

**Premarital Issues in Second Marriages:
What to Plan for
the Second Time Around**

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Estate planning for a second marriage involves different considerations from estate planning for a first marriage. Planning in preparation for a second marriage is especially important for older clients as the majority of marriages between Americans over the age of 65 involve second and third marriages. In 2008, out of approximately 91,000 marriages among Americans over the age of 65, about half (54%) were second marriages and one-third (35%) were third marriages.¹ In addition, older clients entering into a second marriage often have accumulated significant wealth, and the family dynamics associated with the family created by a second marriage can be significantly different from the family dynamics associated with the traditional family.

The traditional family is typically characterized by one marriage with children only from that marriage. A traditional family estate plan generally involves both spouses leaving their respective estates to their surviving spouse upon death (whether outright or in trust) with the assumption that the surviving spouse will care for their children during his or her lifetime and then provide for their children after his or her death.

The family which is created by a second marriage (sometimes

¹ Wendy D. Manning & Susan L. Brown, *The Demography of Unions Among Older Americans: 1980-present* 8 (Natl. Ctr. for Family & Marriage Research Bowling Green St. U. Working Paper No. 09-14, 2009).

referred to as a "blended family") often involves children from the prior marriage of one or both of the spouses. The stepparents and the stepchildren may not have a close familial relationship, especially when the stepchildren are already adults at the time of marriage. Often the spouse/parent will be the only variable which holds together any relationship between the stepparent and the stepchildren. As a result, estate planning for the blended family must take into consideration the current relationships between family members, and the possibilities of what could happen after the spouse/parent holding the familial relationships together is no longer competent or dies. Due to the relationships involved in a blended family, there is not one "typical" estate plan for the blended family.

I. SECOND MARRIAGES: CONSEQUENCES

Marriage has a significant impact on one's life, legally and economically. The consequences of a second marriage may be even more involved than the consequences of a first marriage, especially if benefits are currently being received as a result of a prior marriage, and one or both of the prospective spouses have continuing duties from a prior marriage. Clients preparing to enter into a second marriage should be advised with regard to what a surviving spouse is legally and contractually entitled to upon the death of his or her spouse, and what benefits will be affected by the second marriage.

a. Legal Entitlements upon Death

Generally, the law protects a surviving spouse from disinheritance, whether the decedent dies with or without a Last Will and Testament (a "Will"). Under typical state intestacy statutes, when a decedent dies without a valid Will, a share of the intestate estate is first set aside for the decedent's surviving spouse, and the balance of the intestate estate is then allocated to the decedent's issue in accordance with the scheme set forth in the applicable state intestacy statute. Moreover, in some states, the decedent's surviving spouse receives the entire intestate estate if all of the decedent's descendants are also descendants of the surviving spouse.²

The default distribution schemes set forth in state intestacy statutes are often reasoned to be the probable intent of the decedent to want to support those who were dependent upon the decedent during his or her lifetime and to reward those who assisted in building the estate of the decedent. However, the intent of a decedent who died in a second marriage, with children from a prior marriage, may not mirror what a state legislature assumed to be the probable intent of the decedent. For instance, if one spouse (or both spouses) in a second marriage acquired substantial assets prior to the marriage, such spouse(s) may prefer that upon death his or her assets be distributed to his or

² See § 64.1-1 of the Code of Virginia, 1950, as amended.

her children from a prior marriage instead of to the surviving spouse. Further, if the estate of the first spouse to die was distributed to the surviving spouse, then upon the surviving spouse's death, the entire estate could be distributed to the children of the surviving spouse (and nothing would be distributed to the children of the first spouse to die).

Although an individual can direct the distribution of his or her estate through a Will, and avoid the intestacy distribution scheme created by the state legislature, testamentary freedom is, to a certain extent, limited by law. For example, elective share statutes,³ statutory versions of the common law concept of dower,⁴ and statutory allowances from the decedent's estate for homestead, exempt property, and family property⁵ all provide the surviving spouse with a safeguard against disinheritance. In addition, in community property states, a surviving spouse is generally protected from disinheritance by the fact that when his or her spouse dies one-half of the community property is the property of the surviving spouse and does not pass as part of the decedent's probate estate.

When clients preparing for a second marriage prefer not to

³ See § 64.1-13 of the Code of Virginia, 1950, as amended.

⁴ See Ark. Stat. §§ 28-11-201 et seq.; Ky. Rev. Stat. §§ 392.010 et seq.

⁵ See §§ 64.1-151.1, -151.2, and -151.3 of the Code of Virginia, 1950, as amended.

provide anything to their surviving spouse upon their death, careful planning is needed to ensure such result. For instance, a prenuptial agreement may be executed which waives spousal rights upon death, such as the right to claim an elective share. Similarly, inter vivos transfers outright to third parties or in trust may be utilized. However, care must be taken when planning for such inter vivos transfers as certain state elective share statutes describe the elective share which a spouse may claim in terms of the decedent's augmented estate, which may include not only property owned by the decedent at death but also various forms of inter vivos transfers.⁶

b. Contractual Entitlements upon Death

Clients entering into a second marriage should also consider those assets which will not be distributed by Will at death because of contractual obligations. For example, for purposes of employer-provided group life insurance policies, the surviving spouse may be the default beneficiary in the event the decedent failed to designate a beneficiary prior to his or her death or failed to designate a contingent beneficiary and the primary beneficiary predeceased the decedent. Clients preparing to enter into a second marriage may prefer to designate their children from a prior marriage as the beneficiaries of their life

⁶ See § 64.1-16.1 of the Code of Virginia, 1950, as amended.

insurance policies as opposed to their spouse or to divide the life insurance proceeds between their spouse and their children from a prior marriage.

