

Limiting Spousal Asset Rights

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Albert Einstein's Nobel Prize money went to his ex-wife as part of his divorce settlement.¹

In a previous article in Estate Planning, we discussed how remarriage automatically creates rights, powers and benefits to each new spouse – often to the detriment of the other spouse's heirs. This article will discuss some of the ways to reduce a spouse's claims against assets of their new spouse. These techniques are largely "state specific" and engaging competent local counsel is a vital element in making and implementing these decisions.

Eliminate Probate. In those states in which the spousal elective share is not "augmented" by the non-probate assets of a deceased spouse, it may be possible to eliminate a spousal elective share by not having assets in the probate estate.² Advisors should be aware that a number of states include revocable inter-vivos trusts and other non-probate assets in the calculation of the spousal elective share.

Opportunity: For clients in second and third marriages, eliminating the probate of any assets by beneficiary designations, "pay on death" designations and use of trusts may allow them to eliminate spousal elective shares. However, ERISA retirement plans generally require a qualified spousal waiver to eliminate the surviving spouse's rights.³

Eliminate any Intestate Claim. As noted in first article of this series, a surviving spouse can have at least three potential intestate claims against a decedent's estate:

- An intestate claim if there is no Will, or
- A spousal claim if the Will preceded the marriage and was not drafted in contemplation of the marriage, or
- If the Will or state law provides that upon the death of all named heirs, the assets of the decedent pass to the decedent's intestate heirs and the spouse is the nearest statutory intestate heir.

Drafting: By properly drafting a new Will, the decedent spouse can eliminate all of these potential intestate claims. The common disaster language of the Will should specifically eliminate any inheritance by the spouse or the spouse's family members.

Eliminate the Marriage. In a number of states, marriages are voidable after the marriage, even by

1 Mileva Einstein-Maric, BIOGRAPHY, <http://www.biography.com/people/mileva-einstein-maric-282676> (last visited June 5, 2015).

2 C.f., CONN. GEN. STAT. § 45a-436(a); NH RSA 560:10; OHIO REV. CODE ANN. § 2106.01(C); [WY Stat § 2-5-101](#)

3 See the ERISA retirement plan discussion in the first article in this series.

a decedent's heirs. For example:

- In a recent Wisconsin Supreme Court decision⁴ the court ruled that a marriage could be annulled after the death of a spouse when it was found that the decedent lacked sufficient capacity to enter into the marriage.
- Wisconsin is not alone in permitting annulment of marriages after the death of a spouse. Some states (e.g., Florida,⁵ Texas⁶ and New York⁷) have statutes that allow the voiding of a marriage after a spouse's death.
- In many states, the death of either of the spouses can effectively close the right of heirs to claim that the marriage be voided or annulled.⁸
- Lack of mental capacity is not the only basis for voiding or annulling a marriage. Other statutory grounds for voiding a marriage can include:
 - a spouse being impotent,⁹
 - a "want of understanding" by one of the spouses,¹⁰
 - a spouse having a venereal disease,¹¹
 - a spouse having been convicted of a felony before the marriage without the knowledge of the other party,¹²
 - prior to the marriage, either party had been with a prostitute, without the knowledge of the other party,¹³
 - the wife, without the knowledge of the husband, was with child by some person other than the husband,¹⁴
 - the husband, without knowledge of the wife, had fathered a child born to a woman other than the wife within ten months after the date of the solemnization of the marriage,¹⁵
 - the marriage was entered into as a result of fraud,¹⁶
 - a spouse being underage and marrying without any required parental consent,¹⁷
 - a spouse being under the influence of drugs or alcohol at the time of the marriage,¹⁸ or

⁴ McLeod v. Mudlaff (In re Estate of Laubenheimer), 2013 WI 76, 833 N.W.2d 735, 2013 Wisc. LEXIS 287 (2013); See also: Matter of Estate of Kaminester, 888 NYS2d 385 2009, NY Slip Op 29429, 2009 WL 3415254 (N.Y. Cty. Surr. Ct., 10/14/09).

⁵ FLA. STAT. § 732.805(3) (2015).

⁶ TEX. ESTATES CODE § 123.102 (2015).

⁷ N.Y. EPTL § 5-1.2(a)(1) (2015).

⁸ C.f., California statute § 2211(c) which provides that death of either spouse terminates any right of heirs to challenge the validity of the marriage.

⁹ C.f., TEX. FA. CODE ANN. § 6.106 (2015).

¹⁰ C.f., **NRS § 125.330** (2015).

¹¹ Christensen v. Christensen, 144 Neb. 763, 14 N.W.2d 613 (1944). Generally, the other spouse must not have had knowledge of the disease when the marriage occurred.

¹² C.f., VA CODE. § 20-89.1(b)(2014).

¹³ Id.

¹⁴ Id.

¹⁵ Id.

¹⁶ C.f., **NRS § 125.340** (2015).

¹⁷ Underage varies widely from state to state. For example, in Alabama the minimum age is 14, while in South Carolina it is 14 for a female and 16 for a male. In Kansas it is 15, unless a court allows marriage at a younger age.

