

# Spousal Rights Upon Remarriage

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*“Marriage is often due to lack of Judgment, Divorce to lack of Patience and Remarriage to lack of Memory”*

Minimizing the confiscation of inherited asset to cover state and federal death taxes has long been a part of the estate planning process. But a greater, but largely unrecognized, threat may result in a more significant reduction in inheritances when a relative dies: the various statutory rights that a spouse has against the decedent’s estate. The potential claims of a spouse hit a broader range of Americans than state and federal death taxes. Loss of assets to a spouse potentially hits every marriage at every legal of net worth, while death taxes impact only a small percentage of Americans.<sup>1</sup>

While a remarriage does not create greater spousal rights than a first marriage, there is often an unstated perspective that spouses in second and third marriages (particularly when there are children from a prior relationship) should have limited rights to the assets of the new spouse. Certainly most of the descendants from prior marriages have that perspective. But that is not what the law generally provides.

Studies indicate that divorced and widowed men are more likely to remarry than comparable women. According to a 1996 University of California study,<sup>2</sup> 61% of widowers are engaged in a new romantic relationship within 25 months of their wife’s death, while only 19% of the widows had a new relationship. 20% of men in second marriages marry someone who is at least ten years younger than them.<sup>3</sup> The Census Bureau reports that over 10 times as many widowers as widows who are over age 65 remarry. Roughly 500,000 US residents over age 65 marry each year.<sup>4</sup>

Dad’s marriage to a woman 20 years his junior has created heartburn for many children who have been anticipating a larger and quicker inheritance. The children may attempt to aggressively insert themselves into their parent’s marriage and estate planning process, creating new ethical and legal complexities for the parents’ advisors. According to one source, *“about one in four couples almost did not marry because of negative social pressure particularly from their adult children.”*<sup>5</sup>

Having watched their friends’ experiences, wives are increasingly raising the issue of how to

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1 A Congressional Research Service report estimated that approximately 0.2% of all estates would be subject to an estate tax in 2013. As of January 1, 2015, only 19 states and the District of Columbia have a state death tax.

2 Danielle S. Schneider, *Dating and Remarriage over the First Two Years of Widowhood*, ANN. CLIN. PSYCHIATRY 51-7, (Jun. 8, 1996).

3 Gretchen Livingston, *Tying The Knot Again? Chances Are, There’s A Bigger Age Gap Than The First Time Around*, Pew Research Center (December 4, 2014).

4 US Census Bureau, 1995.

5 Marriage and Remarriage, found at

[http://www.nap411.com/index.php?option=com\\_content&view=article&id=54&Itemid=168](http://www.nap411.com/index.php?option=com_content&view=article&id=54&Itemid=168)

prevent their husband's new spouse from obtaining family assets if the first wife predeceases the husband. As a result we have been seeing wives increasingly pressing for the use of trusts to protect family assets.

Unfortunately, most people getting remarried have little to no concept of the full legal impact of their new marriage. Many believe that documents like pre-nuptials or other waivers are only needed by the wealthy. Most do not modify their estate planning documents when they remarry. As a result they often do little planning when a remarriage occurs.

Every marriage (even second and third marriages) provides the new spouse a substantial number of legal rights in the other spouse's assets and decision making, including, but certainly not limited to, those discussed in this article. The next article in this series will discuss other issues when remarriages occur and a third article will investigate ways to limit the rights and claims of a spouse. A final article will discuss negotiation issues for divorce, from the perspective of a tax and estate planning attorney.

While many of the ideas and issues discussed in these articles equally apply to first marriages, the central focus will be on second, third or later remarriages. These laws are constantly changing. In general, the articles will reflect state and federal law as of June 1, 2015. Among the rights that are automatically attributable to any new spouses are the following:

Divorce Claims. Remarriage opens a new spouse to the potential of divorce and the concomitant loss of property and income. Discussing this loss in detail is something best left to knowledgeable divorce attorneys.

Spousal Elective Share. "Spousal share" or "spousal elective share"<sup>6</sup> refers to a legal claim that a surviving spouse has against a portion of the assets of a deceased spouse, even if the deceased spouse disinherited the survivor.<sup>7</sup> The concept of spousal elective share evolved out of the common law concepts of dower and curtesy.<sup>8</sup> Every state except Georgia permits a spousal share election to a surviving spouse or a community property right in a spouse.<sup>9</sup> There can be significant variations between state laws, and the local nuances can create an easy trap for the uninitiated advisor and their clients.

While some states provide that the elective share may only be made against the probate estate of a deceased spouse,<sup>10</sup> in most states, the assets used in calculating the spousal elective share are "augmented" to include some or all of the non-probate assets of the decedent (e.g., revocable living trusts, life insurance and IRAs that passed by beneficiary designation or jointly owned

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6 The right is also referred to as "widow's share," "statutory share," "election against the will," and "forced share."

7 For a list of state spousal election rights, see JEFFREY A. SCHOENBLUM, MULTISTATE GUIDE TO ESTATE PLANNING, tbl.6, *Rights of a Spouse*, (CCH 2015) and LAWCHEK, *Can a spouse elect against a will in this state?* available at <http://www.lawchek.com/Library1/books/probate/qanda/spouse.htm> (last viewed June 1, 2015).

8 A few states retain dower (e.g., Arkansas, Michigan, Ohio) and curtesy rights (e.g., Arkansas).

9 Georgia has a right called "Years Support" which provides for limited support to a surviving spouse. See: GA. CODE ANN. § 53-3-1 et seq.

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

financial accounts that automatically passed to a joint owner). The elective share base calculation may be reduced by debts (but normally not death taxes) and expenses of the estate (e.g., funeral expenses, administrative expenses).