As a further example, certain retirement plans covered under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"),⁷ are required to provide retirement benefits to the participant in the form of a qualified joint and survivor annuity (where the participant receives a benefit for life, and after the participant's death, the surviving spouse of the participant is entitled to receive a lifetime benefit of at least 50% of the participant's own benefit).⁸ In addition, in the event a vested participant dies before the annuity starting date, the surviving spouse of the participant will be entitled to a qualified preretirement survivor annuity (which provides a benefit to the surviving spouse of at least 50% of the amount the participant would have received if the participant had retired the day before his or her date of death).⁹ The plan participant may elect to waive the qualified joint and survivor annuity or qualified preretirement survivor annuity.¹⁰ However, the election of waiver by the participant will not be effective without the

⁷ 29 U.S.C. §§ 1001 et seq.

⁸ 26 U.S.C. § 417(b).

⁹ *Id.* at § 401(a)(11)(A)(ii).

¹⁰ *Id.* at § 417(a).

written consent of his or her spouse.¹¹ Moreover, a former spouse's consent to the election of waiver by the participant will not bind a subsequent spouse of the same participant.¹² Even if spousal consent has been obtained, the spouse may revoke his or her consent if the retirement plan documents do not preclude a spouse from revoking such consent.¹³ Therefore, careful planning is required in order to designate a beneficiary other than one's spouse for purposes of survivor benefits from a retirement plan governed by ERISA.

IRAs and Roth IRAs are not subject to ERISA. However, a surviving spouse may be the default beneficiary under the IRA or Roth IRA plan. In addition, if the applicable state elective share statute includes an IRA as part of the augmented estate which the surviving spouse can make a claim against, the surviving spouse may be able to receive a portion of the assets in an IRA by claiming his or her elective share.

Government plans, including retirement plans offered by state and local government employers, and church plans are not required to adhere to ERISA regulations. Even though a government plan is not governed by ERISA, the plan document may

¹¹ *Id.* at § 417(b).

¹² Reg. § 1.401(a)-20 Q & A-29.

¹³ There is no legal requirement that the spousal consent under § 417(a) be revocable. Reg. § 1.401(a)-20 Q & A-30.

provide that the surviving spouse has certain rights to the retirement benefits or designate the surviving spouse as the default beneficiary of retirement benefits in the event the worker fails to designate a beneficiary of the plan.

Clients entering into a second marriage may be limited in their ability to transfer assets at death by agreements entered into in connection with a prior divorce or separation. For instance, a prior separation agreement may require that a former spouse be named as the beneficiary of a particular life insurance policy. In addition, a qualified domestic relations order may have ordered that payment of pension benefits be directed to the former spouse as alternate payee (such assignment will only be permitted if the qualified domestic relations order meets the criteria set forth in Section 414(p) of the Internal Revenue Code of 1986, as amended).

c. Benefits Affected during Life by Second Marriages

Clients entering into a second marriage should be advised of the consequences a second marriage will have on benefits which either one or both of the prospective spouses are currently receiving or may be entitled to receive in the future. For example, depending upon the terms of a separation agreement or divorce decree, the alimony or spousal support which a prospective spouse has been receiving as a result of a prior marriage may be reduced or terminated upon remarriage.

As a further example, if a widow or widower is contemplating remarrying, survivor annuities being paid to the widow or widower may cease upon remarriage. In addition, health insurance which a widow or widower is receiving as a surviving spouse might cease upon remarriage.

A widowed or divorced spouse may lose the right to social security benefits on the record of a deceased or former spouse upon remarriage. At a worker's death, the surviving spouse and the surviving divorced spouse of the deceased worker may be eligible for survivor benefits.¹⁴ A divorced spouse may receive social security benefits on the social security record of his or her former spouse if the marriage lasted for at least 10 years and the divorced spouse applying for the benefits is at least 62 years of age or older and unmarried.¹⁵ If the widowed or divorced spouse remarries, then he or she generally cannot collect benefits on the social security record of his or her deceased or former spouse unless the later marriage ends (whether by death, divorce, or annulment).¹⁶ However, social security benefits for a widowed or a surviving divorced spouse will not be terminated by remarriage if the remarriage occurs after the age

¹⁴ 42 U.S.C. §§ 402(e)(1) and 402(f)(1).

¹⁵ *Id.* at §§ 402(b)(1), 402(c)(1), and 416(d).

¹⁶ *Id.* at §§ 402(b)(1)(H), 402(c)(1)(H), 402(e)(1), and 402(f)(1).

of 60 (or the age of 50 if disabled).¹⁷

Even if a widowed or divorced spouse loses the right to social security benefits on his or her deceased or former spouse's record upon remarriage, he or she may be eligible for social security benefits based on the earnings of the new spouse.