¹⁸ C.f., 23 **PA. CONS. STAT. § 3305(a)(3)** (2015) provides: "*The marriage of a person shall be deemed voidable and subject to annulment in the following cases: (3) Where either party to the marriage was under the influence of alcohol or drugs and an action for annulment is commenced within 60 days after the marriage*

- incest or bigamy.¹⁹

Caution: Recognize that some marriages are automatically void and treated as a nullity from the time they were created (e.g., because of bigamy or incest). Other marriages are voidable only after a judicial hearing has made a determination of the relevant facts. The central questions from an estate perspective is who can challenge a voidable marriage (i.e., can descendants make the challenge?) and what is the result if one of the spouses dies? The rules vary widely from state to state.

Trap: Alaska, Connecticut, New Hampshire, New Mexico (underage marriages only), New York, Oregon, Virginia, and Washington provide that alimony may be paid even if the marriage has been annulled.²⁰

Resources:

- Hon. C. Raymond Radigan and Jennifer F. Hillman, *'Til Death Do Us Part: Post-Death Annulment of Marriage and the Right of Election*, 42 NYSBA Trusts and Estates Law Section Newsletter No.4 (Winter 2009).
- Stephanie Rapkin, *In re Estate of Laubenheimer: Does Probate Court Have Authority to Invalidate Marriage Based on Decedent's Lack of Mental Capacity at Time of Marriage?* LISI Estate Planning Newsletter #2150 (October 2, 2013).

Common Law Marriages. An important element of this planning is determining whether a marriage even exists. A minority of states allow their residents to enter into marriages without obtaining a marriage license. As of January 1, 2015, these states include: Alabama,²¹ Colorado,²² Iowa,²³ Kansas,²⁴ Montana,²⁵ New Hampshire,²⁶ Oklahoma,²⁷ Rhode Island,²⁸ South Carolina,²⁹ Texas³⁰ and Utah.³¹

In addition, a number of other states have statutorily eliminated common law marriages which occur after certain dates.³² These states and the effective dates are:³³ Florida (Jan. 1, 1968),³⁴

ceremony.”

¹⁹ C.f., **NRS § 125.290** (2015).

²⁰ Social Security Administration Program Operations Manual System, GN 00305.130 *Voidable Marriages*.

²¹ *Waller v. Waller*, 567 So. 2d 869 (Ala. Civ. App. 1990); *Hudson v. Hudson*, 404 So. 2d 82 (Ala.Civ.App. 1981); Ala. Att’y Gen. Op. 1992-041.

²² [COLO. STAT. § 14-2-109.5](#) (2015).

²³ IOWA CODE § 595.1(A) (2015)

²⁴ [KAN. STAT. ANN. § 23-2502](#), 23-2714 (2015).

²⁵ [MONT. STAT. § 40-1-403](#) (2015).

²⁶ [N.H. REV. STAT. ANN. § 457:39](#) (2015)

²⁷ OKLA. STAT. TIT. 43, § 7-A (2015) provides that marriage is only recognized by the fulfillment of statutory formalities. However, case law indicates that the state may recognize common law marriages.

²⁸ *Demelo v. Zompa*, 844 A.2d 174 (R.I. 2004)

²⁹ [S.C. CODE ANN. § 20-1-360](#) (2015).

³⁰ [TEX. FAM. CODE ANN. § 1.101, 2.401–.402](#) (2015).

³¹ [UTAH CODE ANN. § 30-1-4.5](#) (2015)

³² The following states have never permitted common law marriages: [Arkansas](#), [Connecticut](#), [Delaware](#), [Louisiana](#), [Maryland](#), [North Carolina](#), [Oregon](#), [Tennessee](#), [Vermont](#), [Virginia](#), [Washington](#), [West Virginia](#), and [Wyoming](#).

Georgia (Jan. 1, 1997),³⁵ Indiana (Jan. 1, 1958),³⁶ Mississippi (April 6, 1956),³⁷ Michigan (January 1, 1957), Ohio (Oct. 10, 1991),³⁸ Pennsylvania (Jan. 1, 2005),³⁹ and South Dakota (July 1, 1959).

In most states, a common law marriage only occurs if certain requirements are met. Just living together (even if the cohabitation spans decades) does not create a common law marriage. The requirements normally include:

- the parties have the legal right to marry under state law (e.g., neither is already married or too closely related to each other),
- the couple intends to be married,
- the couple hold themselves out to the public as being married, and
- the couple lives together for some period of time and have sexual relations.

A common law marriage has all of the legal rights of a formalized marriage, and if recognized in the state of residency of the couple, it is generally deemed a legal marriage even if the couple moves to another state which does not permit common law marriages.

Eliminate the Right of Spousal Elective Share. States have adopted a number of limitations that can deny a surviving spouse the right to claim an elective share. For example, a spousal elective share may be denied, if the following conditions apply (rules differ from state to state):

- The marriage was void under state law (e.g., bigamy, incest, fraud) or was annulled after a judicial determination has been made.
- The claimant spouse abandoned the deceased spouse.⁴⁰ For example, Missouri provides:⁴¹ *“If any married person voluntarily leaves his or her spouse and goes away and continues with an adulterer or abandons his or her spouse without reasonable cause and continues to live separate and apart from his or her spouse for one whole year next preceding his or her death, or dwells with another in a state of adultery continuously, such spouse is forever barred from his or her inheritance rights, homestead allowance, exempt property or any statutory allowances from the estate of his or her spouse unless such spouse is voluntarily reconciled to him or her and resumes cohabitation with him or her.”*
- Oregon provides:⁴² *“If the decedent and the surviving spouse were living apart at the time of the decedent’s death, whether or not there was a judgment of legal separation, the court may deny any right to an elective share or may reduce the elective share.”*
- New York provides:⁴³ *“The right of election granted by this section is not available to the spouse of a decedent who was not domiciled in this state at the time of death, unless such*

33 This list only includes states making changes after the 1950s. For example, Massachusetts eliminated common law marriages in 1646 and North Dakota made the elimination in 1890.