In most states, the elective share is in lieu of any inheritance under the deceased spouse's Will.<sup>11</sup> A number of states reduce the elective share by the amount of assets which otherwise passed to the surviving spouse at the decedent's passing (e.g., by beneficiary designation).

**Drafting:** Consider drafting disposition documents to provide that benefits received under the dispositive documents are in lieu of any spousal elective share or other spousal right to take outside the Will.

The spousal elective share normally ranges from 30-50% of the "augmented estate" of the decedent spouse. It is often in addition to the other spousal claims (see below) that the spouse has against the decedent's estate, although the interaction of the cumulative claims can effectively limit the assets passing to the surviving spouse.

Spousal elective rights may grow over the term of the marriage. For example, in North Carolina,<sup>12</sup> the spousal elective share increases the longer the marriage lasts. For marriages that last less than 5 years, the spouse's claim is 15% of the estate, while spouses of marriages that last longer than 15 years have a 50% claim against the decedent's estate.

Because the spousal elective share is considered a taking against the decedent spouse's Will, it effectively gains a priority of distribution over the bequests in the Will, creating a potential abatement of testamentary bequests to satisfy the election. Under most state statutes, the abatement is first applied to the residuary estate and then to specific bequests. In some cases abatement can also apply to non-probate distributions.<sup>13</sup>

**Drafting:** Estate planners need to take this potential abatement into account in how they draft their documents. For example, the Will might provide that if a spousal share is elected, the abatement of bequests applies proportionately to all bequests rather than being borne solely by the residuary bequest.

**Trap:** Every state permitting a spousal elective share allows the right to be waived, but review the statutory waiver requirements closely because inattentiveness to the details can make the waiver invalid (e.g., failure to make a "fair disclosure" of all financial resources).

**Trap:** Surviving spouses generally have a limited time in which to file the election for a spousal share. The period is normally in the range of 6 to 9 months. Death of a surviving

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11 C.f., CONN. GEN. STAT. § 45a-436(b) (2015).

12 N.C. GEN. STAT. § 30-3.1 (2015); H. Chalk Broughton Jr., *Recent Changes To North Carolina's Elective Share Statute – A Trap For The Unwary Estate Planner*, POYNER SPRUILL (Apr. 07, 2014), <http://www.poynerspruill.com/publications/Pages/RecentChangesNCElectiveShareStatuteTrapForUnwaryEstatePlanner.aspx>. Similarly see: Kan. Stat. Ann. § 59-6a202(a)(1)(2015), Minn. Stat. § 52A.2-202(2014), Mont. Code Ann. §72-2-221(2014).

13 C.f., UPC § 2-209(c).

spouse before filing the election normally terminates the elective right (i.e., the surviving spouse's heirs cannot make the election on the spouse's behalf).<sup>14</sup> But a minority of states permit the claim to be made by the surviving spouse's personal representative if the surviving spouse dies during the claim period.<sup>15</sup> Particularly in remarriages this would seem to be an unfortunate rule by allowing the heirs of a spouse who survived a short time to benefit from the assets of deceased spouse in a second or third marriage.

**Trap or Opportunity?** Does the spousal elective share receive an allocated part of the estate's taxable income pursuant to Internal Revenue Code (I.R.C.) section 662? In Deutsch v. Commissioner,<sup>16</sup> the Tax Court ruled that there was not an allocation of income to the spouse because of the spousal election, while in Bingham v. U.S.,<sup>17</sup> a Massachusetts District Court came to a different conclusion.

**Trap:** In some "augmented" states, self-settled trusts, including Charitable Remainder Trusts ("CRT"), can be subject to the spousal elective share. The existence of that right is generally a disqualifying event for the CRT.<sup>18</sup> In order to avoid that disqualification, the IRS requires that a spouse must irrevocably waive any right to make a claim against the CRT.<sup>19</sup>

**Trap:** Disagreements on the value of assets, particularly assets passing outside the probate estate, can create significant and costly conflicts among the fiduciaries, the surviving spouse and other heirs.<sup>20</sup>

**Caution:** If a surviving spouse disclaims an elective share or fails to file an affirmative election, Medicaid may count the elective share as a transferred asset for purposes of qualifying for Medicaid (i.e., it may result in a delayed qualification for Medicaid).<sup>21</sup>

There are ways to reduce or eliminate or a spouse's elective share claim, but the approaches vary widely because of significant differences in state law. See the third article in this series.

**Resources:**

- Robert B. Joslyn, *Surviving Spouse's Rights To Share in Deceased Spouse's Estate*, ACTEC Study 10 (August 2004).
- Christopher P. Cline, Jeffrey N. Pennell, Terry L. Turnipseed, *Spouse's Elective Share*, 841-1<sup>st</sup> TAX MGMT (BNA).

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14 C.f., 22 Pa. Cons. Stat. § 2206 (2015); Me. Rev. Stat. Ann. tit. 18-A, § 2-203.

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

16 74 T.C.M. 935 (1997).

17 983 F. Supp. 46 (D. Mass. 1997).

18 I.R.C. §§ 664(d)(1)(B), 664(d)(2)(B). But see: *Longue Vue Foundation v. Comr.*, 90 T.C. 150 (1988), *acq.*, 1989-1 C.B. 1

19 Notice 2006-15, 2006-8 I.R.B. 501 (2/21/06); Rev. Proc. 2005-24, 2005-16 I.R.B. 909 (4/18/05).

20 C.f., *In re Estate of Hjersted*, 175 P3d 810 (2008).

21 See: *I.G. v. Dept. of Human Servs.*, 900 A.2d 840 (N.J. Super. Ct. 2006); *In re Mattei*, 647 N.Y.S.2d 415 (Sup. Ct. 1996).

