"I Do" or "I Don't" – Estate Plan Considerations as a Result of Marriage or Divorce

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You recently got married... or divorced... Do you need to review and update your estate plan? The answer is yes. These major life changes – for you or your children – can have a significant impact on various components of your estate plan that should not be ignored.

So, what happens if you have been married or divorced and you have not reviewed or updated your estate plan? You may be surprised how Wisconsin law will step in to adjust your plan and even more surprised as to how it may not. This Legal Update will highlight some key results and considerations.

Marriage
The first thing to remember is that Wisconsin is a marital property state. This means that, unless provided otherwise in a marital property agreement, assets accumulated during marriage and while spouses are living in Wisconsin generally will be classified as marital property and treated as owned equally by the spouses. Exceptions include gifts or inheritances, which are classified as individual property. Upon one spouse's death, he or she is free to direct the distribution of only his or her individual property and one-half marital interest in the couple's assets. The remaining one-half marital interest stays with the surviving spouse.

If you have a valid (pre-marriage) Will and you later marry or record a domestic partnership, and then die before updating your Will (post-marriage), your surviving spouse or domestic partner will be entitled to a share of your estate. The value of this share is determined under Wisconsin law. If you have no children outside your marriage, your surviving spouse or domestic partner will be entitled to all of your property not transferred to someone else by specific beneficiary designation (like a beneficiary designation on a life insurance policy) or title (like joint tenancy). If you have children outside the marriage, your surviving spouse or domestic partner will be entitled to one-half of the marital property and one-half of your remaining property described above, but not including property devised to your premarital children or their descendants. In other words, your surviving spouse may receive nothing, or one-half of everything, or something in between – but you won't know unless you review your plan and your beneficiary designations. You may also be surprised to know that – in the absence of a marital property agreement – if you survive your spouse, upon your spouse's death, his or her estate will include a one-half marital interest in assets titled in your name. Assets or accounts titled in your name may be divided at your spouse's death, with one-half of those accounts or assets distributed to your step-children. You will bear the burden of showing that the assets or accounts in your name are not marital property, and therefore should not be divided.

If you fail to review your plan after a new marriage, you can't be sure who will receive your property at your death. The only way to be sure of what the surviving spouse or domestic partner will receive after your death is to provide for him or her in a new or updated estate plan.

Employee benefit plans governed by Federal law ("ERISA plans" – which include most 401(k) plans, defined-benefit plans, insurance plans and many other types of benefits provided by private or non-government employers) are generally not governed by Wisconsin law, and there are automatic spousal benefits that you may not anticipate or, if you have children from a prior marriage, possibly not desire. For a non-ERISA plan, like an IRA or private insurance, your surviving spouse may have a claim to a one-half interest in the portion classified as marital property, based on the length of the marriage.

Finally, the law does not grant your new spouse or domestic partner any decision-making authority over your estate. Those provisions of your pre-marriage plan will remain in place, as drafted, despite the marriage. Therefore, each person must sign a new health care power of attorney (appointing health care agent), financial power of attorney (appointing financial agent), Will (appointing personal representatives, guardians of children, and custodians of custodial accounts) and trust (appointing trustee) if he or she would like to appoint a new spouse or domestic partner to any of those roles.

Divorce
There are various provisions of Wisconsin law that will impact estate plan documents upon divorce or termination of a domestic partnership. These provisions are intended to be helpful and anticipate the desires of someone after divorce, but they only go so far.

If you have provided for a distribution of property to a now-former spouse or domestic partner in any Will, trust, marital property agreement, deed, or other document, and you have not updated that document after your divorce to remove the gift to your now-former spouse or domestic partner, Wisconsin law specifically provides that the gift to that former spouse or domestic partner is revoked. Certain exceptions apply, so it remains important to revisit your estate plan following your divorce.

ERISA plans are not governed by this Wisconsin law, so if you have named a former spouse or domestic partner as a beneficiary, you must update that beneficiary designation following your divorce. If you fail to do so, then unless the plan itself eliminates your former spouse, your former spouse or domestic partner will receive those benefits upon your death.

Wisconsin law intervenes to revoke the nomination of a now-former spouse or domestic partner in each of the following fiduciary or agency roles: personal representative under a Will, agent under a health care power of attorney, and agent under a financial power of attorney. While these are certainly helpful provisions, there could be issues in relying on these provisions for several reasons.

