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PRE & POST NUPTIAL AGREEMENTS

GENERAL ESTATE PLANNING ISSUES

**BETH S. COHN, ESQ.
JABURG & WILK, P.C.
3200 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012
Direct Dial – 602-248-1030
Email: bsc@jaburgwilk.com**

INTRODUCTION

As Family Law attorneys, you are involved with the planning process in order to establish property rights of your clients prior to marriage through Prenuptial Agreements and during marriage through the use of Postnuptial Agreements. For purposes of this article, unless it is necessary to make a distinction between the legal effect of a Prenuptial Agreement or a Postnuptial Agreement, references will be made to the use of a “Marital Agreement”¹. Many of the provisions that you have in these agreements impact the rights of your clients upon the death of their spouse, including estate tax consequences. Many times, your agreements will have provisions in them that state what happens to certain property upon the death of one of the spouses.

For example, it is not uncommon, especially in second marriages, for one of the spouses to come in to the marriage owning a home, which becomes the marital home during the marriage. In many cases, the home remains titled in the name of the spouse who owned the home prior to the marriage. If the spouse who owns the home is the first spouse to die (the “Deceased Spouse”), the Marital Agreement may provide that the surviving spouse (the “Survivor”) has the right to remain in the house and live in the house, for example, rent free. Without a proper estate plan in place for the Deceased Spouse, the intent of the Deceased Spouse may not be properly carried out. Does your client have a Will or a Living Trust? If the Deceased Spouse does not have a Will or a Living Trust, are there state statutes that control what happens to the house on the death of the Deceased Spouse?

These may seem like simple straight forward issues that each Family Law attorney addresses when negotiating and drafting a Marital Agreement. It is surprising that many times these types of issues are not properly addressed. As Family Law attorneys, you must integrate your clients’ estate planning attorneys into preparing to enter into Marital Agreements to be sure that the results you are planning to achieve will be ultimately realized, as will be illustrated in more detail in this article.

SPECIFIC STATE LAW CONCERNS

The purpose of this article is not to examine and analyze specific state laws on marital rights upon the death of a spouse. It is assumed that your state has adopted a version of the Uniform Probate Code (“UPC”).² This article will not be citing specific UPC sections. You will need to consult with an estate planning attorney in your jurisdiction if you need to apply the specific statutes in your jurisdiction to the principles set forth in this article.

¹ The Uniform Premarital Agreement Act as adopted by a particular state, governs the enforcement of Prenuptial Agreements and not Postnuptial Agreements. The distinction between the enforcement of Prenuptial Agreements and Postnuptial Agreement is beyond the scope of this article.

² The following states have adopted the UPC in its entirety: Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Dakota and Utah. In addition, numerous other states have adopted parts of the UPC.

The property law concepts in this article come from the community property laws in effect in Arizona.³ Marital Agreements define property rights during marriage, which have the effect of defining the right of a spouse to inheritance under applicable state statutes. In Arizona and other community property states, the common forms of ownership are community property,⁴ separate property,⁵ community property with right of survivorship,⁶ joint tenancy with right of survivorship⁷ and tenants in common.⁸

In non-community property states, the common forms of ownership are separate property, joint tenancy with right of survivorship, tenancy by the entity and other forms of ownership that are state specific.⁹

MARITAL AGREEMENT VS. ESTATE PLAN

Marital Agreements create contractual obligations that provide that all or a portion of an estate passes to the Survivor through an estate plan. Consider again, the questions asked in the introduction to this article when reviewing the following example:

Example: Assume the Deceased Spouse dies after having entered into a Marital Agreement that provided that the Survivor could live in the personal residence owned by the Deceased Spouse for the rest of the Survivor's lifetime expense free. Also assume that after the Deceased Spouse died it is discovered that the Deceased Spouse did not revise his estate plan and that all of his assets under his existing estate plan pass to his children from his prior marriage. What are the rights of the Survivor?

³ The following states have community property governing their property laws: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin.

⁴ See A.R.S. §33-431A. The presumption under Arizona law is that property acquired during marriage is community property, in which the spouses each own an undivided one-half interest in the respective property.

⁵ See A.R.S. §25-213. Separate property in Arizona is property acquired prior to marriage, property owned by a spouse and defined as separate property in another state before moving to Arizona or property received by a spouse during marriage as a gift or through inheritance.

