spouses usable on lifetime gifts
  - Last deceased spouse rule

# 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

# Planning for Elective Share

- Marital Agreement
- Include Provision in Testamentary Document Regarding Satisfaction of Elective Share
- Lifetime Gifts
- Insurance
- Transfers to Trusts

# Portability Drawbacks and Other Considerations

- Pitfalls and Drawbacks to Portability:
  - Filing of Estate Tax Return
  - Benefit Lost by Subsequent Marriage
  - Not Inflation Indexed
  - GST Exemption Not Portable
  - Growth in Value of Assets
  - Potential State Estate Tax
- Portability will allow for an additional basis step-up on second death.

# Intervivos QTIP Trust to Utilize Poorer Spouse's Exclusion if First to Die

- Statutory QTIP Requirements
- Spouse's Life Income Interest Cannot Terminate in Event of Divorce
- Intervivos QTIP as a Self-Settled Trust
- Ability to Use Poorer Spouse's GST Exemption

# Other Marital Deduction Transfers

- Testamentary QTIP Trust
- QTIP Unitrust
- Life Estate with General Power of Appointment
- Ability to Use Poorer Spouse's GST Exemption


# Tax Appointment Clauses

- For blended families, tax apportionment clauses are critically important
- Consider how state and federal defaults impact the plan (e.g., under IRC Sections 2206, 2207 and 2207A)
- Coordinate both spouses' trusts and wills



# 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



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