- First, the authority of a former spouse under many of these documents is not revoked until a divorce is final, which means that during the pendency of a divorce, the soon-to-be-former spouse may continue to have authority under the documents.
- Second, with respect to the health care power of attorney, the entire document naming the former spouse as agent is revoked upon divorce – not just the appointment of the former spouse. As a result, an alternate agent who you might still intend to have authority to act in the event of your incapacity is also eliminated, possibly leaving you with no health care agent.
- Third, with respect to a financial power of attorney, the filing of a divorce terminates a former spouse's authority. The termination is not effective against anyone who acts in good faith under a power of attorney, so you will have to notify anyone who may have a copy of the power of attorney and is acting in reliance on it, without knowledge of the termination of the power of attorney.

Finally, a word of caution: certain changes to estate planning and other documents are prohibited under Wisconsin law while a divorce action is pending, so be careful. If you are considering divorce, there may be certain changes to your estate planning documents that should be made even before a divorce action is filed, but you should only do so in close consultation with your divorce and estate planning counsel. No changes should be made during the pendency of divorce without first consulting with your divorce counsel. Even if changes are made prior to or during a divorce, you will likely need to make additional changes to your estate plan after your divorce action is finalized. While it may seem costly to make two sets of changes to your estate plan (one before divorce, another after divorce), it may be worthwhile to be sure that your disposition of assets and appointment of decision makers reflect your wishes.

Don't Forget to Take Care of these Pesky Assets

Safe deposit boxes. It can be difficult for your beneficiaries to gain access to a safe deposit box after your death. They will be grateful if you title it in the name of a trust, if you have one, or grant access to one or more trusted family members during your life by designation with the bank.

Edvest Accounts. Remember you can add a successor owner to these accounts directly with the custodian and doing so will ensure the transfer of these accounts at your death to the intended successor.

Refunds from Assisted Living Facilities. If you will have a refund due from an assisted living facility, most facilities will allow you to designate the recipient of the refund on a simple form submitted to the business office. If you have a trust, you may want to assign the refund to the trust.

Out of State Real Estate. You can avoid the need for a probate in another state at your death by titling real estate located outside of Wisconsin in a trust or LLC, using a form of joint ownership during your lifetime, or recording a beneficiary deed or transfer-on-death deed (which are permitted in certain jurisdictions).

Timeshares. Be aware that timeshares can be difficult for your beneficiaries to dispose of or transfer. The process of doing so will depend upon the timeshare company. Some companies will buy it back, but often owners simply deed it back, (if the company will accept it), offer it for sale for $1, or donate it. If you aren't using your timeshare, selling or transferring it during lifetime is preferable.

Choosing What to Keep and What to Give Away

If you want to make gifts during your lifetime, it is important to carefully choose the specific assets to be gifted. Property that you own at your death will receive a new basis at your death, generally resulting in a more favorable tax result for the recipients. For example, if you bought stock for $1/share years ago and it is now worth $10/share, keeping that stock until you die would result in a new basis for the stock, and if your beneficiaries sell it immediately after your death they will have no capital gain on the sale and no income tax as a result of the sale. If you give your beneficiaries that same stock during your lifetime, they will step into your shoes from a basis standpoint, so that if they sell it for the $10/share, they will have a capital gain of $9/share and pay income tax on that gain. Therefore, if you have choices, you may want to choose the property with the least appreciation to give away during your lifetime and hold on to the rest until death to receive the benefit of a new basis.

Could the Exemption Be Reduced?

The current federal gift/estate tax exemption of $11,400,000 is at a record high due to the significant increase of the exemption under the Tax Cuts and Jobs Act of 2017 (TCJA). This means that a single person can transfer property of up to $11,400,000 by gift or at death free of federal gift or estate tax. A married couple can transfer property of $22,800,000 with no federal gift or estate tax with proper planning on first death. This high exemption is set to expire in 2025, but as we enter another election cycle, we may start to see proposals to reduce the exemption back to pre-TCJA levels (between $5-6 million) or even lower. If you can afford to make significant gifts before any reduction takes effect, consider taking advantage of the current exemptions through certain gifting techniques. If this could apply to you, give us a call and we can discuss when and how you can take advantage of the current high exemption.