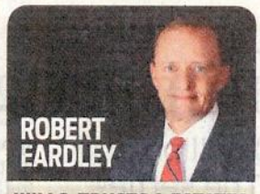
A second marriage estate plan: 'inheritance rights' for spouse, stepchildren



WILLS, TRUSTS & ESTATES

One in every two marriages ends in divorce. Other marriages endure until death. In either situation, the newly single person often remarries and stepchildren become part of the blended family.

Not surprisingly, in a second marriage between seniors, each spouse often desires that his or her own property be inherited by his or her children. However, Florida law can significantly disrupt this desire by diverting a large portion of a deceased spouse's estate to stepchildren or other beneficiaries. This occurs because, under Florida law, a surviving spouse is entitled to a "statutory inheritance" from the deceased spouse's estate — regardless of the terms of the deceased spouse's estate plan or of the surviving spouse's own economic needs.

Florida law provides two main statutory inheritance rights for a surviving spouse — homestead and the elective share.

The homestead right provides that the Florida home, if not jointly owned by the spouses, may only be bequeathed outright to the surviving spouse. Any other bequest of the home is void.

Instead, when the homeowner spouse dies, the surviving spouse becomes the legal owner of a "life estate" in the home, with the deceased spouse's children entitled to possession and ownership upon the surviving spouse's later death.

The "life estate" right permits the surviving spouse to use the home rent-free for the remainder of his or her life.

Alternatively, the surviving spouse may elect a 50 percent ownership interest in the home. In this case, the deceased spouse's heirs immediately become owners of the other 50 percent.

In either case, both the life estate and 50 percent ownership situations present unsettling difficulties. For example, upon a sale of the home, all owners must consent to the sale, and the surviving spouse and each of the deceased spouse's heirs are entitled to a proportionate share of the proceeds.

Florida's second inheritance right is the "elective share" right. ES provides the surviving spouse the option to claim an "elective share" of the deceased spouse's estate, which is 30 percent of the deceased spouse's "elective estate." The elective estate generally includes all of the deceased spouse's property other than the homestead.

The ES value is calculated to an exact dollar amount, paid to the surviving spouse. The ES funds then become the surviving spouse's own property, free and clear.

Although many spouses have mates who would kindly decline to claim the inheritance benefits available to a surviving spouse — at a future point, the surviving spouse may not be positioned to carry out that decision.

For example, Mr. and Mrs. Smith are in a second marriage and each is 70. Mr. and Mrs. Smith verbally agree that the survivor will decline all homestead and ES rights.

Fast forward 15 years. Mr. Smith has just died and the now 85-year-old Mrs. Smith is experiencing diminished capacity. Moreover, Mrs. Smith's financial affairs are being handled by her son Tom (Mr. Smith's stepson) under a power of attorney.

Although Mrs. Smith at age 70 verbally agreed to decline all homestead and ES rights, Tom is not so gracious, especially because he is a beneficiary of Mrs. Smith's estate. Moreover, Tom likely has a legal obligation, as Mrs. Smith's power of attorney, to collect all assets available to her — including all inheritance rights — even if he wishes to honor his mother's promise to Mr. Smith.

Fortunately, several options exist to address spousal inheritance rights so one's estate and heirs are protected.

One option is for the spouses to legally waive all spousal inheritance rights by means of a postnuptial agreement. In such a case, both spouses are then at liberty to implement their estate plans as they desire and unconstrained by Florida inheritance laws.

If one spouse is unwilling to enter into a postnuptial agreement, an alternate option is for the "concerned" spouse to create an estate plan tailored to address the other spouse's 30 percent ES right. Such an estate plan typically places a significant portion of the "concerned" spouse's estate, after death, in an "elective share trust" (or ES trust) for lifetime benefit of the surviving spouse. And at the surviving spouse's later death the ES trust assets pass to the "concerned" spouse's heirs — and not to the surviving spouse's heirs.

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