

DIVORCE, REMARRIAGE, COHABITATION, DEATH, TAXES, PROBATE, AND OTHER ISSUES FOR THE OLDER CLIENT

We are living longer and divorcing more often. An older client's decision to divorce, remarry, or cohabit presents specific problems. A few of these issues will be examined in this paper, as well as general health, life, and estate planning devices.

Social Security

Divorce or remarriage is likely to affect the eligibility of amount of benefits payable to an individual.

There are many nuances to social security eligibility and benefits, and the Act is subject to constant modification. Therefore, clients should be advised to contact the Social Security Administration for specific advice and information.

Resources:

a. Information by phone: 1-800-772-1213 from 7:00 a.m. to 7:00 p.m. (any time zone)

b. Local Social Security Office.

c. Free Publications

*Social Security Handbook

*A Guide for Representative Payees - #05-10076

*Disability - #05-10029

*Medicare - #05-10043

*Retirement - #05-10035

*Social Security and SSI Benefits for Children with Disabilities - #05-10026

*SSI - #05-11000

*Survivors - #05-10084

*Understanding Social Security - #05-10024

Also check www.ssa.gov for more information

Two general points:

1. Everyone should send for a "Request for Earnings and Benefit Estimate Statement." Within approximately thirty (30) days, a statement will be provided showing the number of credits earned, the earnings record, and an estimate of the benefits the person would currently receive.

2. A spouse, even though divorced, is entitled to old-age or disability insurance benefits based upon the employment of the other spouse, provided the non-employee spouse is not entitled to his or her own primary benefit in an amount equal to or greater than one-half of the amount due the other spouse. The non-employee spouse must be unmarried and at least 62 years of age. If divorced, the marriage must have existed for at least 10 years before the effective date of the divorce. If the non-employee spouse remarries before age 60, those benefits will be lost unless the marriage is terminated before reaching age 60. This loss of benefits is often overlooked by older persons about to remarry.

Health Insurance

A part of pre-divorce or post-divorce budget planning should be the investigation of the cost and availability of health insurance.

Divorce will eliminate a non-employee spouse's entitlement to health insurance. Although COBRA may be available to provide continued coverage, entitlement is limited, new insurance will have to be obtained when the entitlement period elapses (usually 36 months), and pre-existing conditions may make it impossible to obtain adequate health insurance.

Many retirement benefits provide for the retention of health insurance by the non-employee spouse if the divorce occurs after the retirement date of the employee spouse. If possible, the retirement plan should be carefully evaluated to determine the optimum divorce date.

If the non-employee spouse is 65 years of age or will be 65 within the COBRA entitlement period, and is entitled to Social Security benefits, Medicare will probably be their primary insurer. The non-employee spouse should be counseled to obtain information on the costs and benefits of Medicare Part A and Part B, and the costs, benefits, and propriety of Medigap Insurance.

Irrevocable Trusts

If a former spouse has been named as the irrevocable beneficiary of a trust, there may not be anyway to revoke or modify the instrument. However, the terms should be examined to see if there are any "escape hatches." Also, the trust may not have been funded. Lastly, the primary asset may be life insurance. In such cases, unless there is a separate obligation to maintain it, the policy can be allowed to lapse.

Joint Ownership

Joint ownership arrangements should be reviewed. While right of survivorship provisions may avoid probate, they do not resolve the issue of lifetime property management if one spouse becomes incapacitated. Additionally, the joint owner may inadvertently take a larger percentage of the decedent's assets than the decedent desired, and the property may be liable to the claims of the non-contributing owner's creditors.

In particular, review financial accounts. Many individuals place a child's name on an account for convenience, but inadvertently designate the account as "JTROS." If the account is the primary asset of the estate, that child will be paid all of the funds, even though the client intended for her estate to equally divided to her three children under the terms of her will.

Residence

In Texas, the surviving spouse has a right to remain in the homestead until death or abandonment, even if the property was owned by the deceased spouse as his/her separate property. The deceased spouse can bequeath the property to other persons, but their right to use and possession, and right to dispose of the property, is subject to the homestead right of the surviving spouse.

Alimony

Alimony commonly terminates upon remarriage. Financial consideration should be given to this loss of income that cannot be regained if the subsequent marriage fails.