⁶ See A.R.S. §33-431C. This is a special form of community property formed by the granting instrument, which must be accepted by the spouses, that gives spouses the benefit of community property laws, with survivorship rights to the Survivor upon death of the Deceased Spouse.

⁷ See A.R.S. §33-431B. This is specifically not community property or tenancy in common and is formed by special language in the granting instrument, which must be accepted by the spouses.

⁸ See A.R.S. §25-204. By a Marital Agreement, spouses in Arizona can each own an undivided one-half interest in property, without the benefits of community property laws. Property owned as community property which is severed by a Marital Agreement or upon a divorce is owned by the spouses, or former spouses, as tenants in common.

⁹ The description of the forms of ownership of property in Arizona were given to the readers for purposes of understanding how property is defined in Arizona, the jurisdiction under which this author is licensed to practice law. Each reader must analyze the concepts under this article under the property laws of the state in which they practice.

Answer: The Survivor has a contractual claim as an unsecured creditor against the probate estate of the Deceased Spouse. The Survivor does not have the right to possession of the house or to live in the house rent free.¹⁰

This situation is most problematic where under state law there is no probate estate because the Deceased Spouse owned the residence in a trust.¹¹

Implementation of Estate Plan.

It is important to also understand the rules of intestate succession in your state. It is not uncommon in the case of a second marriage for a spouse to have children from both a prior marriage and the current marriage. The Marital Agreement may provide for support payments for children in the event of a divorce. It is not uncommon for a divorce decree from a prior marriage to provide that the spouse with the higher earning power maintain life insurance for the children from the prior marriage in the event of the death of that spouse. However, the decree from a prior marriage does not provide for what happens to property upon the death of one of the former spouses.

Again, using Arizona statutes for illustrative purposes, if a spouse dies intestate, the estate is distributed as follows:

a) If there are no children from a prior marriage, the Deceased Spouse's separate property and one-half of the community property that belongs to the Deceased Spouse pass to the Survivor.¹²

b) If there are children from a prior marriage, and none from the current marriage, one-half of the Deceased Spouse's community property and one-half of the Deceased Spouse's separate property pass to the children from the prior marriage and one-half of the Deceased Spouse's separate property and none of the community property pass to the Survivor.¹³

c) If there are children from both the prior marriage and the current marriage, the result is the same as in Section b., except the children from both marriages share the Deceased Spouse's one-half share of the community property and one-half of the Deceased Spouse's separate property equally.¹⁴

¹⁰ As in most UPC states, in Arizona, unsecured creditors are only entitled to claims against the probate estate after certain allowances and priority claims have been paid. See, A.R.S. § 14-3804.

¹¹ In certain circumstances, if there is no probate estate, claims can be made against non-probate assets after certain allowances and priority claims have been satisfied. See, A.R.S. § 14-6102.

¹² See A.R.S. § 14-2102.

¹³ See A.R.S. § 14-2103.

¹⁴ See A.R.S. § 14-2103.

Example: Deceased Spouse, an Arizona resident, has a probate estate of \$2,000,000.00. Decedent has three children from his prior marriage and two children from his current marriage. All of the Deceased Spouse's property is community property.

Survivor receives:	Survivor's ½ of the community property	\$1,000,000.00
	Deceased Spouse's ½ of the community property:	
Children from current marriage receive:	3/5 X \$1,000,000.00 =	\$ 600,000.00
Children from prior marriage receive:	2/5 x \$1,000,000.00 =	\$ 400,000.00
	TOTAL COMMUNITY ESTATE:	<u>\$2,000,000.00</u>

Waiver of Certain Marital Rights.

In Arizona, community property rights and marital rights are a matter of public policy and can only be waived if certain legal requirements are satisfied in a Premarital Agreement.¹⁵

Upon the death of a Deceased Spouse, the Survivor has certain statutory allowances, which are exempt from creditors' claims. If these allowances are waived in a Premarital Agreement, the Survivor gives up the right to receive assets or cash from the estate of the Deceased Spouse which are exempt from creditors' claims.

