The Second Marriage Estate Planning Dilemma –

Spousal Inheritance Rights for the Surviving Spouse

By: Robert H. Eardley

One in every two marriages ends in divorce. The others last until "death do us part." In either situation, a second marriage often occurs and a blended family forms.

Not surprisingly, most remarried seniors desire that their separate estates be inherited by their own children. However, Florida inheritance law can inadvertently divert a large portion of a deceased spouse's estate to the survivor and, ultimately, to the survivor's heirs.

Specifically, Florida law provides a surviving spouse a "statutory inheritance" regardless of the terms of the deceased spouse's Will or Trust. Lesser rights include the option to claim (1) "exempt property" (up to $20,000 in household items and 2 vehicles), and (2) "family allowance" – which is up to $18,000 in cash. However, the more significant inheritance rights are "homestead" and "elective share."

Florida homestead law provides that if the home is not jointly owned, then it must be devised outright to the survivor. Any other devise is void. In the case of a void devise, the survivor automatically inherits a "life estate" in the home. Alternatively, the survivor may opt for a 50% ownership interest in the home in lieu of the life estate.

In either case, Florida's spousal homestead right presents difficulties. For example, the life estate affords the survivor rent-free use of the home for

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life, but the survivor is not obligated to use the home as a residence. Instead, he or she may rent out the home or cohabitate there. Also, upon a sale, all owners (the survivor and the deceased spouse's heirs) are entitled to a share of the proceeds.

The elective share statute affords the survivor the right to claim an "elective share" of the deceased spouse's estate – which is a sum equal to 30% of the estate's value minus the value of the homestead benefit. The elective share amount is calculated pursuant to Florida statute and then paid to the survivor.

Although many spouses would gladly decline to claim inheritance benefits, at a future point the survivor may be incompetent and thus legally unable to decline.

EXAMPLE: Mr. and Mrs. Smith are in a second marriage, and each is 70 years old. They verbally agree that the survivor will decline inheritance rights. Fast forward 15 years. Mr. Smith has died, 85-year old Mrs. Smith has had a stroke, and Mrs. Smith's son Tom handles her financial affairs under a Power of Attorney. Despite Mrs. Smith's commitment to decline inheritance rights, Tom has no obligation to honor it. Moreover, Tom likely has a legal duty (under Mrs. Smith's Power of Attorney) to collect all assets available to her, including her inheritance rights.

Fortunately, spouses may enter into a prenuptial or postnuptial agreement to alter or waive their inheritance rights.

Note that if one party is unwilling or unable to waive his or her elective share right, the other can create an estate plan which satisfies the elective share right but retains the assets "in the family." This technique places a portion of the "concerned" spouse's estate, after death, into an elective share trust. This trust benefits the survivor for life and, at the survivor's later death, passes to the concerned spouse's heirs. A drawback is that the trust must be funded with a larger percentage of the estate than would have otherwise satisfied the spouse's elective share.

Importantly, other techniques exist to address inheritance rights which are beyond the scope of this article and best addressed with your estate planning advisor on a case-by-case basis.

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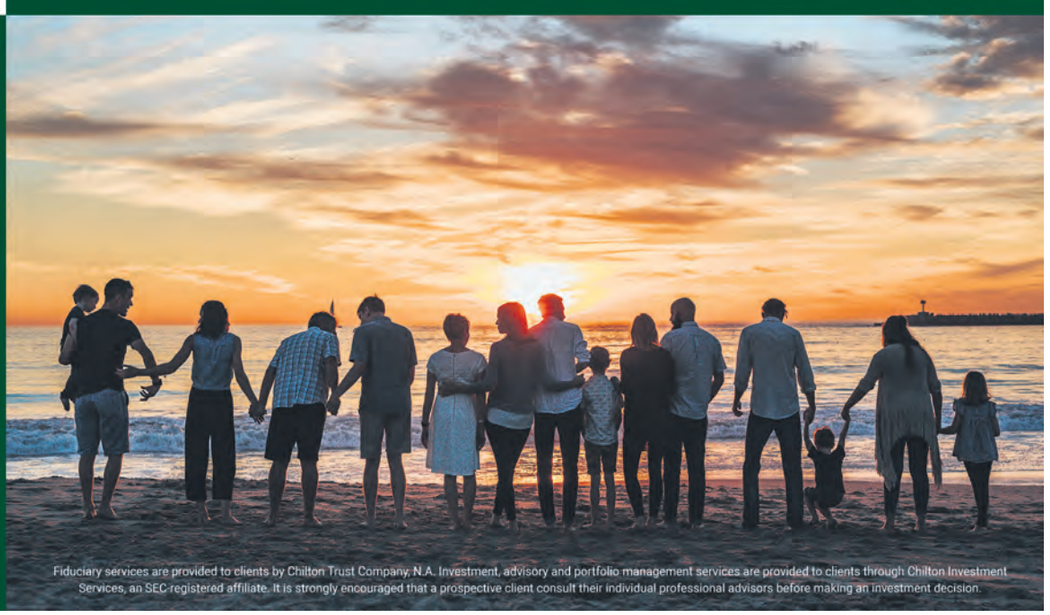

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