Marriage can also cause various tax consequences, some of which are negative. For instance, social security benefits which were not taxable before marriage may become partially taxable after marriage because the income of both spouses is considered for purposes of determining whether social security benefits are taxable.¹⁸ For a married couple filing a joint return, part of the social security benefits received by the married couple are required to be included in income if the combined modified adjusted gross income of the spouses plus one-half of the combined social security benefits received during the taxable year exceed \$32,000.¹⁹

II. PRENUPTIAL AGREEMENTS

Clients preparing to enter into a second marriage should be advised with regard to what the law provides in the absence of a prenuptial agreement and what a prenuptial agreement can accomplish. It is estimated that approximately 20% of second

¹⁷ *Id.* at §§ 402(e)(3) and 402(f)(3).

¹⁸ 26 U.S.C. § 86.

¹⁹ *Id.* at §§ 86(a) and 86(b)(1)(B).

marriages involve a prenuptial agreement.²⁰ A prenuptial agreement may reduce the likelihood of potential litigation (and expenses associated with litigation) by setting forth the rights of each prospective spouse in the event of divorce and upon death. Even if the prospective spouses decide not to enter into a prenuptial agreement prior to marriage, many states recognize postnuptial agreements, which, like a prenuptial agreement, can set forth the rights and obligations of the spouses in the event of divorce or death.

There are many reasons why clients preparing for a second marriage may wish to enter into a prenuptial agreement. Older couples may have already established themselves financially and wish to maintain separate finances during marriage. Prospective spouses may have children from a prior marriage who they want to ensure receive their respective property. A prospective spouse may have earned significant wealth over his or her lifetime which he or she wishes to protect from the claims of the not as wealthy prospective spouse in the event of divorce. One or both of the prospective spouses may anticipate receiving a significant inheritance which he or she wishes to protect from the other prospective spouse in the event of divorce.

If the prospective spouses have previously been through a

²⁰ Douglas E. Abrams et al., *Contemporary Family Law* 822 (West 2006) (citing Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 Colum. L. Rev. 75, 80 n.12 (2004)).

divorce, they may wish to avoid paying alimony or losing assets in the event of a second divorce. Moreover, one or both of the prospective spouses may still be paying alimony or spousal support to a former spouse at the time of the second marriage.

Prior to drafting a prenuptial agreement for a client it is important to gather as much information regarding the client's personal and financial situation as possible. With regard to the client's personal situation, the attorney should inquire about the client's familial relationships and the client's relationship with his or her prospective spouse and prospective spouse's family. The attorney should obtain information about the client's prospective spouse, including his or her relationship with the client's children, his or her wishes, and his or her experience with financial matters. Information with regard to prior marriages of the client should be discussed, including any continuing responsibilities from a prior marriage (for example, alimony or a requirement to designate a former spouse as beneficiary of a particular life insurance policy), and copies of any separation agreements or divorce decrees should be reviewed by the attorney.

Information in connection with the financial situation of the client is necessary so that the attorney can ensure that the prenuptial agreement covers, to the fullest extent possible, all existing assets and assets which the client may acquire in the

future. Copies of recent tax returns and financial statements will provide a starting place for discussion in connection with the assets and liabilities of the client. For each asset, the attorney should request the current value of the asset, in whose name the asset is titled, and any beneficiary designations associated with such asset.

a. Enforcement Issues

Prenuptial agreements are recognized in almost every jurisdiction. However, laws in connection with the requirements for enforceability of prenuptial agreements vary by jurisdiction. In an attempt to provide clear and uniform laws with regard to the validity, scope, and enforceability of prenuptial agreements, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Premarital Agreement Act (the "UPAA") in 1983. The UPAA (or a portion of the UPAA) has been adopted in 27 states, and in 2009 it was introduced in 4 additional states.²¹ For purposes of this article, the requirements for an enforceable prenuptial agreement as set forth in the UPAA will be examined. However, as the requirements for an enforceable prenuptial agreement vary by state, applicable state law should be reviewed prior to drafting any prenuptial agreement.

Under the UPAA, prenuptial agreements must be in writing and

²¹ NCCUSL, UPAA Fact Sheet, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upaa.asp (accessed January 25, 2010).

signed by both parties.²² Certain states also require other formalities, including notarization or an acknowledgement.²³ Just like any other contract, prospective spouses entering into prenuptial agreements must have sufficient contractual capacity, including being competent to contract.²⁴ As marriage is the consideration of the agreement, a prenuptial agreement will only be effective upon marriage.²⁵

State laws impose special duties of disclosure and fair dealing upon prospective spouses entering into a prenuptial agreement. The relationship between prospective spouses entering into a prenuptial agreement makes the prenuptial agreement different from typical business agreements which are negotiated at arms-length. The prospective spouses may not be as cautious when dealing with each other as they would be if they were dealing with strangers. Some courts have held that engaged couples negotiating a prenuptial agreement are in a confidential relationship which requires special duties of fair dealing.²⁶ Other courts have held that the confidential relationship only

²² Unif. Premarital Agreement Act § 2.

²³ *Id.* at § 2 cmt.

²⁴ *Id.*

²⁵ *Id.* at § 4.