34 [FLA. STAT. § 741.211](#) (2015).

35 GA. CODE ANN. § 19-3-1.1 (2015).

36 [IND. CODE § 3 1-11-8-5](#) (2015).

37 MISS CODE ANN § 465.5 (1956).

38 [OHIO REV. CODE ANN. § 3105.12](#) (2015)

39 23 [PA. CONS. STAT. § 1103](#) (2015).

40 C.f., CONN. GEN. STAT. § 45a-436(g) (2015); NY CODE § 5-1.2(a)(5) (2015).

41 MO Rev. Stat. § 474.140.

42 ORS § 114.725 (2015).

43 NY CODE § 5-1.1-a(c)(6) (2015).

decedent has elected, under paragraph (h) of 3-5.1, to have the disposition of his or her property situated in this state governed by the laws of this state.”

- Pennsylvania provides⁴⁴ that the elective share is not permitted: “*in the event a married person domiciled in this Commonwealth dies during the course of divorce proceedings,.. and grounds have been established as provided in 23 Pa.C.S. § 3323(g).*”
- The electing spouse dies before filing a claim for their elective share.⁴⁵ But note that some states permit the claim to be made by the surviving spouse’s personal representative if the surviving spouse dies during the claim period.⁴⁶
- The electing spouse or their qualified agent fails to file the election within the period provided for in the statute.

Reduce the Elective Share. In many states, the spouse’s elective share is reduced to the extent the claimant spouse received assets as a result of the decedent spouse’s passing.⁴⁷

Opportunity: This rule may effectively permit the decedent to plan for the particular assets (excluding the homestead in a number of states) they want to pass to the spouse as an elective share. For example, the decedent may have structured his estate to assure that the family business passes to his descendants, while other (perhaps less favorable) assets pass to the surviving spouse.

Distributions in Lieu of Taking under the Will. The nature of the spousal elective share is that the surviving spouse is taking against the Will. Therefore, it is generally expected that the spouse could not take both a spousal elective share and a bequest under the Will. Moreover, non-probate distributions to the surviving spouse (e.g., beneficiary designations and joint accounts) may statutorily reduce the spousal elective share. However, this may not be the case in other rights that a surviving spouse has, such as a family allowance.

Drafting: If the Will or Living Trust makes a bequest for the surviving spouse, consider providing that those testamentary benefits are in lieu of any other statutory claims the surviving spouse might otherwise have.

Eliminate the Assets. In planning their estates, parents should be encouraged to contemplate the possibility of either a child’s divorce or death and the resulting potential claims of a spouse. By proper planning, the assets can be removed from any divorce settlement or the rights of a surviving spouse at the death of a child.

Drafting: A client has three children who are all married and in their 40s. Two daughters have children, while the son has no children. Neither the client nor any of the children are expected to have a taxable estate for federal or state tax purposes. The client has a strong desire to keep the family assets in the blood line. As a result, the client should understand that the son’s spouse could take up to 100% of the son’s inheritance by the spousal

44 22 Pa. Cons. Stat. § 2203(c) (2015).

45 C.f., NY CODE § 5-1.1-a(c)(3) (2015); NC GEN. STAT. § 30-3.4(a) (2015); ORS § 114.625 (2015).

46 C.f., S.D. Codified Laws § 29A-2-212 (2015); Tenn. Code Ann. § 31-4-105(2015); Wyo. Stat. § 2-5-105(a).

47 C.f., FLA. STAT. § 732.2075(1) (2015).

elective share and/or by intestate share. All those assets could then pass to the heirs and/or new spouse of the son's spouse. To keep the disposition of assets in the blood line, the client should use a spendthrift, discretionary, generation skipping trust. The trust might provide a lifetime interest in the son's surviving spouse, but then pass the assets back to the blood line. When the father says "*I want to give one-third of my estate to my son, because I know my son will do the right thing and pass his inherited assets back to our family,*" the advisor needs to point out that the spousal elective share are an automatic right of the son's spouse, not something controlled by the son.

Drafting: This same problem can occur in family businesses. Assume a daughter is gifted or bequeathed half of a family business. Upon divorce or death, the daughter's surviving husband could take up to 100% of her ownership in the business. If the husband remarries and then passes, the new wife may inherit that business interest. Passage of the business outside the blood family is probably not what the family intended. Make sure there is a buy-sell agreement on all of the family business interests which allows the business to "call" any shares at any time for their appraised fair market value.

Apportioning Expenses and Taxes. To limit the funds passing to a surviving spouse as an elective share and or homestead claim, clients should consider having a specific language in the dispositive documents that provides for an apportionment of part of any state and/or federal death taxes, debts and expenses of the estate to assets passing to a surviving spouse that are elected by the spouse against the Will. The specific language should also provide a specific and reasonable method for calculating the apportionment.