- JEFFREY A. SCHOENBLUM, MULTISTATE GUIDE TO ESTATE PLANNING, tbl.6, *Rights of a Spouse*, (CCH 2015)

Community Property Rights. As of January 1, 2015, the following nine states have enacted community property laws: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.<sup>22</sup> Alaska and Tennessee<sup>23</sup> permit their residents to elect into community property treatment. Fundamentally, the laws provide that “marital assets” acquired during the marriage are jointly owned by both spouses. The community property rules vary significantly from state to state. States with community property rights do not generally provide for a statutory spousal elective share because the surviving spouse is entitled to half of the marital estate.<sup>24</sup> However, both Idaho<sup>25</sup> and Wisconsin<sup>26</sup> have a spousal elective share that can apply to some estate assets.

Homestead Rights. According in the Wall Street Journal<sup>27</sup> on average, the homes of American households age 65 and older constitute 33.1% of their net wealth. Many states grant a “homestead allowance” to a surviving spouse. The homestead allowance is generally a priority claim that a surviving spouse has against the estate of a deceased spouse.

The homestead allowance can be fairly small. For example, note the following homestead allowances:

- Alabama<sup>28</sup> provides a \$6,000 homestead allowance.
- Idaho<sup>29</sup> provides a \$50,000 homestead allowance.
- Maine<sup>30</sup> provides a \$7,000 homestead allowance.
- Oregon<sup>31</sup> allows the surviving spouse to occupy the homestead for one year.
- Virginia<sup>32</sup> provides a \$20,000 homestead allowance.

As noted above, the homestead allowance is often treated as a claim for a defined sum against the estate, rather than a right to directly claim the homestead residence. For example, Idaho<sup>33</sup> provides: “*The homestead allowance is not a right to claim ownership of, or succession to, any homestead owned by the decedent at the time of the decedent's death but is only the right to claim the sum set forth above.*”

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22 U.S. DEPT OF TREASURY, INTERNAL REVENUE SERV., PUBLICATION 555, COMMUNITY PROPERTY 2 (2014).

23 The Tennessee Community Property Trust Act of 2010, TENN. CODE ANN. §35-17-101 to -108 (2015); See also: Dan Holbrook, *Where There's a Will*, TENN. B.J., Dec. 2010, at 26; William Roberts, *A Cautionary Tale Community Property Trusts*, TENN. B.J., July 2011, at 24.

24 For more information, see: Terry L. Turnipseed, *Community Property v. The Elective Share*, 72 La. L. Rev. (2011) Available at: <http://digitalcommons.law.lsu.edu/lalrev/vol72/iss1/8>

25 Idaho Code Ann. § 15-2-205(a)(2015)., which applies to “quasi-community property.”

26 Wis. Stat. § 851-055(2015), which applies to “deferred marital property.”

27 “*Lost Inheritance*” WALL ST. J., (March 7, 2013),

28 ALA. CODE § 43-8-110 (2015).

29 Idaho Code Ann. § 15-2-402(2015).

30 Me. Rev. Stat. Ann. tit. 18-A, § 2-402 (2015).

31 Or. Rev. Stat. § 114.005(2015)

32 Va. Code Ann. § 64.2-311(2015).

33 Idaho Code Ann. § 15-2-402(2015).

Florida has unique rules that govern the devise of a homestead. In Florida a surviving spouse has a constitutional right to a life estate in the homestead,<sup>34</sup> or the surviving spouse can elect to take an undivided one-half interest in the homestead as a tenant in common.<sup>35</sup> These rights exist even if the surviving spouse was not on the title and even if the residence was held in trust.<sup>36</sup> The statute reads: “As provided by the Florida Constitution the homestead shall not be subject to devise if the owner is survived by a spouse or a minor child or minor children, except that the homestead may be devised to the owner’s spouse if there is no minor child or minor children.”<sup>37</sup> Florida homestead rights can be waived.<sup>38</sup> The Florida homestead rules are very complex and should not be handled without a thorough knowledge of their unique provisions.<sup>39</sup>

**Trap:** Because of the spousal rights to the residential homestead, creditors may require the non-owner spouse to be liable for any mortgage debt on the homestead, waive their homestead right or subordinate the spouse’s legal right to the homestead to the mortgage holder.<sup>40</sup>

**Trap:** Clients who move their residency to Florida after having signed a marital agreement should have a local attorney review the agreement to determine if it effectively waives the Florida homestead rights.

**Spousal Support.** A number of states provide for support rights to a surviving spouse.<sup>41</sup> For example, the Georgia “Years Support” claim is a priority claim that a surviving spouse and/or minor child can make against a deceased spouse’s testate or intestate estate.<sup>42</sup> The Georgia statute<sup>43</sup> provides: “The surviving spouse and minor children of a testate or intestate decedent are entitled to year’s support in the form of property for their support and maintenance for the period of 12 months from the date of the decedent’s death.” A number of states have similar rights that are often called a “family allowance.”

**Drafting:** Unless contrary language is provided in the Will, the right to claim Years Support or a family allowance may be in addition to any bequests to the surviving spouse.

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34 FLA. CONST. art. X, § 4(c).

35 FLA. STAT. § 732.401(2) (2015).

36 FLA. STAT. § 732.401 (2015).

37 FLA. STAT. § 732.4015(1) (2015).

38 FLA. STAT. § 732.702 (2015) (“Each spouse shall make a fair disclosure to the other of that spouse’s estate if the agreement, contract, or waiver is executed after marriage. No disclosure shall be required for an agreement, contract, or waiver executed before marriage.”).

