Farm Management

Estate planning issues surface in second marriage

Farm & Family

By **STACEY LEE**

Key Points

- State law, spouse change of heart supersede verbal planning agreements.
- State law grants surviving spouse certain rights under Elective Share statute.
- Want your wishes and goals followed? Write an estate plan!

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THIS month and next month, I'm going to address the often-asked question, "I'm going to get married and this is the second marriage for both of us, so do I need to update my estate plan?"

The answer is almost always yes. There are many twists and turns with estate planning for couples that are entering into a second marriage, oftentimes with children from their first marriages. This article is not intended to cover every issue, but merely to address a few of the larger impact issues that arise. As you can tell from my previous columns, I prefer using scenarios to discuss legal topics and will continue with that process in this article as well.

Our second marriage scenario

Fred and Wilma made an appointment with me to discuss whether they need to do any estate planning, as they are madly in love and plan to run off to Las Vegas to elope in the very near future.

Fred is 65 years old and is a retired farmer. He has two adult children from his first marriage. Neither child farms. Fred owns 320 acres of land in his name valued at $6,000 per acre, and a farm building site, totaling approximately $2 million. Fred also has a $1 million life insurance policy and a $500,000 SEP IRA, both of which list his two children as primary beneficiaries.

Wilma is 55 years old and is a retired nurse. She has one adult child from her first marriage. Wilma has a $100,000 CD and $100,000 in a 403(b) retirement plan, both of which list her adult child as the primary beneficiary.

Fred and Wilma have agreed orally that all of Fred's assets will go to Fred's children, and all of Wilma's assets will go to Wilma's child. They are adamant that they trust each other to follow their respective wishes that their assets will stay with their respective children, should one of them pass away.

From an attorney's perspective, that's all well and fine until one of them actually does pass away and the estate must be administered. Fred also expressed concern that Wilma is provided for during her lifetime. So, we broke the discussion up as follows:

1. Wilma's total estate is substantially lower than Fred's estate. So upon Wilma's death, regardless of who passes away first, Fred and Wilma both agreed that her CD and 403(b) retirement plan would go directly her adult child. We will not address Wilma's assets any further and, for purposes of this article, address only Fred's assets.

2. What would happen if Fred passed away first, assuming Fred died without a will?

3. What would happen if Fred passed away first, assuming Fred died with a simple "I love you"-type will, which leaves everything to the surviving spouse?

4. What would happen if Fred passed away first, assuming Fred and Wilma actually completed their estate plan to achieve their goals of providing assets, so Wilma is provided for during her lifetime, ensuring the farmland goes to Fred's adult children, and dealing with the life insurance proceeds and SEP IRA?

Death without a will

Let's look at Fred passing away first without a will. In Minnesota, residents who die without a valid will are said to have died "intestate." There are Minnesota intestacy statutes that determine who will receive your property if you die intestate.

Note that the intestacy estate of a decedent does not include assets with payable-on-death beneficiaries or jointly held property, among other things. The distribution of the property depends on whether you have a surviving spouse and who the parents are of your surviving children. Assuming Fred and Wilma were married and knowing that their respective children are not related, Wilma as the surviving spouse could elect to receive the first $150,000 of the intestate estate plus one-half of the balance of Fred's intestate estate.

In this case, Wilma would be entitled to one-half interest in the farmland. Fred's two adult children would receive the remaining one-half interest in the farmland, the $1 million life insurance proceeds and the $500,000 SEP IRA. This is not what Fred had intended, as Fred wanted the farmland to end up with his two adult children.

Furthermore, Minnesota offers an election to protect a surviving spouse in the form of a Minnesota Elective Share. Upon the death of a spouse, Minnesota grants the surviving spouse the right to elect to receive a percentage of the decedent's "augmented estate," which is calculated in a manner that includes both probate and non-probate assets of both spouses. It is based upon the length of the marriage, and the percentage ranges from 3% to 50% of the decedent's augmented estate.

The Minnesota Elective Share statutes were passed with the goals of protecting surviving spouses, and sometimes children, from being disinherited, and reinforcing the decedent's duty to support his or her spouse during his or her lifetime. This election must be made within nine months of the decedent's death, and filed and approved by the court. It can be a complicated calculation that can result in a significant change in how each of the spouses had intended their property to be distributed upon their death.

In this case, depending on how many years they were married, Wilma would be entitled to not only a percentage of interest in the farmland (up to 50%), but also a portion of the life insurance proceeds and the SEP IRA, even though the beneficiaries listed state otherwise. Again, this is not what Fred had intended.

Lastly, Fred's estate would be subject to probate in Minnesota. I have discussed the probate process in previous articles. In summary, the probate process involves a court proceeding where the judge oversees the decedent's estate administration. Probate can be a process that clients choose to avoid, due to the time frame, publicity and costs involved. In this case, there were some fairly simple alternatives Fred could put in place that would avoid the need to probate his estate.

Common 'I love you' will does not avoid probate

Now let's look at Fred passing away first with simple "I love you" wills in place. These simple "I love you" wills are fairly common. Clients have a will that give everything to their surviving spouse. In this case, 100% of the farmland would be distributed to Wilma and none to his two adult children. This would be totally contradictory to Fred's goals, as the farmland is currently titled in Fred's name and, with no other estate planning, would go directly to Wilma.

The remaining analysis is very similar to the scenario where Fred passed away first without a will. The Minnesota intestacy statutes would still apply as well as the Minnesota Elective Share option, if elected. Fred's estate would still be subject to probate, as wills do not avoid the need to probate.

And last, we examine what happens when Fred passes away first and estate planning has been completed prior to the Las Vegas wedding. To keep you all guessing, I'm saving those estate planning recommendations for next month's article.

As a preview, we will be addressing the use of a prenuptial agreement and a QTIP trust; reviewing beneficiaries; and appropriately naming power of attorneys to achieve Fred and Wilma's estate planning goals.

Stay tuned!

Stacey Lee is an attorney at law and CPA at Miller Legal Strategic Planning Centers PA., Tyler. Contact her at comments@millerlegal.com.