Caution: The elective share is an election against the decedent's Will – effectively a rejection of the Will. As such it can be argued that a surviving spouse cannot take advantage of terms of the Will which may eliminate any apportionment of death taxes and/or expenses against the marital share.⁴⁸

A similar argument could deny the estate the right to limit the spousal elective share by allocating costs and taxes to the surviving spouse under the terms of the Will.⁴⁹ Moreover, some state statutes⁵⁰ specifically provide that the elective share cannot be reduced by the apportionment of death taxes to the elective share.

Trap: The reduction of the marital deduction by an apportionment of death taxes can create a tax-spiral, effectively increasing the total state and federal estate taxes which may be due from the estate. But, if the desire is to reduce the assets passing to the surviving spouse, the client may view this additional tax cost as a penalty or disincentive for electing outside the Will.

Resource: BNA Portfolio 841-1st: Spouse's Elective Share, § VII. *Impact on Other Beneficiaries*, § C. *Estate Tax*.

48 See: *DeShazo v. Smith*, No. 1:05-cv-01046 (E.D. Va. 11/22/06) and *In re Estate of Thompson*, 512 N.W.2d 560 (Iowa 1994).

49 See: *Weeks v. Vandever*, 233 N.E.2d 502 (Ohio 1968).

50 C.f., OHIO REV. CODE §2113.86(D) (2015); TENN. CODE § 31-4-101(d) (2015).

Gifts in Contemplation of Death. Connecticut is the only state with a state gift tax. For clients facing a tax gap between the state and federal death tax exemptions, making lifetime gifts may be a way to reduce the state death tax.⁵¹ Gifting assets proximate to the donor's passing can also potentially eliminate the spousal elective share of a surviving spouse. However, the Uniform Probate Code provides that the spousal elective share is only eliminated if the donor survives the gift by two years.⁵²

Trap: Some states have rules that provide that certain "gifts in contemplation of death" remain subject to a state death tax. As of January 1, 2015, these states include Iowa, Kentucky, Maryland, Nebraska, New Jersey, and Pennsylvania.⁵³ The rules vary widely (e.g., the period of "contemplation") and in some cases are rebuttable. There are a number of other states which had contemplation of death inclusions, but the repeal of their state death taxes effectively eliminated the issue. These states include Indiana,⁵⁴ Ohio,⁵⁵ and Tennessee.⁵⁶

If a gift is taxable for state death tax purposes after the donor's death, then a number of issues can arise, including:

- The client has not eliminated the state death tax on the gifted assets, but for federal tax purposes, they may have lost the potential for a step-up in basis of the gifted assets.
- Does the inclusion of the gift result in an estate becoming taxable for state tax purposes?
- Does the donee or the estate have the funds to pay any state death tax? Is the state death tax allocable to the residuary of the estate versus the donee?
- What fiduciary responsibilities does the estate administrator have for determining the gifts that were made and reporting them to the state Department of Revenue?
- Are exceptions made for annual exclusion gifts?

Trap: Make sure the gift transfer is completed before the donor's passing.

Life Insurance. Life insurance owned by the decedent/insured in those states which have augmented spousal elective shares can increase the claim of a surviving spouse, even if the insurance is paid to a named beneficiary.

Opportunity: Clients who want to eliminate spousal elective shares should consider moving new or existing life insurance into an Irrevocable Life Insurance Trust to eliminate a spousal claim. It may also be possible to eliminate this spousal claim by changing the ownership of the policy to the intended beneficiary.

51 For a more detailed analysis of this issue, see Debra L. Stetter, *Deathbed Gifts: A Savings Opportunity for Residents of Decoupled States*, 30 EST. PLAN. 270 (June 2004).

52 UNIFORM PROBATE CODE § 2-205-(3)(C) (as Amended in 2010). Note that a number of states that have adopted the UPC have not adopted this two year rule.

53 JOEL MICHAEL, RESEARCH DEP'T, MINN. HOUSE OF REPRESENTATIVES, SURVEY OF STATE ESTATE, INHERITANCE AND GIFT TAXES 12 (2014).

54 Indiana repealed its inheritance tax effective as of January 1, 2013.

55 Ohio has repealed its state estate tax and inheritance tax effective as of January 1, 2013.

56 Effective January 1, 2016, Tennessee's inheritance tax was eliminated.

Trap: Beware of the two year contemplation of death rule in the Uniform Probate Code⁵⁷ and the three year federal estate tax inclusion rule for the transfer of existing life insurance policies.⁵⁸

Waivers. Given all of the marital rights noted in the first article of this series, reducing or eliminating those rights may be vitally important, particularly when second and third marriages occur and one or both of the spouses want to limit the rights of the other spouse. Some spousal rights can only be defeated by a voluntary waiver of the other spouse (e.g., ERISA rights and the Florida homestead exemption).

In many states, spousal rights may be waived by the new spouse before or after the wedding if required standards are met.⁵⁹ For example, the Alabama code⁶⁰ provides: “*The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or a waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of ‘all rights’ (or equivalent language) in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, exempt property and family allowance by each spouse in the property of the other at death and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.*”

Drafting: Estate planning attorneys who represent a remarried spouse should consider advising the client to obtain a well drafted waiver of spousal rights from their new spouse, even if the state does not provide significant benefits to the new spouse. There is no assurance that the couple will remain residents of their current state.