39 For more information see: Jeffrey A. Baskies, *Florida Homestead Laws Present Malpractice Traps for the Unwary*, 35 EST. PLAN. J. 23 (May 2008); Jeffrey A. Baskies, *New Florida Homestead Laws Add Flexibility in Estate Planning*, 38 EST. PLAN. J. 13 (Mar. 2011); Jeffrey A. Baskies, *Please Don’t Plan with Your Clients’ Florida Homesteads*, ASSET PROTECTION PLAN. NEWSLETTER (LISI), no. 209, Sept. 24, 2012; Chuck Rubin, *Restrictions on Transfers of Florida Homestead Property Chart*, ASSET PROTECTION PLAN. NEWSLETTER (LISI), no. 210, Oct. 4, 2012.

40 See also *National State Requirements*, WORLD WIDE LAND TRANSFER (Feb. 26, 2012), <http://worldwidelandtransfer.com/marital-signature-requirements> (summarizing these state rules).

41 For a list of spousal rights in addition to the spousal election, see JEFFREY A. SCHOENBLUM, *MULTISTATE GUIDE TO ESTATE PLANNING*, tbl.6.01 (CCH 2015).

42 GA. CODE ANN. § 53-3-1 to -20 (2015).

43 GA. CODE ANN. § 53-3-1(c) (2015).

It generally makes sense to provide in the Will that any spousal bequests are “in lieu” of any such rights to avoid an unexpected increase in the passage of assets to the spouse.

**Opportunity:** In many states, the family allowance is a priority payment that steps in front of other unsecured debts of the estate. For example, the Alabama statute reads: <sup>44</sup> “*The family allowance is exempt from and has priority over all claims, but does not have priority over the homestead allowance.*”<sup>45</sup> As a consequence, these rights may be used to pass assets to a surviving spouse and/or minor child even if the estate is insolvent.

Personal Property Rights. A number of states provide that a surviving spouse has a priority claim to some of the tangible personal property of a deceased spouse. The property is often referred to as “Exempt Property.” In many cases, personal property right is in addition to any other benefits the surviving spouse might receive upon the decedent passing.<sup>46</sup>

The right may be to particular tangible personal property or may be expressed in a monetary value. For example, the Uniform Probate Code provides:<sup>47</sup> “*In addition to the homestead allowance, the decedent’s surviving spouse is entitled from the estate to a value, not exceeding \$15,000 in excess of any security interests therein, in household furniture, automobiles, furnishings, appliances, and personal effects.*”

For example, Oklahoma<sup>48</sup> provides: “... *the following property must be immediately delivered by the executor or administrator to such surviving wife or husband, and child or children, and is not to be deemed assets, namely:*

1. *All family pictures.*
2. *A pew or other sitting in any house of worship.*
3. *A lot or lots in any burial ground.*
4. *The family Bible and all school books used by the family, and all other books used as part of the family library, not exceeding in value of One Hundred Dollars (\$100.00).*
5. *All wearing apparel and clothing of the decedent and his family.*
6. *The provisions for the family necessary for one (1) year's supply, either provided or growing, or both; and fuel necessary for one (1) year.*
7. *All household and kitchen furniture, including stoves, beds, bedsteads and bedding”*

**Trap:** In second and third marriages, family heirlooms may be lost to the surviving spouse’s family, particularly if the surviving spouse can designate the personal property they want to receive. To avoid this problem, clients should either create personal property lists designating how important family personal property is to pass (and reference those lists in their Wills) or provide for such passage in their Wills.<sup>49</sup>

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44 ALA. CODE § 43-8-112 (2015).

45 ALA. CODE § 43-8-112 (2015).

46 C.f., FLA. STAT. § 732-402(4)(2015) provides: “*Exempt property shall be in addition to protected homestead, statutory entitlements, and property passing under the decedent’s will or by intestate succession.*”

47 UNIF. PROB. CODE § 2-403 (UNIF. LAW COMM’N 2014).

48 58 OK Stat § 58-311 (2014) (emphasis added). Similarly see: Fla. Stat. § 732.402, N.Y. EPT. LAW § 5-3.1 (2015) and Mo. Rev. Stat. § 474-0250(2015).

49 For example, FLA. STAT. § 732-402(5)(2015) provides: “*Property specifically or demonstratively*

Intestate Claims. There are at least three ways that a surviving spouse can obtain an intestate share of a deceased spouse's estate.

First, if a married client dies without a Will<sup>50</sup>(or similar dispositive documents), then the surviving spouse is entitled to a share of the estate, generally limited to the intestate estate (e.g., excluding jointly held bank accounts that pass to the co-owner, IRAs pass to the named beneficiary, etc.). If the decedent leaves no descendants (or in many states, no surviving parent<sup>51</sup>), then the surviving spouse will normally receive 100% of the intestate estate.<sup>52</sup> In some states, the surviving spouse receives at least a minimum dollar amount or minimum percentage of the intestate estate even if there are surviving descendants or surviving parents.<sup>53</sup>

Second, in most states, if the decedent's Will existed before a marriage and was not made in contemplation of the marriage, the new spouse is entitled to an intestate share of the estate.<sup>54</sup> For example, Michigan's provides: <sup>55</sup> "if a testator's surviving spouse marries the testator after the testator executes his or her will, the surviving spouse is entitled to receive, as an intestate share, not less than the value of the share of the estate the surviving spouse would have received if the testator had died intestate as to that portion of the testator's estate, if any..." [excluding certain transfers for the decedent's descendants]. Assume the decedent dies with no surviving descendants or parents. Michigan provides:<sup>56</sup> "The intestate share of a decedent's surviving spouse is ... (a) The entire intestate estate if no descendant or parent of the decedent survives the decedent."

Third, even if the decedent spouse executed a new Will, there is at least one other route by which a surviving spouse could inherit. If all of the named heirs should predecease the decedent or if a trust was created and all of the trust beneficiaries die before the termination of the trust, the surviving spouse might have a right to inherit as a surviving intestate heir – with a priority of intestate inheritance in front of more remote family members.