²⁶ See *Posner v. Posner*, 257 So. 2d 530 (Fla. 1972).

begins upon marriage.²⁷

Under the UPAA, a prenuptial agreement is void if the party against whom enforcement is sought proves that (1) he or she did not execute the agreement voluntarily or (2) the agreement was unconscionable when it was executed and, before execution of the agreement, he or she (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party, (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided, and (iii) did not have, or reasonably could not have had, an adequate knowledge of the property and financial obligations of the other party.²⁸

Each prospective spouse should be represented by independent legal counsel to ensure the validity of the prenuptial agreement. Although the UPAA does not expressly require independent legal counsel as a condition for enforceability of a prenuptial agreement, lack of independent legal counsel may be a factor courts consider in determining whether the conditions for enforceability set forth in the UPAA existed.²⁹ If one prospective spouse chooses not to have the prenuptial agreement reviewed by independent legal counsel, then such prospective

²⁷ See *In re Marriage of Bonds*, 5 P.3d 815 (Cal. 2000).

²⁸ Unif. Premarital Agreement Act § 6.

²⁹ *Id.* at § 6 cmt.

spouse should acknowledge that he or she was advised to have the prenuptial agreement reviewed by independent legal counsel prior to executing the prenuptial agreement.

b. Protecting the Assets of Your Client in the Event of Divorce and after Death

Under the UPAA, the scope of matters which the prospective spouses may agree to is broad.³⁰

i. Division of Assets

Parties to a prenuptial agreement may contract with respect to the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located, and to the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event.³¹ If a client owns any real property, retirement assets, and/or business interests, the prenuptial agreement should specifically address such assets.

Detailed information should be obtained from the client with regard to real property currently owned by the client and by the client's prospective spouse, and any real property which they intend to purchase. How the real property is titled is essential for purposes of addressing the disposition of the real property in the event of divorce and upon death in the prenuptial

³⁰ *Id.* § 3.

³¹ *Id.* at §§ 3(a)(1) and 3(a)(3).

agreement and whether changes should be made to the ownership of the real property. The prenuptial agreement should address whether the provisions with regard to the residence will apply only to the current residence, or whether the provisions with regard to the residence will also apply to any future residence(s).

If the prospective spouses plan to move into a residence owned by only one of them, then it is important to include a provision in the prenuptial agreement with regard to the disposition of such residence upon the death of the owner. Specifically, the prenuptial agreement should address whether the non-owner surviving spouse will be permitted to continue to occupy the residence after the death of the owner or whether ownership of the residence will pass to the surviving spouse outright. If ownership does not pass to the surviving spouse but the surviving spouse is permitted to live in the residence during his or her lifetime, then the prenuptial agreement should address in detail which responsibilities, if any, the surviving spouse will have with regard to expenses associated with the residence, including monthly expenditures, such as utilities, as well as capital expenditures, such as replacing the roof. In addition, the prenuptial agreement should provide that the residence will ultimately be distributed in accordance with the deceased owner's wishes (which may be to the deceased owner's children from a

prior marriage).

With regard to retirement assets, the attorney should request information in connection with all retirement plans in which the client has an interest. Specifically, the attorney should request information with regard to beneficiary designations and any restrictions on the ability of the owner to transfer retirement assets in the event of divorce or upon death, including restrictions set forth in the plan document and any restrictions resulting from a prior marriage. Each prospective spouse will need to decide whether he or she will waive any rights and interests which he or she may have, as a result of marriage, in his or her prospective spouse's retirement assets. If such rights and interests will be waived, the prospective spouses should agree to execute after marriage, at the request of the other, any additional documents required to evidence the waiver of rights and interests in their spouse's retirement assets.

With regard to business interests, the attorney should request information in connection with all business interests currently owned by the client. The attorney should request a copy of all instruments governing such business interests (including any limited liability company operating agreements, shareholder agreements, corporation bylaws and articles of incorporation, and partnership agreements) to determine whether

restrictions apply to the transfer or division of the client's business interests in the event of divorce and upon death.

ii. Alimony and Support Payments

The parties to a prenuptial agreement may contract with respect to the modification or elimination of alimony or spousal support.³² One or both prospective spouses may have existing responsibilities of support to a former spouse and may not want to agree to similar responsibilities with regard to the second spouse. If neither alimony nor spousal support will be provided, then an express waiver of alimony and spousal support (whether it is in the form of support, maintenance, separate maintenance, temporary alimony, lump-sum settlements, or any other type of payment for support) should be included in the prenuptial agreement.

In situations in which one prospective spouse is not as wealthy as the other, a provision with regard to alimony or spousal support may be specifically requested by the not as wealthy prospective spouse. The wealthier prospective spouse may wish to provide alimony or spousal support to the not as wealthy prospective spouse in hopes of avoiding future litigation in connection with the enforceability of the prenuptial agreement (specifically, to avoid litigation by a spouse claiming that the prenuptial agreement was unconscionable).

³² Unif. Premarital Agreement Act § 3(a)(4).

iii. Choice of Law Provisions

Older clients preparing to enter into a second marriage may be close to retirement, and may plan on moving to a different state when they retire. The prenuptial agreement should clearly provide which state law will govern the prenuptial agreement to prevent any confusion with regard to the laws for interpreting the prenuptial agreement. The parties should also acknowledge that such state law will apply regardless of the domicile of the parties at the time the prenuptial agreement is sought to be enforced.

c. Prenuptial Agreement as an Integral Part of an Estate Plan

i. Drafting the Prenuptial Agreement in Conjunction with Other Estate Planning Documents

Individuals entering into a second marriage may prefer to only have a prenuptial agreement prepared, and prefer to revise estate planning documents after the marriage. However, discussions with regard to the provisions of a prenuptial agreement are often interrelated to discussions with regard to the preparation of estate planning documents. An attorney who is asked to prepare a prenuptial agreement on behalf of a client should request copies of all of the client's existing estate planning documents, and recommend that the estate planning documents be revised to avoid any inconsistencies between the

prenuptial agreement and the estate planning documents and potential conflicts at death.