Again, these allowances will be state specific. As an example, in Arizona these allowances are the Homestead Allowance,¹⁶ the Family Allowance¹⁷ and Exempt Property.¹⁸

In addition to any statutory allowances, each state has its own set of intestacy laws, as described above, which allow the Survivor the right to receive a statutory share from the estate of the Deceased Spouse. The following is an example of

¹⁵ See A.R.S. § 25-201.

¹⁶ The surviving spouse is entitled to an allowance of \$18,000. under A.R.S. § 14-2402 (A).

¹⁷ For up to one year, the surviving spouse is entitled to up to \$12,000 or \$1000 per month by the personal representative during estate administration under A.R.S. §§ 14-2404 and 14-2405.

¹⁸ A.R.S. § 14-2403 allows the surviving spouse to receive \$7,000 of equity in household furniture, automobiles, furnishings, appliances and personal effects.

language that evidences both of these waivers and the waiver of the right of the Survivor to serve as the administrator of the estate of the Deceased Spouse.¹⁹

Except as otherwise set forth in this Agreement, Husband and Wife each shall have an immediate right to dispose of, transfer in any manner, or bequeath by Will his or her respective interests in and to any and all of their own respective estate.

Each of Husband and Wife hereby agrees forever to relinquish, renounce, release and waive (i) all right to act as executor, executrix, administrator or administratrix of the estate of the other, unless named as such in a valid Will executed, confirmed by codicil or republished subsequent to the effective date of this Agreement; and (ii) all rights, if any, to request or petition for appointment of any person as administrator or administrative, executor or executrix of the Will of the other.

Except as otherwise is set forth in this Agreement, each of the parties hereto forever relinquishes, renounces, releases and waives any right to inherit from the other and the right to receive any property of the other upon the death of the other, whether under the laws of succession, wills, community property, marital rights or otherwise, excepting only by reason of a valid Will executed, confirmed by codicil or republished subsequent to the effective date of this Agreement.

Each of Husband and Wife hereby further waives and relinquishes any right or claim of right to establish a probate homestead in or from any of the sole and separate property of the other and waives and relinquishes any right or claim to a family allowance or other allowance out of the sole and separate property of the other.

SUMMARY OF BASIC ESTATE PLANNING CONCEPTS

In structuring estates of spouses through Marital Agreements, it is important for Family Law attorneys to understand basic gift and estate tax concepts.²⁰ The gift tax system and the estate tax system are two different transfer tax systems, with the gift tax being applicable during lifetime and the estate tax being applicable upon the death of a spouse. How assets are titled and left to or for the benefit of the Survivor by a Deceased Spouse may have significant estate tax ramifications on the Survivor and possibly the children of the Deceased Spouse, especially if they are not the children of the Survivor.

¹⁹ Especially in situations where there has been a prior deceased spouse and a remarriage, there may also be concerns as to whether the new spouse should act as durable power of attorney or health care attorney for the other spouse. In some circumstances it may be advisable also to waive these rights in order to allow adult children from the previous marriage to serve in these roles.

²⁰ This is the federal gift and estate tax system, which is followed by many states. It is important that you consult with a qualified tax advisor in both federal and state gift and estate taxes in your jurisdiction.

Gifts Between Spouses.

There may be circumstances where one spouse is obligated under a Marital Agreement to make gifts to the other spouse.²¹ Gifts between spouses are not subject to gift tax because of the unlimited marital deduction.²² Everyone is entitled to a federal gift tax exemption of \$1,000,000.00, which is not applicable as to gifts between spouses.²³

Summary of Estate Tax Laws.

The following is a basic summary of the federal estate tax system. How assets are titled as a result of a Marital Agreement and how the assets pass upon the death of a Deceased Spouse will control how the assets are reported for estate tax purposes and define if and when any estate tax is due.²⁴

Assets that are included in the Gross Estate of a Deceased Spouse for federal estate tax purposes include:²⁵

1. Real Property;
2. Stocks and bonds;
3. Mortgages, notes and cash;
4. Insurance on the decedent's life (including insurance transferred within three years of the decedent's death);
5. Tangible personal property;
6. Partnership interests and membership interests;
7. Power of Appointment²⁶;
8. Annuities, including retirement benefits; and
9. Certain transfers in which the decedent retains an interest²⁷

The Gross Estate is reduced by:²⁸

1. Funeral expenses and expenses incurred in administering property subject to claims;

²¹ Sometimes these gifts are made purely financial reasons and other times these gifts are made to equalize estates to minimize the impact of the estate tax upon the death of one of the spouses.