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*devised by the decedent's will to any devisee shall not be included in exempt property."*

50 A Lawyers.com study noted that in 2009 only 35% of Americans had a Will. See: *Lawyers.com Survey Reveals Drop in Estate Planning By Americans in 2009; Ailing Economy Likely Reason*, copy at: <http://www.lexisnexis.com/en-us/about-us/media/press-release.page?id=1268676534119836>

51 C.f., ALA. CODE § 43-8-41(2015) which provides that "[i]f there is no surviving issue but the decedent is survived by a parent or parents, the first \$100,000.00 in value, plus one-half of the balance of the intestate estate" passes to the surviving spouse with the parents equally taking the remainder of the estate. Similarly see: Mich. Comp. Laws § 700.2102, MD Code Est. & Trusts § 3-102.

52 C.f., FLA. STAT. § 732.102(1) (2015) and GA. CODE ANN. § 53-2-1(c) (2015). But see: Ark. Code § 28-9-214 which provides that the spousal intestate share is reduced to 50% of the estate if the marriage has not been in existence for three years before the decedent's death.

53 C.f., Hawaii grants a surviving spouse the first \$200,000 of assets of an intestate estate and 75% of the balance of the estate if the decedent is only survived by a parent. Haw. Rev. Stat. § 560:2-102(2) (2015).

54 C.f., Me. Rev. Stat. Ann. tit. 18-A, § 2-301.

55 Mich. Comp. Laws § 700.2301(1). This rule is limited by certain exceptions in paragraph (2) of the statute. (emphasis added)

56 Mich. Comp. Laws § 700.2102(1)(a).

**Drafting:** Wills and trusts should specifically deal with this potential intestate claim. For example, the document can provide that if there are no living descendants or named heirs, the assets of the estate or trust pass to designated charities.

**Caution:** The interaction and detailed calculation of the various claims and elections that a surviving spouse can make against the estate vary widely from state to state. A discussion of these variations is beyond the scope of this article.

**Resource:** JEFFREY A. SCHOENBLUM, *MULTISTATE GUIDE TO ESTATE PLANNING*, tbl.7, *Intestate Succession*. (CCH 2015).

**ERISA.** The Employee Retirement Income Security Act of 1974 (ERISA)<sup>57</sup> governs qualified retirement plans. Upon marriage a spouse normally and automatically becomes the primary beneficiary of the other spouse's ERISA defined contribution account.<sup>58</sup> In making a pre-retirement distribution decision for a defined benefit or money purchase plan, unless both spouses choose otherwise, the form of payment must be a qualified joint and survivor annuity, providing payments over the participant's lifetime and then a surviving spouse's lifetime.<sup>59</sup>

In addition, changes in beneficiary designations of an ERISA retirement plan generally require written approval of a spouse if the participant is married.<sup>60</sup>

IRAs do not have similar mandatory spousal rights or spousal approval requirements in changing the IRA beneficiary.<sup>61</sup>

**Survivor Benefits.** A surviving spouse who is named as beneficiary of a retirement plan or IRA can elect to either roll over the IRA to the spouse's own IRA<sup>62</sup> or retain the deceased spouse's IRA. If the spouse elects to maintain the deceased spouse's IRA, they have the option of delaying required minimum distributions until the end of the year in which the deceased spouse would have reached age 70½.<sup>63</sup>

**Trap:** If the surviving spouse needs IRA funds before age 59½, the distribution may be subject to a 10% early withdrawal penalty if the spouse converts the IRA to the spouse's own IRA.<sup>64</sup> It may make more sense to treat the IRA as an inherited IRA which is not subject to the 10% penalty.

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57 Pub. L. No. 93-406, 88 Stat. 829 [hereinafter "ERISA"].

58 I.R.C. § 401(a)(11)(B)(iii) (2015). I.R.C. § 401(11)(D) (2015) permits a retirement plan to require that the marriage must meet a one year requirement, but, in the author's experience, most plans have not adopted this exception.

59 I.R.C. § 401(a)(11).

60 29 U.S.C. § 1055(c)(2)(A) (2015).

61 29 U.S.C. §§ 1051–1061 (2015).

62 I.R.C. § 408(d)(3)(C)(ii)(II) (2015).

63 I.R.C. § 401(a)(9)(B)(iv) (2015).

64 See I.R.C. § 72(t) (2015); *Sears v. Comm'r*, 100 T.C.M. (CCH) 6 (2010); *Gee v. Comm'r*, 127 T.C. 1 (2006); Bob Keebler & Michelle Ward, *Sears v. Commissioner: Spousal Rollover Trap*, EMP. BENEFITS & RETIREMENT PLAN. NEWSLETTER (LISI), no. 543, Oct. 12, 2010.

**Resource:** Natalie B. Choate, Life and Death Planning for Retirement Benefits (2011).

**Social Security Benefits.** A spouse has at least two possible benefits from social security. First, if the couple gets divorced, the divorced spouse may have claims to a portion of their ex-spouse's social security benefits. Second, a surviving spouse may have rights to a portion of their deceased spouse's benefits. See the Social Security Administration's two page statement summarizing the rights of a spouse to Social Security benefits.<sup>65</sup>

**Resources:** There are various strategies by which married couples can significantly increase their social security benefits. See the following resources:

- LAURENCE J. KOTLIKOFF, ET AL., *GET WHAT'S YOURS: THE SECRETS TO MAXING OUT YOUR SOCIAL SECURITY* (2015).
- *How to Maximize Your Social Security Benefits*, AARP, available at [www.aarp.org](http://www.aarp.org).
- Kenneth A. Hansen and Steven J. Carlson, *Maximizing After-Tax Social Security Lifetime Payouts*, 1 *Taxes* 55-62 (November 2013).