The provisions in the prenuptial agreement should be consistent with the estate plan of the prospective spouses. The provisions of the prenuptial agreement which set forth how assets will be disposed of upon death should reflect the dispositions of such assets set forth in each of the prospective spouses' estate planning documents, especially dispositions made in their Wills and any trusts. If the prenuptial agreement provides that the surviving spouse receives the residence upon the death of his or her spouse, but the residence is titled in the name of a trust created by the deceased spouse which provides that all property in the trust shall be distributed to the deceased spouse's children from a prior marriage, litigation at death is likely.

A mutual waiver of spousal rights in the estate of the other is an important provision to discuss in connection with the preparation of a prenuptial agreement. The prospective spouses should decide whether their respective estate plans will dictate the disposition of their assets upon death, or whether the statutes of the applicable state (including the elective share and intestacy statutes) may have a role in such dispositions.

ii. Changing Designated Beneficiaries of Retirement Plans to Be Consistent with Prenuptial Agreement

If the retirement plan of a client is governed by ERISA, the

client will need spousal consent to designate someone other than his or her surviving spouse as beneficiary of survivor benefits. A prenuptial agreement does not satisfy the applicable consent requirements for purposes of ERISA because the parties to a prenuptial agreement are not "spouses".³³ Therefore, a provision in the prenuptial agreement providing for the mutual waiver by the prospective spouses in the retirement assets of the other should always include an agreement by the parties to execute, at the request of the other party, any additional documents required to evidence any necessary spousal consent in connection with the other spouse's retirement assets. Moreover, the prospective spouses should actually request and execute the spousal consent documents after marriage.

Spousal consent must be in writing, recite the alternative beneficiary (or expressly permit designations by the participant without any requirement of further consent by the spouse), acknowledge the effect of the spousal consent, be notarized or witnessed by a plan representative, and be completed within 90 days of the annuity's starting date.³⁴ Unless the spouse expressly permits designations by the participant without any requirement of further consent, the spouse is required to consent to the specific beneficiary (including any class of beneficiary

³³ Reg. § 1.401(a)-20 Q & A-28.

³⁴ 29 U.S.C. § 1055(c)(2)(A).

or any contingent beneficiaries) who will receive the benefit.³⁵ For example, if spouse B consents to participant A's election to waive a qualified preretirement survivor annuity, and to have any benefits payable upon A's death before the annuity starting date paid to A's children, A may not subsequently change beneficiaries without the consent of B (except if A elects the qualified preretirement survivor annuity or the spouse waived any requirement for further consent to beneficiary designations).³⁶ If the designated beneficiary is a trust, A's spouse need only consent to the designation of the trust and need not consent to the designation of trust beneficiaries or any changes to trust beneficiaries.³⁷

The importance of properly changing retirement plan beneficiary designations is set forth in the following example: David and Debbie are preparing to marry. David has two children from a prior marriage. David and Debbie execute a prenuptial agreement which provides:

Each party waives and releases any claim, demand or interest in any pension, profit-sharing, Keogh or other retirement benefit plan qualified under ERISA and the Internal Revenue Code of the other party and agrees to execute any documentation to verify and confirm this fact with the plan administrator of such plan.

³⁵ Reg. § 1.401(a)-20 Q & A-31.

³⁶ *Id.*

³⁷ *Id.*

David's retirement plan (which is subject to ERISA) provides that the spouse of a married participant is deemed the default beneficiary of the retirement plan, but the "Participant may designate a Beneficiary other than such spouse if (a) such spouse consents in writing to a specific beneficiary . . . and (b) such consent acknowledges the effect of such consent." David does not designate a beneficiary to replace his spouse under the retirement plan. David dies, survived by Debbie and his two children from a prior marriage. Who is entitled to receive the retirement plan benefits after David's death?

These facts were based on the case *Greenebaum Doll & McDonald PLLC v. Sandler*.³⁸ The United States District Court for the Western District of Kentucky held that the surviving spouse was entitled to the retirement plan account notwithstanding the prenuptial agreement. The court emphasized that the plan administrator is required to discharge his or her duties in accordance with the documents and instruments governing the ERISA plan. The court found that the execution of the prenuptial agreement did not meet the retirement plan's requirements for designation of a new beneficiary and spousal consent to such action. There was no evidence that the participant requested his spouse to execute any consent form to change the plan beneficiary or that the surviving spouse refused to execute any other

³⁸ 458 F.Supp.2d 420 (W.D. Ky., 2006).

documentation to verify or confirm the change. Therefore, under the plan's rules the surviving spouse remained the plan beneficiary. In a footnote, the court noted that the surviving spouse may have been in breach of the prenuptial agreement if the surviving spouse had been presented with a consent and waiver form to sign and refused.