Prenuptial Agreements. Prenuptial agreements have become a significant part of the estate planning and asset protection process. Probably the last thing an engaged couple wants to do is meet with their paranoid lawyers to discuss the possibility of their premature death, incapacity or divorce. Nonetheless, it should also be a vital part of the preparation for any remarriage. Prenuptial agreements tend to take a bit of the romance out of the first marriage, but by the second or third marriage the historic reality of divorce often creates a different perspective.

Drafting: The pre-nuptial agreement must be carefully drafted. Among the ways to increase the enforceability of the prenuptial agreement are:

- Prenuptial agreements are governed by state law and the state laws vary significantly. Make sure the agreement addresses the unique requirements and rulings in the domiciliary state of the couple.
- Make sure the document contemplates the impact of the couple moving to a state with

⁵⁷ UNIFORM PROBATE CODE § 2-205-(3)(C) (as Amended in 2010). Note that a number of states that have adopted the UPC have not adopted this two year rule.

⁵⁸ I.R.C. § 2035 (2015).

⁵⁹ See UNIF. PREMARITAL AGREEMENT ACT; UNIF. PROB. CODE § 2-213 (UNIF. LAW COMM’N 2008).

⁶⁰ ALA. CODE § 43-8-72 (2015).

- differing laws (e.g., the homestead rights of a surviving spouse in Florida).
- Make sure that the pre-nuptial agreement thoroughly discloses the income, assets and liabilities of each person. Be as specific as possible. Listing specific account numbers and the date of valuation may be an important element when a judge or jury subsequently reviews the agreement. Consider attaching copies of each party's state and federal income tax returns and financial account statements to the agreement. If a client anticipates a sizable inheritance, it may even be advisable to disclose the existence and possible range of values of such an inheritance.
 - Make sure that each party has competent (e.g., has the attorney ever dealt with a prenuptial agreement before?) and independent legal representation in the negotiation and drafting of the agreement with the attorneys also signing the agreement. A court might rule that the less wealthy spouse lacked an adequate understanding of the agreement because competent counsel was absent. One attorney should never represent both parties. It might even make sense to have the signing of the document videotaped to show that each party was represented by counsel who thoroughly explained the document to the client.
 - Sign the agreement well in advance of the marriage. If one of the spouses has not had adequate time to review the agreement (e.g., it is delivered the day of the marriage), the court could focus on whether the signature was coerced, and if so, invalidate the agreement.⁶¹
 - The agreement should not create an “unconscionable” result. This is an ambiguous concept at best,⁶² but planners must take into account the potential review by the court as to the fairness and reasonableness of the document.
 - Make sure the agreement provides for relinquishment not only of rights in divorce, but also deals with the rights of either spouse against the estate of a deceased spouse.⁶³ Consider providing that any un-waived spousal elective share must be held in trust and pass to the first to die spouse's heirs at the death of the surviving spouse.
 - Marriage can make each spouse legally liable for the long term care costs of the other. To protect against those claims, consider having the prenuptial agreement waive any such rights, but recognize that state statutes may effectively override the prenuptial agreement.⁶⁴

Caution: If the client provides bequests or other transfers to their spouse upon their passing, consider providing that those transfers are in lieu of any rights under any marital agreement

61 Flaherty v. Flaherty, 128 So. 3d 920 (Fla. Ct. App. 2013); see also Chuck Rubin, Flaherty v. Flaherty: Spouse Need Not Challenge a Voidable Prenuptial Agreement during the Marriage, EST. PLAN. NEWS. (LISI), no. 2184, Jan. 16, 2014.

62 For example, in *Dematteo v. Dematteo*, 762 N.E.2d 797 (2002), the Massachusetts Supreme Judicial Court provided that upon a divorce from a husband worth \$83–\$108 million, a prenuptial agreement which provided the ex-spouse an annual payment of \$35,000, the marital home, an automobile and medical insurance until death or remarriage was not unconscionable.

63 For example, in *Pysell v. Keck*, 559 S.E.2d 677 (Va. 2002), the Virginia Supreme Court ruled that the prenuptial agreement's failure to specifically waive rights against the estate of a deceased husband allowed the surviving wife to make certain statutory spousal survival rights against the estate—even when the Will made no provision for the surviving wife.

64 See *Susan T. Peterson, The Price of Admission: Liability and Responsibility for Nursing Home Expenses*, MINN. BENCH & B. (2009), http://www2.mnbar.org/benchandbar/2009/mj09/nursing_home.html (discussing spousal responsibility in Minnesota).

and/or statutory elective share rights.

Resources:

- DAVID WESTFALL & GEORGE MAIR, ESTATE PLANNING AND TAXATION ch. 11 (WG&L 2015).
- Linda J. Ravdin, *Marital Agreements*, 849-2nd TAX MGMT. (BNA).
- Arlene G. Dubin & Carole M. Bass, *Ten Tips for Estate Planners Who Draft Prenuptial Agreements*, 42 EST. PLAN. 3 (June 2015).
- Carlyn S. McCaffrey, *With All My Worldly Goods I Thee Endow, Except as Provided in Article Five*, 47TH HECKERLING INST. ON EST. PLAN. (2013).
- Cohen and Schlissel, *Thinking Through the Tax Ramifications of a Prenup*, 33 Family Advocate No. 3.