**Filial Support Laws.** Older Americans have not been planning for their retirement and as a consequence, many are unprepared for their long term care needs. Many elderly are living longer than they ever expected and are outliving their assets.<sup>66</sup> According to a 2011 MetLife Survey,<sup>67</sup> an average private room in a nursing home has a cost of \$87,235 per year. Costs have only increased since 2011.

According to the Statute of Frauds, an individual cannot generally be held liable for the debts of another person without agreeing to such liability.<sup>68</sup> However, as many as 30 states have adopted Filial Support statutes, in which family members can be held legally liable for the support obligations of spouses, parents and other family members. These costs include health care and long term care costs, even if the family member has not signed a document guaranteeing those liabilities or received any assets from the needy family member.

In California,<sup>69</sup> Connecticut,<sup>70</sup> Indiana,<sup>71</sup> Massachusetts,<sup>72</sup> North Carolina,<sup>73</sup> Ohio,<sup>74</sup> failure to provide the necessary support to a spouse can be a criminal felony or misdemeanor.

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65 SOCIAL SECURITY ADMINISTRATION,

<http://www.ssa.gov/sf/FactSheets/WomenandSSrev1.pdf> (last visited July 29, 2015).

66 According to a study by Allianz Life Insurance Company of North America 82% of married respondents in their late 40s with children have a greater fear of outliving their assets than they did of dying. See: *Retirement in America will Never be the Same*, available at <https://www.allianzlife.com/retirement-and-planning-tools/reclaiming-the-future/white-paper-findings> (last visited July 30, 2015).

67 MARKET SURVEY OF LONG-TERM CARE COSTS, METLIFE (2011), available at <https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-market-survey-nursing-home-assisted-living-adult-day-services-costs.pdf>; see also COST OF CARE SURVEY, GENWORTH (2014), available at [https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/130568\\_032514\\_CostofCare\\_FINAL\\_no\\_nsecure.pdf](https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/130568_032514_CostofCare_FINAL_no_nsecure.pdf).

68 See, e.g., FLA. STAT. § 725.01 (2015) (Florida's version of this provision of the Statute of Frauds).

69 CAL. PENAL CODE § 270(a) (2015) provides that non-support of a spouse is a Misdemeanor.

70 CONN. GEN. STAT. § 53-304 (2015) provides for up to a year of imprisonment.

71 IND. CODE § 35-46-1-6 (2015) provides that non-support of a spouse is a Class D Felony.

72 MASS. GEN. LAWS ch. 273, § 1 (2015) provides that non-support is a felony.

73 N.C. GEN. STAT. § 14-322 (2015) provides that non-support of a spouse is a Class 1 or 2 Misdemeanor.

**Caution:** The increased life expectancy of Americans, combined with their lack of adequate financial preparation for their long term care, will cause increased enforcement of Filial Support Laws against family members. This right may prove to be particularly problematic in second and third marriages, even when there is a prenuptial agreement in place.

**Opportunity:** On the other side of the coin, if you represent an impoverished elder or incapacitated client, do you raise the specter of Filial Support Laws to family members?

**Opportunity:** If the client's state of residency has a strong Filial Support statute, consider obtaining a Long Term Care policy for the spouse to insure against the cost and avoid Medicaid issues on the couple's joint assets.

**Resources:**

- Katherine C. Pearson, *Filial Support Laws in the Modern Era: Domestic and International Comparison of Enforcement Practices for Laws Requiring Adult Children to Support Indigent Parents*, 20 ELDER L.J. 269 (2013).
- Susan T. Peterson, *The Price of Admission: Liability and Responsibility for Nursing Home Expenses*, MINN. BENCH & B. (2009), [http://www2.mnbar.org/benchandbar/2009/mj09/nursing\\_home.html](http://www2.mnbar.org/benchandbar/2009/mj09/nursing_home.html) (discussing spousal responsibility in Minnesota).
- Kelly Greene, *29 States That Could Make Adult Children Pay for Mom's Care*, WALL ST. J. (June 25, 2012, 10:28 AM), <http://blogs.wsj.com/totalreturn/2012/06/25/29-states-that-could-make-adult-children-pay-for-moms-care/>
- Shannon Frank Edelstone, *Filial Responsibility: Can the Legal Duty to Support our Parents be Legally Enforced?* 36 FAM. L.Q. 501 (2002);
- Ben Matlin, *Providers Pursue Kids For Parents' LTC Costs*, FIN. ADVISOR (Aug. 4, 2014), <http://www.fa-mag.com/news/providers-pursue-kids-for-parents--ltc-costs-18763.html>;
- Northwestern MutualVoice Team, *Who Will Pay for Mom's or Dad's Nursing Home Bill? Filial Support Laws and Long-Term Care*, FORBES (Feb. 3, 2014, 8:45 AM), <http://www.forbes.com/sites/northwesternmutual/2014/02/03/who-will-pay-for-moms-or-dads-nursing-home-bill-filial-support-laws-and-long-term-care/>.

**Incapacity Decision-Making.** Only 33% of adult Americans have executed a medical directive.<sup>75</sup> In 2000, the AARP reported that only 45% of Americans over the age of 50 have executed a durable general power of attorney.<sup>76</sup> A Lawyers.com study reported that in 2009 only 29% of Americans had either a medical directive or a general power of attorney.<sup>77</sup>

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<sup>74</sup> OHIO REV. CODE ANN. § 2919.21 (West 2015) provides that non-support of a spouse is a misdemeanor of the first degree.

<sup>75</sup> See MYTHS AND FACTS ABOUT HEALTH CARE ADVANCE DIRECTIVES, AM. B. ASS'N, (2013).

<sup>76</sup> *Where There is a Will...Legal Documents Among the 50+ Population: Findings from an AARP Survey*, AARP (Apr. 2000), <http://www.aarp.org/money/estate-planning/info-2000/aresearch-import-424.html>.