²² Internal Revenue Code ("IRC") § 2523(a).

²³ This is called the lifetime gift tax exemption, and because of how the gift tax system works, is not applicable to gifts between spouses.

²⁴ The Estate Tax system is very complicated. Many of the general statements in this section have exceptions. You must consult an estate tax planning professional for a more detailed analysis and explanation.

²⁵ IRC §2031. Unless a special election is taken to value assets at fair market value 6 months after the date of Deceased Spouse's death under IRC § 2032, assets are valued for estate tax purposes at fair market value as of the date of Deceased Spouse's death.

²⁶ This is a power retained by the Deceased Spouse to appoint property granted to the Deceased Spouse under another person's will or trust to the Deceased Spouse, the Deceased Spouse's estate or to the Deceased Spouse's creditors.

²⁷ A discussion of these provisions is beyond the scope of this article.

²⁸ A discussion of these provisions is beyond the scope of this article.

2. Debts of the Deceased Spouse, including mortgages and liens;
3. Net losses during administration and expenses incurred in administering property not subject to claims;
4. Bequests to the Survivor spouse (marital deduction); and
5. Charitable bequests.

Every person is entitled to an exemption from the estate tax.²⁹ The amount of the lifetime exemption has gradually increased from \$1.0 million in 2001 to \$3.5 million in 2009. There is no estate tax at the date of writing of this article in 2010. The exemption equivalent is then reduced back to \$1.0 million in 2011.³⁰ For purposes of comparing the amount of the exemption equivalent and the amount of the estate tax savings available for each spouse in a marriage, the following chart shows the amount of the per person exemption equivalent for the years 2008 through 2011 as of the date of writing of this article.

<u>Year</u>	<u>Exemption Equivalent</u>	<u>Estate Tax Savings</u>
2008	\$2,000,000.00	\$ 780,800.00
2009	\$3,500,000.00	\$1,455,800.00
2010	No Estate Tax	
2011	\$1,000,000.00	\$ 345,800.00 ³¹

Use of Lifetime Exemption.

Since many estates will not reach the \$3,500,000 level, it is possible to structure a trust for the benefit of the Survivor utilizing the Deceased Spouse's lifetime exemption amount, with the remainder of the trust on the death of the Survivor to pass outright or remain in trust for the benefit of the children of the Deceased Spouse from the Deceased Spouse's prior marriage. For purposes of this article, this will be called an "Exemption Trust". The basic terms of an Exemption Trust are as follows:

- i) All income can be payable to the Survivor outright or in the discretion of the trustee;
- ii) All principal can be paid to the Survivor during the Survivor's lifetime for the health, support and maintenance of the Survivor;
- iii) There can be a discretionary right of the trustee to pay income or principal to or for the benefit of the Deceased Spouse's children during the lifetime of the Survivor;

²⁹ This is sometimes called the "lifetime exemption", the "exemption equivalent" or the "unified credit". This is calculated by applying a tax credit against the estate tax, which is the amount of the estate tax on the exemption equivalent.

³⁰ During the Bush administration, this was part of the proposed repeal of the estate tax, with it coming back to 2001 levels in 2011.

³¹ As of the date of writing of this article, there have been two estate tax reform bills proposed before Congress which freeze the exempt amount at \$3.5 million and repeal the suspension of the estate tax in 2010.

- iv) The Survivor can have a limited right to take the greater of 5% of the trust principal or \$5,000.00 for any reason one time a year;³²
- v) Can be subject to a special power of appointment (“SPOA”) – may want to provide that the trust estate does not pass to children of Survivor. Sample language of a SPOA:

Upon the death of the Survivor, the principal remaining, together with any accumulated or undistributed income therefrom, shall be paid over, conveyed and distributed to any, all or some of the following persons, free of all trusts created hereunder or subject to the trust provisions contained herein as modified by the terms of the document exercising this power of appointment, in such manner and in such proportions as the Survivor may designate and appoint by the Survivor’s Last Will and Testament, or other written document, executed and acknowledged by the Survivor and delivered by him or her to the Trustee:

- i) Children of Deceased Spouse;*
- ii) Children of Deceased Spouse’s children;*
- iii) Issue of those designated in 2;*
- iv) Spouses of those designated in 1, 2 or 3*

Marital Deduction.