Post-Nuptial Agreements. An increasing phenomenon has been the development of post-nuptial agreements. These agreements are drafted after marriage and provide for the treatment if the parties subsequently divorce. In most cases, they are a result of some traumatic event in the marriage (e.g. an affair). Such agreements are similar to legal separation agreements, but rather than focusing on separation, they are designed to foster reconciliation. They can also be a punitive mechanism placed on a wayward spouse who is unwilling to terminate the marriage.

Resources:

- Judith E. Siegel-Baum & Josh W. Averill, *Post-Nuptial Agreements can Resolve Personal and Estate Planning Issues*, 29 EST. PLAN. 405 (Aug. 2002);
- PETER SPERO, ASSET PROTECTION: LEGAL PLANNING, STRATEGIES AND FORMS § 4.10 (2015);
- DAVID WESTFALL & GEORGE MAIR, ESTATE PLANNING AND TAXATION ch. 12 (WG&L 2015).
- Linda J. Ravdin, *Marital Agreements*, 849-2nd TAX MGMT. (BNA).

ERISA and Waivers. In a series of decisions, the federal courts have ruled that a spouse's right to an ERISA retirement plan cannot be waived prior to the marriage of the parties.⁶⁵ Thus, if the parties intend for such a waiver, a renunciation of rights should be signed after the marriage occurs. A waiver before marriage may be void. However, although the pre-marriage waiver may not be effective upon the death of the plan participant, it might be effective upon the divorce of the couple.⁶⁶

Opportunity: Clients are well advised to consider having a spouse waive any ERISA retirement rights after the marriage is completed. Just because the current value of the retirement accounts is relatively insignificant does not mean they will be small when a divorce or death occurs.

⁶⁵ See *Hagwood v. Newton*, 282 F.3d 285 (4th Cir. 2002); *Nat'l Autos. Dealers & Assoc. Ret. Tr. v. Arbeitman*, 89 F.3d 496 (8th Cir. 1996); *Howard v. Branham & Baker Coal Co.*, 968 F.2d 1214 (6th Cir. 1992); *Hurwitz v. Sher*, 982 F.2d 778 (2nd Cir. 1992); see also 26 U.S.C. §§ 417(a), 1055 (2012); Treas. Reg. § 1.401(a)-20 Q&A 28 (2015). But see *Strong v. Dubin*, 75 A.D.3d 66 (N.Y. Sup. Ct. 2010).

⁶⁶ See *In re Rahn*, 914 P.2d 463 (Colo Ct. App. 1995)

Opportunity: Treasury Regulation § 1.401(a)-20, Answer 27 provides a number of exceptions to the ERISA spousal consent rights: For example, it reads: “*If it is established to the satisfaction of a plan representative that there is no spouse or that the spouse cannot be located, spousal consent to waive the QJSA or the QPSA is not required. If the spouse is legally incompetent to give consent, the spouse's legal guardian, even if the guardian is the participant, may give consent. Also, if the participant is legally separated or the participant has been abandoned (within the meaning of local law) and the participant has a court order to such effect, spousal consent is not required unless a QDRO provides otherwise.*”

Opportunity: The Minnesota Supreme Court recently ruled⁶⁷ that “*A Domestic Relations Order issued after a plan participant’s [pension plan] retirement that requires the distribution to an alternate payee of some or all of a surviving spouse benefit that is payable to another beneficiary under the form of benefit then in effect cannot be qualified because it requires a pension plan to pay the alternate payee a type or form of benefit not otherwise provided by the plan.*” Even though the decedent/retiree’s divorce decree provide the former wife half of the pension plan, her failure to file a valid Domestic Relations Order before the retirement of the former spouse eliminated the former wife’s claim and paid it to the decedent’s new spouse.

ERISA and IRAs. IRAs are not governed by ERISA. Subject to state laws (e.g., inclusion in an “augmented” estate), an IRA owner may be able to eliminate a spouse’s right to inherit or make a claim against an IRA.

Opportunity: In Charles Schwab v. Debickero,⁶⁸ a husband rolled a 401(k) into an IRA after retirement but before his remarriage. The husband named his children as the IRA beneficiaries. When the IRA owner passed away, his wife argued that because her husband had rolled his 401(k) into the IRA, she should receive the same protections that his ERISA qualified retirement plan had provided to her. The Ninth Circuit disagreed: “*Thus, under both § 401(a) and the accompanying regulations, there is no basis for imposing on the Schwab IRA the automatic survivor annuity requirements of § 401(a)(11) and overriding the beneficiary designations rightfully made by Wilson in establishing the account.*”⁶⁹

Opportunity: Because the ERISA rules do not apply to IRA accounts,⁷⁰ any spousal elective rights that might include an IRA account can be waived before the marriage, if permitted by state law.

IRA Trusts. Many clients in second and third marriages are concerned that passing their substantial IRA accounts directly to a spouse will either result in a rapid dissipation of the IRA or result in IRA funds that remain upon the spouse’s death ultimately passing to someone other

67 Langston v. Wilson McShane Corporation, 828 N.W.2d 109 (Minn. 2013).

68 593 F.3d 916 (9th Cir. 2010); *see also* Brad Dewan, Charles Schwab & Company v. Chandler – Surviving Spouse Benefits & IRAs, EMP. BENEFITS & RET. PLAN. NEWS., no. 519, Mar. 17, 2010.