Pension

As part of pre-divorce planning, pension and retirement plans should be reviewed to determine vesting, amount and types of benefits (including survivor benefits and health insurance), the availability of early withdrawal, and if permitted, any penalties that may be assessed.

Income Taxes

The so-called "marriage penalty" should be computed. Married people in Texas often pay higher taxes than two single people with the identical income.

Additionally, there is a one-time capital gain exclusion of \$125,000.00 arising from the sale of the homestead. This exclusion ceases to exist once it is used by either party to a marriage, even if exercised in a prior marriage or while single. For example, if Sally, who has never exercised the exclusion, marries Bob, who exercised the exclusion in a prior marriage, Sally cannot exercise the exclusion during her marriage to Bob.

Therefore, it is important to determine if either party to a contemplated marriage has exercised the \$125,000.00 capital gain exclusion.

Co-Habitation

If an older couple decides to cohabit instead of getting married, they should consider a Cohabitation Agreement covering topics similar to those that would be included in a premarital contract, specifically including ownership rights to property acquired during the relationship and at the termination of the relationship. If a significant bequest is made by Will to the surviving partner, particular care should be taken to try to prevent a challenge by the decedent's family. All formal requisites of state law should be made; totally disinterested witnesses should be used; and if competency may be questioned, the testator should be examined by a physician on the day of execution of the Will or Trust instrument.

Recommended Documents Relating to Personal Care

1. Directive to Physicians. This is often referred to as a "Living Will." This document authorizes the withholding or withdrawal of life-sustaining procedures in the event of a terminal condition. An agent can be appointed to make this decision if the person is comatose, incompetent, or unable to communicate.
2. Durable Power of Attorney for Health Care. This document covers both terminal and non-terminal situations. Common examples of non-terminal situations would be Alzheimers, strokes, or a coma. To the extent of conflict with the Directive to Physicians, the last executed document controls. *The Texas Legislature made changes in the law in 1997. Please make sure your durable power of attorney is up-to-date.*
3. Declaration of Guardian. This document designates the name of the person who should serve as guardian in the event of incapacity. This document can also list those persons who should not be appointed as guardian.
4. Values History Form. This document outlines what legal documents exist, their dates, and their location. It can also outline the client's wishes concerning specific medical procedures and personal relationships. Organ donations, funeral plans, resuscitation, and artificial nutrition and hydration desires are topics commonly covered.

Recommended Documents Relating to Property

1. General Power of Attorney. A general durable power of attorney grants an agent the right to deal with all kinds of property, and survives incapacity. They are an inexpensive management device that requires no maintenance. Unlike trusts, assets do not have to be transferred. Caution should be taken to insure that the probable recipient of the Power of Attorney will accept the general form used. Many banks, brokerage companies, etc, have their own forms. Also, the client should be warned about possible abuses by the agent. The power of attorney must specifically state that it survives the incapacity of the maker. It is also possible to have a power of attorney that only comes into effect upon incapacity. If all property is included, a court guardianship can be avoided. If all property is not included, the power of attorney expires if a guardian is appointed.
2. Joint Ownership or Beneficiary Designations. These include bank account, insurance, and pension beneficiary designations. Upon death, the asset goes to the beneficiary outside of the probate estate.
3. Trusts. A grantor can set up a trust to manage his/her assets until death or disability, and include provisions for management during disability and disposition upon death. Trusts can be used to protect assets from creditors, save taxes, and avoid probate.
4. Wills. A Will is effective only at death, and only if probated. In the absence of a Will, the decedent's property is distributed by the laws of intestacy. The probate of a will serves to clear title to property and clear up any disputes over ownership interests. Clients should be cautioned to let their families know they have a will, and the location of the will. They should also be cautioned not to dismantle their existing wills, or to make hand-written alterations.

This article contains general legal concepts and is not legal advice on any particular case. Consult with an attorney about your specific situation. You can do everything mentioned in this article yourself, just as you could perform surgery on yourself. The question is: do you want to be the first person that the doctor does surgery on? If not, get an experienced one. Similarly, consider hiring experienced attorneys to help you with these major decisions in your life.