III. BLENDED FAMILY DYNAMICS AND THE ESTATE PLAN

a. Conflicts between the Surviving Spouse and Children from a Prior Marriage

In a blended family, a close familial relationship may not exist between stepparents and stepchildren. In some situations, the stepparent and stepchildren may get along amicably as a matter of respect for the spouse/parent who is the only connection in the relationship. In these situations, the conflict of interest between a stepparent and stepchild may not be apparent, especially to the spouse/parent who has a loving relationship with both his or her spouse and his or her children. Naturally, the client thinks the best of both his or her new spouse and his or her children from a prior marriage. The client, however, may not have considered that the new spouse and the children from a prior marriage may act differently after the client's death. The client may be the only reason the parties have any form of a relationship. The attorney could address these issues with the client by providing examples of conflicts

which could arise between the spouse and children.

i. Investments for Income Versus Investments for Growth

Conflicts are inherent where a trust instrument provides that the trustee shall distribute income to the surviving spouse for life, and upon the death of the surviving spouse, the trust estate shall be distributed to the children of the settlor. The lifetime beneficiary, the surviving spouse, has an interest in maximizing the income of the trust, and, as such, prefers that trust property be invested in income-producing assets (such as assets which produce dividends, interest, and rent). The remainder beneficiaries, the children of the settlor, have an interest in ensuring that the trust property is invested in growth assets (such as equities).

In a traditional family, love and affection may influence the interests of both the surviving spouse and the children. The children as remainder beneficiaries have an interest in ensuring that their surviving parent is supported and his or her needs and wishes are met. Such interest may outweigh any interest the children have in ensuring the trust property is invested in growth assets. Further, the surviving parent often wishes to leave an inheritance for his or her children or wishes to continue to support his or her children after his or her death. The surviving spouse may find these interests outweigh the

interests of the surviving spouse in maximizing the amount of income he or she receives from the trust.

However, love and affection, which often balances the interests between the income beneficiary and the remainder beneficiaries of a trust in a traditional family, may not exist in a blended family. In a blended family, the children of the deceased spouse may not care about the needs and wishes of the surviving spouse, and the surviving spouse may not care about the needs and wishes of the children of the deceased spouse, if they are not related by blood. The surviving spouse may, however, have an interest in maximizing distributions which he or she receives from the trust so that such assets can be distributed as a part of the surviving spouse's estate upon death.

ii. Designating Fiduciaries to Avoid Conflicts

Conflicts between income beneficiaries and remainder beneficiaries may be avoided by designating independent trustees (meaning trustees who are not beneficiaries of the trust). If the surviving spouse, who is the lifetime beneficiary of the trust, is designated as the trustee of the trust, the surviving spouse could invest the trust assets in income-producing assets to the disadvantage of the remainder beneficiaries. In addition, if the trustee has the power to make discretionary distributions of principal to himself or herself, the surviving spouse may deplete the corpus of the trust and leave nothing for the

remainder beneficiaries. Similarly, if a child of the settlor from a prior marriage, who is a remainder beneficiary of the trust, is designated as the trustee of the trust, and the trustee is not required to make minimum distributions of income, the trustee might invest trust property in growth assets which have little or no income. However, in order to qualify as a marital deduction trust, a surviving spouse must have a qualifying income interest for life, including the power to require the trust assets to be income-producing.

It is often advisable for a client to designate the same individual(s) to serve as executor and trustee. Designating the same individual(s) to serve in dual fiduciary capacities ensures consistency in the administration of the probate estate and the trust estate.

Conflicts between the stepparent and stepchildren can also arise when either the stepparent or one or more stepchildren are designated as the fiduciaries under a power of attorney instrument. If a spouse is designated as the attorney-in-fact under a durable general power of attorney, and the principal is no longer competent, then depending upon the powers in the durable general power of attorney, the spouse could transfer assets titled in the principal's individual name to a trust which benefits the spouse (but does not benefit the principal's children from a prior marriage) or directly into the name of the

spouse to the detriment of the principal's children from a prior marriage. A similar situation could occur if one or more of the principal's children from a prior marriage are designated as the attorney-in-fact under a durable general power of attorney, and as attorney-in-fact exercises his or her power to transfer the principal's assets to a trust which only provided for the principal's children from a prior marriage or into the individual name of the principal's children from a prior marriage. By providing too much power to either the spouse or the children from a prior marriage in a power of attorney instrument, the client may be opening the door to the possibility that his or her estate plan will be frustrated by the actions of his or her attorney-in-fact during life.

Considerations with regard to designating a client's spouse as fiduciary of a trust or power of attorney instrument may differ from considerations with regard to designating a client's spouse as fiduciary for purposes of health care decision-making instruments, such as a medical power of attorney or advance medical directive. A client may prefer to designate his or her spouse as the agent under his or her advance medical directive because a spouse is the person who is likely to be at the hospital when health care decisions need to be made. Adult children may not be available when health care decisions need to be made, especially if they live far away from the client. In

addition, parents may feel that the responsibility with regard to health care decision-making should not be placed on their children.

b. Balancing the Interests of a Surviving Spouse and Children from a Prior Marriage Using QTIP Trusts

A client who wishes to balance the interests of a surviving spouse and children from a prior marriage may direct in a Will or trust that, upon death, his or her assets be divided into separate shares, either outright or in trust, for the benefit of his or her surviving spouse and children from a prior marriage (subject to the limitations, if any, imposed by law regarding the surviving spouse's entitlement to share in the estate).