All assets passing outright to the Survivor are deductible from the gross estate and qualify for the estate tax marital deduction.³³ In many cases where there is a second marriage, the Deceased Spouse does not want assets passing outright to the Survivor. In these cases, the Deceased Spouse may want to create a life estate for the benefit of the Survivor, with the remaining trust estate to pass to the Deceased Spouse’s children from a prior marriage upon the death of the Survivor. Trust assets passing to the Survivor in trust from the Deceased Spouse are subject to the marital deduction in one of the two following circumstances: (i) the trust for the benefit of the Survivor can be revoked or modified by the Survivor, all income and principal is paid to the Survivor and the Survivor has a general power of appointment over the trust.³⁴ or (ii) the trust for the benefit of the Survivor for the Survivor’s lifetime is irrevocable and is subject to an election to be deductible.³⁵ All assets passing to the Survivor and that qualify for the

³² Under IRC §2041, this is a limited power of appointment and to the extent not exercised is included in the estate of the Survivor if the Survivor dies while holding the power.

³³ IRC § 2056.

³⁴ See footnote 26.

³⁵ Under IRC §2056, property left in trust for the benefit of the Survivor is subject to the unlimited marital deduction, and is only deductible if left in trust for the lifetime of the Survivor, the property qualifies as “qualified terminal interest property” and is subject to a “QTIP” election.

marital deduction is included in the estate of the Survivor for estate tax purposes. If the trust is irrevocable and subject to the QTIP election, it has the following provisions:

- ii. All income is payable to the Survivor and if the Survivor dies, to the estate of the Survivor;
- iii. All principal is paid to the Survivor during the Survivor's lifetime for health, support and maintenance;
- iv. No one other than the Survivor can receive any benefits during the lifetime of the surviving spouse;
- v. The Survivor can have a limited right to take the greater of 5% of the trust principal or \$5,000.00 for any reason one time a year;³⁶
- vi. Can be subject to a SPOA.³⁷

Estate Planning Examples.

In the following examples, it is being assumed that there is a total taxable estate for estate tax purposes of \$7,000,000 or \$10,000,000 to illustrate several different estate planning concepts. In each example the above principles of estate planning are illustrated.

1. Assume Deceased Spouse has no estate plan and, under state law, and Deceased Spouse and Survivor each own ½ of the estate :

Estate	\$7,000,000
Deceased Spouse's share:	\$3,500,000
Survivor's share:	\$3,500,000
Lifetime Exemption is:	\$3,500,000
Deceased Spouse's Share passes to Survivor Under state law	

a. No estate tax because of the unlimited marital deduction on Deceased Spouse's death:

Deceased Spouse's Estate	\$3,500,000
Marital Deduction	<u>(\$3,500,000)</u>
Taxable estate on Deceased Spouse's Death	<u>\$ 0</u>

³⁶ See footnote 32.

³⁷ See sample language above.

b.	Survivor's estate	\$7,000,000 ³⁸
	Less Survivor's lifetime	
	Exemption	<u>(\$3,500,000)</u>
	Taxable estate upon	
	Survivor's death	<u>\$3,500,000</u>
	Tax	\$1,455,800

2. Estate plan with same facts as (1) above, except Deceased Spouse and Survivor have a Living Trust with an Exemption Trust.³⁹

a. Death of Deceased Spouse:

Deceased Spouse's estate:	\$3,500,000
*Deceased Spouse's lifetime	
Exemption in Exemption Trust ⁴⁰	<u>(\$3,500,000)</u>
Taxable Estate	<u>0</u>

b. Death of Survivor:

Survivor's estate	\$3,500,000
Survivor's lifetime exemption	<u>(\$3,500,000)</u>
Taxable estate	<u>0</u>

Trust⁴¹ 3. Estate plan with Exemption Trust and QTIP (Marital Deduction)

Estate:	\$10,000,000
Deceased Spouse's share:	\$ 5,000,000
Spouse's share:	\$ 5,000,000

