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Estate Planning

The Second Marriage Estate Planning Dilemma

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A well-known statistic is that one in two marriages ends in divorce. Other marriages endure until death. However, in either situation the newly single person often remarries and stepchildren come into the picture.

Not surprisingly, in a second marriage each spouse usually desires that his or her own property be inherited by his or her children. However, Florida law can significantly disrupt this wish by ultimately diverting a large portion of a deceased spouse's estate to step-children or other beneficiaries. This occurs because 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 inheritance rights.

The first right is the "homestead" inheritance right. This right provides that the homestead, if not jointly owned by the spouses, may only be bequeathed to the surviving spouse. Any other bequest of homestead is void. Moreover, if the deceased spouse had one or more minor children, then no bequest at all is valid.

Instead, in both situations the surviving spouse becomes the owner of a "life estate" in the home, with the deceased spouse's children entitled to possession and full ownership upon the surviving spouse's later death. The "life estate" permits the surviving spouse to use the home rent-free for the remainder of his or her life. Of note, the surviving spouse is not precluded from using the home as a rental property or from cohabiting there with others.

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

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In any event, both the life estate and 50% ownership situations create various difficult economic and familial issues. For example, upon a sale of the home, all owners (the surviving spouse and the deceased spouse's children) generally must consent to the sale and are entitled to a share of the proceeds.

Florida's second inheritance right grants the surviving spouse the option to claim an "elective share" of the deceased spouse's estate. The elective share is equal to 30% of the deceased spouse's "elective estate," which generally includes most of the deceased spouse's probate and non-probate property, other than the homestead. The elective share is calculated to an exact dollar amount and is then paid to the surviving spouse. The elective share funds become the surviving spouse's own property, free and clear.

Fortunately, there are several options to address spousal inheritance rights so that an estate and its heirs are protected.

One option is for the spouses to waive spousal inheritance rights by means of a prenuptial or postnuptial agreement. Both spouses are then at liberty to implement their estate plans as they desire, unconstrained by Florida inheritance laws.

If one spouse is unwilling to enter into a prenuptial or postnuptial agreement, the "concerned" spouse may create an estate plan to address the other spouse's 30% elective share right. Such an estate plan typically places a significant portion of the concerned spouse's estate, after death, in trust for the surviving spouse. Upon the surviving spouse's death, the trust property passes to the "concerned" spouse's heirs. Unfortunately, this option does not effectively address the homestead right, and it also requires that more than 30% of the elective estate be placed in spouse's trust for the surviving spouse.

There are additional techniques to address inheritance rights which are beyond the scope of this article.

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