69 *Id.*

70 29 C.F.R. § 2510.3-2(d) (2015); I.R.C. § 417 (2015).

than the clients' family members (e.g., a new spouse or children from a prior marriage). To provide current benefits to a spouse while placing a "gate keeper" trustee between the spouse and the assets, the clients should consider the use of a "Qualifying Trust" or a "Conduit Trust."⁷¹ These trusts can also limit the claims of creditors on a spousal inherited IRA after the Clark v. Rameker decision.⁷²

Trap: In states which have a broad augmented spousal elective share, the surviving spouse may be able to make a claim against the IRA, notwithstanding the decedent's intentions.

Drafting: When drafting an IRA trust for the benefit of a spouse, particularly a second or third spouse, consider having the spouse waive any rights (e.g., spousal elective share in an augmented state) to the IRA as a part of the documents being signed. Because the couple might move to an "augmented" state, this waiver should be made even if the domicile state has limited spousal rights to make claims against an IRA.

Automatic Elimination of Claims. Largely because of continual mistakes by divorced residents, at least 23 states have adopted statutes which provide that divorce automatically results in a deemed elimination of beneficiary designations for the benefit of the former spouse.⁷³ For example, Florida provides that a former spouse is treated as predeceasing the decedent when a divorce occurs.⁷⁴

Trap: A number of Supreme Court decisions⁷⁵ have indicated that state statutes that automatically rescind rights upon divorce do not apply to ERISA retirement plans and other federally provided benefits because federal law preempts state law with regard to such rights.⁷⁶ Therefore, clients are well advised to promptly review and modify all beneficiary designations as a part of their remarriage or divorce.

Resources:

- John H. Langbein, *Destructive Federal Preemption of State Wealth Transfer Law in Beneficiary Designation Cases: Hillman Doubles Down on Egelhoff*, 67 VAND. L. REV. 1665 (2014).
- Leslie A. Shaner, *When Clients Fail to Change Beneficiary Designations*, FAM. L. MAG., (Dec. 10, 2013), available at

⁷¹ See: John P. Dedon and Pamela M. Buskirk, *IRA Beneficiary Designations Stretch or Shorten Payout Period*, EST. PLAN. J. (February 2011).

⁷² 134 S. Ct. 2242 (2014).

⁷³ Leslie A. Shaner, *When Clients Fail to Change Beneficiary Designations*, FAM. L. MAG. (Dec. 10, 2013), <http://www.familylawyermagazine.com/articles/beneficiary-designations>. See also UNIF. PROB. CODE § 2-804 (UNIF. LAW COMM'N 2014)

⁷⁴ FLA. STAT. § 732.703 (2015); See Jeff Baskies, *New Florida Statute Clarifies Impact of Divorce on Non-Probate Assets*, EST. PLAN. NEWS. (LISI), no. 1990, July 23, 2012.

⁷⁵ *Hillman v. Maretta*, 133 S.Ct. 1943 (2013); *Kennedy v. DuPont Savings and Investment Plan*, 555 U.S. 285 (2009); *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001); *Ridgeway v. Ridgeway* 454 U.S. 46 (1981); *Wissner v. Wissner*, 338 U.S. 655 (1950). A number of state courts have issued similar rulings (see, e.g., *In re Sauer*, 32 A.3d 1241 (Pa. 2011)).

⁷⁶ ERISA § 514(a) (codified at 29 U.S.C. §1144(a) (2012)) provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any [ERISA] employee benefit plan."

<http://www.familylawyermagazine.com/articles/beneficiary-designations>.

- Albert Feuer, *Determining the Death Beneficiary Under an ERISA Plan and the Rights of Such A Beneficiary*, 54 TAX MGMT. MEMO. 323 (2014).
- Albert Feuer, *The Supreme Court Finds Federal Life Insurance Rules Preempt State Law in Hillman v. Maretta and Reinforces ERISA Protections for ERISA Plan Participants and Beneficiaries*, 32 TAX MGMT. WEEKLY J. (Aug. 2013).

Self-Settled Spendthrift Trusts. Prenuptial agreements can take a lot of the romance out of the impending marriage and create some tense negotiations. An alternative may be the creation of a self-settled trust before the marriage. Traditionally, states have not allowed individuals to set up “self-funded” spendthrift trusts. That is, the grantor of a trust was not allowed to set up a trust against which his creditors (including a divorcing spouse) could not make claim.

In recent years, a number of states have provided limited protection for a grantor of a self-settled spendthrift trust. While a comparison of the state and foreign trust rules are beyond the scope of this article, planners should carefully consider the advantages and disadvantages of creating self-funded spendthrift trusts in one of the states which offer greater creditor protection.⁷⁷ Such trusts may be created in lieu of or as part of a prenuptial agreement. If created as a part of prenuptial agreement, the client should fully disclose the existence of the trust. Preferably, the trusts should be created before the marriage occurs.

Caution: A bankruptcy court may disagree with the protections potentially obtained by the use of a self-settled spendthrift trust.⁷⁸

Resource: Daniel S. Rubin, *Protecting Assets Without the Pre-Nup: Use a Self-Settled Trust*, 47TH ANNUAL HECKERLING INST. ON EST. PLAN. (2013).

Change of Residency. Spousal rights vary widely from state to state. Moving to another state can change the inheritance rights and powers of a surviving spouse.