<sup>77</sup> *Lawyers.com Survey Reveals Drop in Estate Planning By Americans in 2009; Ailing Economy Likely Reason*, copy at: <http://www.lexisnexis.com/en-us/about-us/media/press-release.page?id=1268676534119836>

Some states provide that marriage automatically revokes a Medical Directive, except with regard to the new spouse. For example, Georgia law provides: “*Unless an advance directive for health care expressly provides otherwise, if after executing an advance directive for health care, the declarant marries, such marriage shall revoke the designation of a person other than the declarant's spouse as the declarant's health care agent....*”<sup>78</sup>

In the absence of Medical Directives and/or Durable General Powers of Attorney, most states provide that the current spouse has the highest priority to serve as Guardian/Custodian over the assets and/or person of an incapacitated spouse. For example, Georgia provides a statutory order of preference for Guardians: “*Individuals who are eligible have preference in the following order: (1) The individual last nominated by the adult in accordance with the provisions of subsection (c) of this Code section; (2) The spouse of the adult or an individual nominated by the adult's spouse in accordance with the provisions of subsection (d) of this Code section; (3) An adult child of the adult or an individual nominated by an adult child of the adult in accordance with the provisions of subsection (d) of this Code section....*”<sup>79</sup>

**Drafting:** If a client is entering into a new marriage and wants to name someone other than the new spouse as incapacity decision maker, then the client should execute a new Medical Directive and Durable General Power of Attorney as soon as possible, even before marriage (with language that the documents were executed in contemplation of the impending marriage). Moreover, incapacity documents should provide for when (e.g., upon the filing of a divorce complaint) and how (e.g., treat the power holder as predeceasing the maker of the instrument) any divorce impacts the agents’ appointment.

**Trap:** In a number of states, appointment of a guardian (e.g., the current spouse) revokes or limits the agent holding a General Power of Attorney (e.g., Florida,<sup>80</sup> Texas,<sup>81</sup> Virginia,<sup>82</sup> and Washington<sup>83</sup>). To avoid this problem, provide in the General Power of Attorney and Medical Directive that the named agent is also intended to be the Guardian if it is necessary to name one.

Estate Representation. In the event of an intestate estate or the failure of all named Personal Representatives to serve, the surviving spouse generally has a priority right to be the Executor/Personal Representative of the deceased spouse’s estate, even if there are children from a prior relationship. For example, the State of Washington provides: “*Administration of an estate if the decedent died intestate or if the personal representative or representatives named in the will declined or were unable to serve shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order: (1) The surviving spouse or state registered domestic partner, or such person as he or she may request to*

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78 GA. CODE ANN. § 31-32-6(b) (2015).

79 GA. CODE ANN. § 29-4-3 (2015) (emphasis added)

80 FLA. STAT. § 709.2109(1)(c) (2015).

81 TEX. CODE ANN. § 485 (2015).

82 VA. CODE ANN. § 64.2-1606 (2015).

83 WASH. REV. CODE § 11.94.010(1) (2015).

have appointed. (2) The next of kin in the following order: (a) Child or children; (b) father or mother; (c) brothers or sisters; (d) grandchildren; (e) nephews or nieces.<sup>84</sup>

**Veterans Benefits.** The Veterans Administration offers a variety of benefits and services to spouses, children, and parents of former military members and veterans who are deceased or totally and permanently disabled by a service-connected disability.

***Trap:*** For some veterans, their VA medical benefits are based upon their lack of income or assets. Marriage or divorce can change that financial calculation.

***Resource:*** For a comprehensive list of veterans' benefits to dependents and surviving spouses, see: U.S. DEP'T OF VETERANS AFFAIRS, OFFICE OF PUB. & INTERGOVERNMENTAL AFFAIRS, FEDERAL BENEFITS FOR VETERANS, DEPENDENTS, AND SURVIVORS, ch. 13 (2014), available at [http://www.va.gov/opa/publications/benefits\\_book/benefits\\_chap13.asp](http://www.va.gov/opa/publications/benefits_book/benefits_chap13.asp); DEP'T OF VETERANS AFFAIRS, SPOUSE'S PLANNING GUIDE (2011), available at [http://www.independenceplaceky.org/spouse\\_planning\\_guide.htm](http://www.independenceplaceky.org/spouse_planning_guide.htm).

**Military Residency.** The Military Spouses Residency Relief Act ("MSRRA")<sup>85</sup> provides spouses of active duty military similar (but not identical) rights to those of the military member to elect to retain residency in another state in which they were previously domiciled even when they have moved out of that state as a result of their spouse's military service.

***Opportunity:*** MSRRA provides that a military spouse does not have to go through all of the normal residency requirements of a new state (e.g., new driver's license, voter registration, etc.) and, if the previous state of residency has a lower income tax, reduce their state income taxes.

**Tax Benefits.** Married couples can file joint tax returns,<sup>86</sup> unless the couple is divorced or legally separated at year end<sup>87</sup> or the "abandoned spouse" rule<sup>88</sup> applies. When a spouse dies before year end, the surviving spouse can still file a final joint return for the year of death.<sup>89</sup>

***Opportunity:*** Non-resident aliens can elect to be treated as a resident of the United States for joint return filing purposes.<sup>90</sup> The non-resident alien election remains in place until revoked by the spouse, the death of a spouse, legal separation, or divorce.<sup>91</sup>

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84 WASH. REV. CODE § 11.28.120 (2015) (emphasis added).

85 Pub. L. No. 111-97, 123 Stat. 3007 (2009) (codified in scattered sections of 50 U.S.C. app.); see also Marc Soss, *Military Spouses Residency Relief Act*, EST. PLAN. NEWS., no. 1569 (Dec. 30, 2009); *Military Spouse Act – Residency Relief (MSRRA)*, MILITARY BENEFITS, <http://militarybenefits.info/military-spouse-act-residency-relief-msrra/> (last visited August 3, 2015).