\$10,000,000

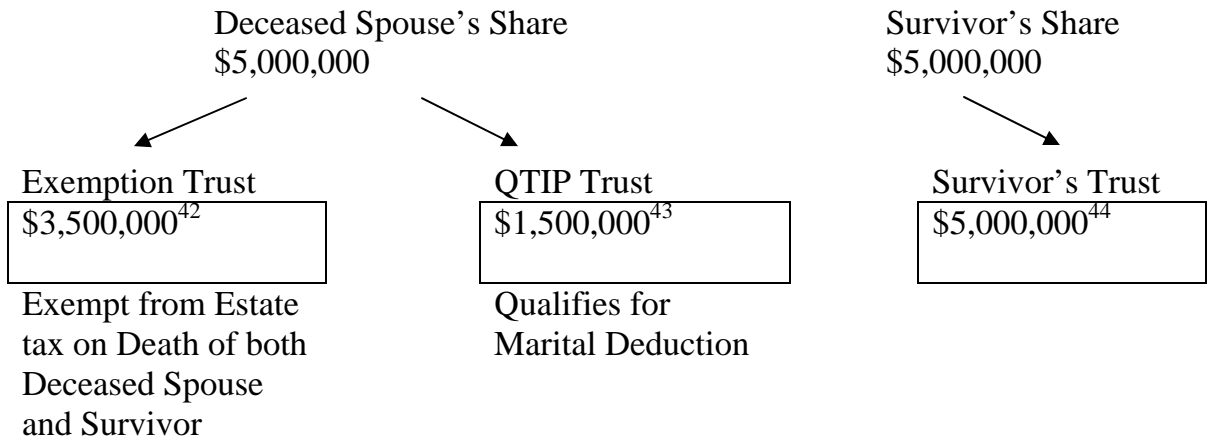


³⁸ Deceased Spouse's 1/2 of assets plus Survivor's 1/2 of assets.

³⁹ In community property states, these are generally joint trusts and in non-community property states will be separate trusts for each of the spouses.

⁴⁰ Exempt Trust is excluded from Survivor's estate. Survivor is the Trustee and beneficiary. Survivor gets all income. Survivor gets principal for health, support and maintenance. Survivor has a special power of appointment.

⁴¹ Deceased Spouse wants Deceased Spouse's 1/2 to pass to his children after Survivor's death.



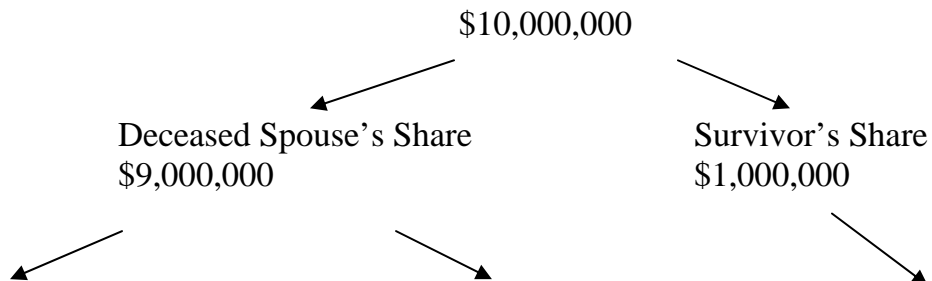
Survivor's Estate:	\$6,500,000
Survivor's Lifetime Exemption	(<u>\$3,500,000</u>)
Taxable Estate on Survivor's death	<u>\$3,000,000</u>
Estate Tax	<u>\$1,230,800⁴⁵</u>
Net Balance of Estate after Tax	\$8,769,200

4. Estate plan with Deceased Spouse having larger estate:

Estate:	\$10,000,000
Deceased Spouse's share:	\$ 9,000,000
Spouse's share:	\$ 1,000,000

Plan has Exemption Trust and QTIP (Marital Deduction).

Deceased Spouse wants Deceased Spouse's assets to pass to Deceased Spouse's children after Survivor's death:



⁴² Exemption Trust can be limited to pass only to Deceased Spouse's children.

⁴³ QTIP Trust can be limited to pass only to Deceased Spouse's children. QTIP Trust is included in Survivor's estate.

⁴⁴ Survivor's Trust can be limited to pass only to Survivor's children or give Survivor a general power of appointment.

⁴⁵ Estate taxes need to be prorated between net assets passing to both sets of children.