Opportunity: The amount of the spousal elective share can vary widely from state to state. Georgia is the only state that does not permit a spouse to make a spousal elective share claim.⁷⁹ The Georgia statutes⁸⁰ provide: “A testator, by will, may make any disposition of property that is not inconsistent with the laws or contrary to the public policy of the state and may give all the property to strangers, to the exclusion of the testator's spouse and descendants.”

⁷⁷ *Id.*; RICHARD W. NENNO & W. DONALD SPARKS, DELAWARE DYNASTY TRUSTS, TOTAL RETURN TRUSTS, AND ASSET PROTECTION TRUSTS (2002); RICHARD W. NENNO, PERPETUAL DYNASTY TRUSTS (2010); ALA-ABA, *Planning Techniques for Large Estates* (Apr. 2002).

⁷⁸ C.f., *In re Castellano*, 2014 WL 3881338 (Bk.N.D.Ill., Aug. 6, 2014); Jay Adkisson, David Slenn & Philip Martino, *In re Castellano: A Wake-Up Call for Self-Settled Trusts and Spendthrift Provisions*, LISI Asset Protection Planning Newsletter #258, (September 8, 2014).

⁷⁹ In Georgia a surviving spouse may be entitled to some estate funds using a statutory rule called “Years Support.” GA. CODE ANN. § 53-3-1 to -20 (2015).

⁸⁰ GA. CODE ANN § 53-4-1 (2015).

Opportunity: Moving to a state with a little to no augmentation of the spousal share could provide opportunities to reduce the value upon which the spousal elective share is computed.

Trap: Clients may inadvertently and unexpectedly increase the rights of a spouse when they change the state of domicile (e.g., a move from Georgia to Florida). When changing residency it makes sense to evaluate the rules governing the rights of spouses and children in the new state of domicile, particularly in Community Property states.

Opportunity or Trap? Depending upon which side of the inheritance you are on, moving an incapacitated spouse to a jurisdiction with greater benefits for the surviving spouse may be a method of increasing the surviving spouse's inheritance. For example, a couple in their second marriage with children from prior marriages resides in Georgia. Each spouse executed a Will that disinherits the surviving spouse in favor of the testator's descendants. The husband is now in an Alzheimer unit and the wife (who holds a general power of attorney and medical directive) wants both of them to "retire" to Florida. Neither spouse has waived any marital rights. The change of domicile could result in the wife being able to claim a Florida spousal elective share and make a claim against the homestead property.

Trap: A marital agreement that waives all spousal benefits before the couple moved to another state may not be enforceable to the extent the spousal rights were only acquired when the couple became a resident of the second state. The argument of a surviving spouse may be similar to the ERISA issues on prenuptial waivers – you cannot prospectively waive a right you do not yet have. Moreover, the new state's law may require a "fair disclosure" as part of any waiver to spousal rights – a requirement that the previous waiver may not satisfy.

Practicing in this Area. Here are a few recommendations that advisors should consider when clients are getting remarried:

- Never represent both spouses, even if they agree to waive any conflict. You may inevitably be accused of favoring one family group over the other.
- Thoroughly understand the implications of the marriage under state and federal law and create a detailed state-specific article for your clients to review and sign, recognizing the implications of their new marriage.
- Always recommend that clients update all of their estate planning documents before the remarriage and examine their beneficiary designations. Discuss appropriate waivers for the soon-to-be new spouse.
- Discuss and document the potential conflicts between children from a prior relationship and the new spouse, including decision makers and the passage and value of assets (e.g., personal property).
- In your engagement letter, advise your clients that the spousal rights will probably change if they move to another state and they need to engage competent local counsel before or immediately after a move. For example, a move of a remarried couple from Georgia to Florida would create substantial new rights over the decedent's assets in the surviving spouse (e.g., spousal elective share and homestead rights).

- One of the reasons that these articles have provided information on the wide variety of state laws governing spousal rights is so that the reader can understand the complexity and diversity of this area of law. Alerting clients who are moving across state lines of the need to not just redo their wills, but also understand the spousal rights that will change upon that move is a vitally important service to clients. Alerting clients as to the legal implications of a parent's or other family member's remarriage are equally vital.

Conclusion: This area of law is probably more complex than the federal tax code – fifty states with broadly different and constantly changing rules, exceptions, exclusions and limitations. But a central part of being a skilled estate planner is to make sure your clients fully comprehend the practical, legal and tax impacts of an impending remarriage or recent remarriage.

The next article will discuss negotiation issues for divorce, from the perspective of a tax and estate planning attorney

Global Resources:

- Steve Oshins & Martin Bearg, *Tannen v. Tannen: Keeping Trust Assets off the Table in a Divorce*, EST. PLAN. NEWS. (LISI), no. 1904, Dec. 12, 2011.
- Jeffery Pennell, *Minimizing the Surviving Spouse's Elective Share*, ALI Estate Planning in Depth (2014);
- Christopher P. Cline, Jeffrey N. Pennell, Terry L. Turnipseed, *Spouse's Elective Share*, 841-1st TAX MGMT (BNA).
- Laura Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1127.
- Terry L. Turnipseed, *Community Property v. The Elective Share*, 72 La. L. Rev. (2011) Available at: <http://digitalcommons.law.lsu.edu/lalrev/vol72/iss1/8>