86 I.R.C. § 6013 (2015).

87 I.R.C. § 7703(a)(2) (2015).

88 See: I.R.C. § 7703(b) (2015) for the abandoned spouse rules.

89 I.R.C. § 7703(a)(1) (2015).

90 I.R.C. § 6013(g)(1) (2015).

91 I.R.C. § 6013(g)(4) (2015).

Married couples enjoy a number of federal tax benefits. For example (but not limited to):

- The right to contribute to an IRA for a non-working spouse.
- A potentially lower marginal income tax rate if one spouse does not work or has lower income.
- A higher standard deduction.
- A higher exclusion upon sale of the primary residence.
- Tax-free passage of assets to the other spouse by gift or bequest.
- Lower transfer taxes using the portable transfer tax exemption of the first to die spouse.

Gift-Splitting. A spouse can elect to be treated as co-donor of the other spouse's gifts under the gift-splitting rules.<sup>92</sup> However, with the large transfer tax exemptions currently available, this approach will normally only be favorable for transfer tax purposes if one or both of the spouses are very wealthy.

In order for the "gift-splitting" to apply, the donor must file a gift tax return, on which the spouse consents to the treatment of the gifts as made one-half by the spouse.<sup>93</sup> Gift-splitting for any year applies to all gifts and cannot be made on a gift-by-gift basis - except if a divorce occurs in the year of the gift-split, post-divorce gifts are not gift-split. If a married couple agrees to "gift-splitting," each is treated as though they made the gift for generation-skipping tax purposes also.<sup>94</sup> The couple must be married on the date the gift is made if they intend to elect gift-splitting and neither can marry someone else before the end of the year.<sup>95</sup>

**Trap:** If gift-splitting is elected, the spouses have joint and several liability for any gift tax which may be due.<sup>96</sup> Because of this rule, consenting spouses should be very careful to assure that the value of the gifts are accurate. The consenting spouse may want to obtain an indemnity from the gifting spouse.

No Due-on-Sale. Pursuant to federal law, a spouse, at either death of the other spouse or at divorce, may have the right to receive a personal residence without the lender being able to call the loan, pursuant to any due on sale clause.<sup>97</sup> However, lenders will sometimes try to coerce the heirs into paying a mortgage assumption fee.

Protected Divorce Claims in Bankruptcy. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005<sup>98</sup> added new bankruptcy provisions providing that unpaid child support

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92 I.R.C. § 2513(a)(1) (2015). For a detailed examination of the gift splitting rules, see: Diana S.C. Zeydel, *Gift-Splitting—A Boondoggle or a Bad Idea? A Comprehensive Look at the Rules*, J. of Tax (June 2007).

93 Treas. Reg. § 25-2513-2(a) (2015). The return must be filed by the donor spouse, even if a gift tax return was not otherwise required (e.g., only annual exclusion gifts were made).

94 I.R.C. § 2652(a)(2) (2015).

95 I.R.C. § 2513(a)(1) (2015).

96 I.R.C. § 2513(d); Treas. Reg. § 25-2513-2(a) (2015).

97 12 C.F.R. § 591.5.(b) (2015) (emphasis added); *see also* Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 341, 96 Stat. 1469, 1505–07 (codified at 42 U.S.C. § 5402 (2012)). For more information see: Erik J. Murdock, Note, *The Due-on-Sale Controversy: Beneficial Effects of the Garn St. Germain Depository Institution Act of 1982*, 1984 DUKE L.J. 121.

98 Pub.L. No. 109-8, 119 Stat. 23 (2005) (codified in scattered sections of 11 U.S.C.).

and alimony are not dischargeable in bankruptcy<sup>99</sup> and providing such claims a first priority claim over other creditor claims, including taxes owed.<sup>100</sup> The former spouse must file a proof of claim with the bankruptcy court to receive payment.

**Trap:** If the payment is not a “domestic support obligation,”<sup>101</sup> then it may be discharged in bankruptcy. For example, an obligation to pay a debt of the former married couple could be discharged in bankruptcy.

**Trap:** If the alimony claim is assigned to another person, the payor may be able to wipe out the debt in bankruptcy.<sup>102</sup>

Tenancy by Entireties. Unlike unmarried individuals, married couples can own their property as “tenants by entirety” in states which permit such ownership. Such ownership can provide unique asset protection possibilities for the couple.<sup>103</sup>

**Conclusion:** Clients need to have a full understanding of the plethora of rights that their new spouse automatically obtains upon a remarriage. If there are concerns with the extent of the new rights, adjustments in the planning should to be adopted, generally before the marriage occurs.

The next article in this series will discuss other issues in remarriages.

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**Global Resources:**

- Christopher P. Cline, Jeffrey N. Pennell, Terry L. Turnipseed, *Spouse’s Elective Share*, 841-1<sup>st</sup> TAX MGMT (BNA).
- Jeffrey A. Schoenblum, Family, Kinship, Descent, and Distribution, 858-1<sup>st</sup> TAX MGMT (BNA).
- JEFFREY A. SCHOENBLUM, MULTISTATE GUIDE TO ESTATE PLANNING, tbl.6, *The Rights of a Spouse*. (CCH 2015).

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99 11 U.S.C. § 523(a)(5) (2012).

100 11 U.S.C. § 507(a)(1) (2012).

101 11 U.S.C. §101(14A) (2012).

102 11 U.S.C. §101(14A)(D) (2012) (defining “domestic support obligation,” which excludes certain assignments of the rights).

103 For more information see: Fred Franke, *Asset Protection and Tenancy [by the Entirety](#)*, 34 *ACTEC J.* 210-233 (Spring 2009).