Allocating a separate share for the benefit of the surviving spouse and children from a prior marriage alleviates potential issues which a trustee may otherwise face in administering the estate, such as whether to invest trust assets for income versus growth. In addition, a client may designate specific assets, such as his or her residence, family heirlooms, or an ownership interest in a closely-held business, to be allocated to the share of the surviving spouse or the share of the children from a prior marriage.

However, it may not be practicable for a client to divide assets into separate shares for the benefit of his or her surviving spouse and children from a prior marriage. Or, a

client may wish to only provide for the support of the surviving spouse during his or her lifetime, while ultimately distributing all of the assets to the children from a prior marriage upon the death of the surviving spouse. In such instances, a qualified terminable interest property trust ("QTIP trust") can be a useful estate planning tool for purposes of balancing the interests of a surviving spouse and children from a prior marriage. In a QTIP trust, the settlor can provide the surviving spouse with income during life, while controlling the ultimate disposition of the trust property after the surviving spouse's death (such as to the settlor's children from a prior marriage). QTIP trusts are eligible for the federal estate tax marital deduction, and, as such, can be used to reduce or eliminate federal estate tax at the death of the first spouse.³⁹ In addition, a QTIP trust protects the surviving spouse from creditors and predators, which is especially important for surviving spouses who are elderly, inexperienced with financial matters, or spendthrifts, and protects the corpus of the QTIP trust in the event the surviving spouse remarries.

³⁹ As of this article's preparation, the federal estate tax laws continue to be in a period of transition, and, as such, the federal estate tax under the Internal Revenue Code of 1986, as amended, would not currently apply to a decedent's estate in year 2010.

i. Supporting the Surviving Spouse with Mandatory Distributions of Income from the Trust

In a QTIP trust, the surviving spouse knows that he or she will be receiving all of the income from the trust. A federal estate tax marital deduction will be permitted for property transferred to a QTIP trust for the benefit of the surviving spouse if (1) the surviving spouse has a qualifying income interest for life, and (2) the decedent's executor makes an election to treat all or a specific portion of the trust property as QTIP.⁴⁰ A surviving spouse is treated as receiving a qualifying income interest for life if he or she is entitled to all of the income from the QTIP trust, payable at least annually, and no person has a power, during the surviving spouse's life, to appoint any part of the property to any person other than the surviving spouse.⁴¹

The requirement that the surviving spouse be entitled to all of the income for life can be satisfied by providing the surviving spouse with varying amounts of control and flexibility. For purposes of a second marriage, the settlor may prefer that the trustee be required to distribute to the surviving spouse all income of the QTIP trust, payable at least annually, and not permit the trustee to make any principal distributions to the

⁴⁰ 26 U.S.C. § 2056(b)(7).

⁴¹ *Id.* at § 2056(b)(7)(B)(ii).

surviving spouse. This arrangement ensures that the surviving spouse receives income during his or her lifetime and preserves the corpus of the QTIP trust for the remainder beneficiaries.

Alternately, the trust instrument could provide the surviving spouse with more flexibility. For instance, the "all income" requirement will be satisfied if the terms of the trust provide that the surviving spouse has the right to require distribution to himself or herself of the trust income at least annually, and if the trust income is not distributed, the trust income is to be accumulated and added to the trust corpus.⁴²

This alternative provides the surviving spouse with the option of allowing income distributions to be added to the principal of the QTIP trust, thereby increasing the amount which will pass to the remainder beneficiaries upon the surviving spouse's death.

ii. Preserving Wealth for Children from a Prior Marriage

During the surviving spouse's lifetime, a settlor can preserve the corpus of a QTIP trust for the remainder beneficiaries by limiting the surviving spouse's rights to trust principal. If the trustee is permitted to make discretionary distributions of principal to the surviving spouse, then a provision could be added which requires the trustee to consider the resources available for the support of the surviving spouse

⁴² Reg. § 20.2056(b)-5(f)(8).

before discretionary distributions of principal are made to the surviving spouse.

The settlor of the QTIP trust, who wishes his or her children from a prior marriage to ultimately receive his or her assets, does not need to rely on his or her surviving spouse's estate plan, which can be amended or revoked after the settlor's death. The settlor may specifically designate the beneficiaries who will receive the trust assets following the death of the surviving spouse. This takes away all power of the surviving spouse with regard to designating the remainder beneficiaries.

Alternately, the settlor of the QTIP trust may provide the surviving spouse with a testamentary limited power of appointment over the trust estate. The settlor may limit the eligible beneficiaries to whom the surviving spouse can appoint the trust property following his or her death to the settlor's children from a prior marriage. A testamentary limited power of appointment allows the surviving spouse to take into account changes in the circumstances of the beneficiaries after the settlor's death. However, a testamentary limited power of appointment also provides the opportunity for the surviving spouse to disinherit one of the potential beneficiaries for any reason, even though such a disinheritance may not have been the intent of the settlor.