Exemption Trust

\$3,500,000

QTIP Trust

\$5,500,000

Survivor's Trust

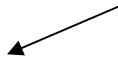
\$1,000,000

Result is the same as 3 on death of Survivor.

5. Estate with Deceased Spouse having smaller estate:

Deceased Spouse's Share
\$1,000,000

Survivor's Share
\$9,000,000



Exemption Trust

\$1,000,000⁴⁶

Survivor's Trust

\$9,000,000⁴⁷

Survivor's Estate:	\$9,000,000
Survivor's Lifetime Exemption	(\$3,500,000)
Taxable Estate on Survivor's Death	<u>\$5,500,000</u>
Estate Tax	\$2,355,800
Net Balance of Estate After Tax	<u>\$7,644,200</u>

SPECIAL CONSIDERATIONS

The following are some thoughts and suggestions to consider when advising a client to revise an estate plan after a marriage where there are children from a prior marriage, especially where your client has entered into a Marital Agreement:

1. When the Deceased Spouse owns the common family home, either the Marital Agreement, the estate planning documents or both may provide that the Survivor can live in the home until his or her death. If there are provisions in both the Marital Agreement and the estate planning documents, they must be consistent. A living trust may set up special trust provisions for the Survivor to live in the home for

⁴⁶ Balance of Exempt Trust can pass to Deceased Spouse's children on Survivor's death.

⁴⁷ If Survivor had made non-taxable gift to Deceased Spouse during Deceased Spouse's lifetime of \$2,500,000, Survivor would have saved \$1,125,000 of estate tax.

the Survivor's lifetime or until the Survivor cannot live in the home any more. The special trust can provide for a special split of proceeds on the sale of the home.⁴⁸

2. Consider an Exemption Trust and a QTIP Trust to allow for the split of assets after death of the Survivor for children from Deceased Spouse's prior marriage versus children of both spouses.

3. For retirement benefits, the Survivor has to sign a waiver of joint and survivor annuity if someone other than Survivor, such as the Deceased Spouse's children are named as beneficiaries.⁴⁹

4. If one spouse has significantly more assets than the other coming into the marriage, determine whether any gifts should be made to maximize both spouses' lifetime exemptions.

5. After signing a Marital Agreement, the spouses can change the character of the assets by agreement (e.g., converting separate property to community property). Be sure any changes are taken into account in the estate plan.⁵⁰

6. Be sure assets are titled properly after entering into a Marital Agreement or after a divorce.

7. Consider a "band-aid estate" plan during a divorce proceeding.⁵¹

8. If any rights are given under a Marital Agreement that create a legal obligation upon the death of a spouse, e.g. continued payment for support of the Survivor after the death of the wealthier Deceased Spouse, be sure that the rights of the Survivor can be enforced under the estate planning documents.

9. If you have a client that is getting married, advise your client that the marriage will invalidate their old estate plan and that they need to enter into a new estate plan.

⁴⁸ When Survivor is no longer living in the house, the proceeds can go to the children of the Deceased Spouse, if the house was owned by the Deceased Spouse prior to the marriage with the Survivor. Consent of the Survivor can also be required to allow the trustee to sell the house.

⁴⁹ IRC § 417(a)(1).

⁵⁰ A tax consideration in deciding how to title property, such as the family home, for estate tax purpose all property held as community property for community property with right of survivorship gets a step up in basis to the fair market value as of the date of death of the Deceased Spouse on both halves of the property on the death of the Deceased Spouse. This does not apply to other forms of joint ownership in community property states or non-community property states. For property that has gone down in value, this could actually be a step-down in basis.

⁵¹ Need to consider the impact of any automatic injunction in place under state law once divorce proceedings are initiated in making changes to an existing estate plan.

CONCLUSION

The purpose of this article is not to make you estate planning attorneys, but to make you aware of the many issues that estate planners deal with on an everyday basis and that what you do everyday has an impact on what we do as estate planners. I have personally heard family law attorneys say that they weren't aware that an estate plan had to be completed if the Marital Agreement provides certain right on the death of the Deceased Spouse for the benefit of the Survivor. It is more important now than ever that the estate planners and the family law attorneys work together to accomplish these common goals of our clients. Especially where there are significant estates, it is your job to get an estate planning attorney involved to protect the wishes and rights of your client on your client's death or the death of their spouse in a manner that will minimize the impact of the estate tax to them.