As evidenced by the various subject matters addressed

herein, estate planning for a second marriage oftentimes involves different considerations from estate planning for a first marriage. A client may have support obligations to his or her former spouse, and may have acquired substantially more wealth between the time of his or her first marriage and anticipated second marriage. Further, a client may have children from a first marriage whom he or she wishes to benefit as well as his or her spouse. Depending upon the age of the children and the relationship of the children and the prospective spouse, as well as the wishes of the client, development of an estate plan on behalf of the client may involve detailed planning in order to ensure both the children and the spouse benefit in the manner intended by the client. As estate planning for a second marriage may present significant hurdles that do not exist in connection with estate planning for a first marriage, an attorney should give each aspect of a client's estate plan the time and attention required to fully address the disposition of assets and to ensure the client's estate plan is carried forth to the fullest extent possible.

PREMARITAL ISSUES IN SECOND MARRIAGES:

What to Plan for the Second Time Around

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Second Marriages

- ◉ Traditional v. Blended Family
 - Love and Affection Not Guaranteed
 - Relationships during Life v. after Death
- ◉ Estate Planning Considerations
 - Planning Essential for Second Marriages
 - No "Typical" Estate Plan for Blended Family

Consequences

- ◉ Legal Entitlements upon Death
 - Intestacy Favors the Surviving Spouse
 - Protection from Disinheritance
- ◉ Contractual Entitlements upon Death
 - Group Life Insurance – Default Beneficiary
 - ERISA Retirement Plans – Spousal Consent
 - IRAs and Roth IRAs – Default Beneficiary
 - Previous Separation Agreements and Divorce Decrees

Consequences

- ◉ Benefits Affected during Life
 - Alimony and Spousal Support
 - Survivor Annuities and Health Insurance
 - Social Security Benefits
- ◉ Adverse Tax Consequences
 - Taxation of Social Security Benefits

Prenuptial Agreements

- ◉ Importance for Second Marriages
 - Preserving Wealth
 - Protecting Children from a Prior Marriage
 - Planning in the Event of Divorce
- ◉ Practical Tips for Gathering Information
 - Personal – Relationships, Objectives
 - Financial – Tax Returns, Financial Statements

Preuptial Agreements

- ◉ Goals of a Prenuptial Agreement
 - Enforceable
 - Fully Address Client's Assets
- ◉ UPAA: Prenuptial Agreement Void if
 - Not Voluntarily Executed or
 - Unconscionable when Executed and Party Against Whom Enforcement is Sought:
 - Not Provided Fair and Reasonable Disclosure
 - Did Not Voluntarily/Expressly Waive Disclosure
 - Lacked Adequate Knowledge of Property and Financial Obligations

Preuptial Agreements

- ◉ Protecting Your Client upon Divorce
 - Addressing Division of Assets
 - Real Property
 - Retirement Plans
 - Business Interests
 - Alimony and Spousal Support
 - Choice of Law Provision

Preuptial Agreements

- ◉ Integral Part of the Estate Plan
 - What is a Spouse Entitled to upon Death?
 - Mutual Waiver of Rights in Estate
 - Prepare or Revise Estate Planning Documents Simultaneously
 - Avoids Inconsistencies
 - Avoids Conflicts upon Death

Preuptial Agreements

- ◉ Change of Retirement Plan Beneficiary
 - ERISA Plans
 - Prenuptial Agreement is Not "Spousal Consent"
 - Provision Agreeing to Execute after Marriage
 - Follow Up after Marriage

Blended Families: Estate Plan

- ◉ Conflict:
 - Surviving Spouse
 - Deceased's Children from a Prior Marriage
 - Self-Interest May Outweigh Love and Affection
- ◉ Trust Interests:
 - Investing for Income
 - Investing for Growth

Blended Families: Estate Plan

- ◉ Designating Fiduciaries
 - Trust
 - Trustee have Power to Frustrate Estate Plan?
 - Durable General Power of Attorney
 - Attorney-in-Fact have Power to Frustrate Estate Plan?

Blended Families: Estate Plan

- ◉ Designating Health Care Agents
 - Who Will be Available?
 - Who Does the Client Feel should be Responsible for Health Care Decisions?

Blended Families: Estate Plan

- ◉ Balancing the Interests with QTIP Trust
 - Support Surviving Spouse during Life
 - Control Disposition after Spouse's Death
 - Reduce or Eliminate Federal Estate Tax
 - Protection from Creditors and Predators

Blended Families: Estate Plan

- ◉ Supporting Surviving Spouse: Qualifying Income Interest for Life
 - Entitled to All Income, Payable at Least Annually
 - No Power to Appoint to Other than Surviving Spouse during his or her Life

Blended Families: Estate Plan

- ◉ Drafting: How Much Control Should the Surviving Spouse Have?
 - Only Entitled to All Income
 - Right to Require Distribution of Income, Income Not Distributed Added to Corpus

Blended Families: Estate Plan

- ◉ Preserving Wealth for Children from Prior Marriage
 - Surviving Spouse's Right to Principal
 - No Rights to Principal Distributions
 - Discretionary Distributions
 - Trustee Considers Other Available Resources

Blended Families: Estate Plan

- ◉ Preserving Wealth for Children from Prior Marriage
 - Grantor Designates Remainder Beneficiaries
 - Grantor Maintains Complete Control
 - Surviving Spouse has No Control

Blended Families: Estate Plan

- ◉ Preserving Wealth for Children from Prior Marriage
 - Testamentary Limited Power of Appointment
 - Limited to Beneficiaries Named by Grantor
 - Change in Circumstances can be Considered
 - Potential to Disinherit a Named Beneficiary
