THE ALAN GASSMAN CHANNEL - LEGAL PROVISIONS COLLECTION

MARITAL ASSET PRESERVATION SYSTEMS (MAPS)

One of the primary purposes for utilizing the Marital Asset Preservation System ("MAPS") is to ensure that married couples keep their marital assets in the family for generations to come. In general, conscientious estate and tax planners will do their very best to meticulously plan and preserve assets for a surviving spouse, while also enabling the surviving spouse to leave assets to common descendants of the decedent, and with the minimal amount of taxes and probate expenses.

However, there is one question that is routinely left out of the discussions between married couples and estate planners during the planning process:

> Would you like some assurance that your marital assets will only pass to your common descendants upon the death of the survivor of you?

The answer to this question is usually a resounding "yes", and as such, requires the surviving spouse to protect the marital assets by not allowing them to be left to a subsequent spouse or some other future significant other.

That answer leaves the estate planner with some rather intricate issues and challenges, not to mention more work and an added layer of complexity to design and implement the various trust systems and strategies to be used.

Once the clients have decided that this is the right strategy for them, the planner must explain that upon the death of one spouse, the surviving spouse may serve as Trustee or Co-Trustee of one or more irrevocable trusts, with the power to change the trusteeship within pre-agreed parameters. These irrevocable trusts may only allow the surviving spouse to have access to assets and monies as needed for the spouse to maintain the standard of living that has been enjoyed during the marriage, and to provide support for common descendants. There are several restrictions that can be placed on a surviving spouse, one of which is to allow them to only make distributions outside of the family based upon an annual allowance that might be used for charity, religious organization dues and donations and gifts to friends based upon guidelines that can be set forth in the documents. There can also be limitations placed on how much compensation might be paid to third parties for services like housekeeping, nursing, private lessons, personal trainers and otherwise. There can also be limited access for charity, church or synagogue donations, and other defined causes.

An Ability to Provide Limited Benefits and Compensation to a Subsequent Spouse.

While it is commonly assumed that the "next spouse" might threaten to deprive descendants of marital wealth, and might place the surviving spouse in jeopardy of losing assets that would be needed for his or her well-being, there is also the possibility that the subsequent spouse will contribute meaningfully both to the preservation and enhancement of marital assets, and with respect to providing care and support for the surviving spouse. It could be both unfair and counterproductive for the surviving spouse to not be able to allow a subsequent spouse to contribute meaningfully to marital assets, and to be compensated for providing necessary services, whether personal, nursing, or managerial, where this is clearly in the best interests of the surviving spouse, and possibly one or more of the descendants of the original marriage.

For this reason, the authors also provide that the MAPS Agreement or system may be amended by one or more of the adult descendants of the original couple, and/or an independent Trust Protectors or other advisors, to take into account appropriate circumstances and formal requests for changes.

The above normally fits well and naturally under a credit shelter/marital deduction trust arrangement that will typically be established on the death of a first dying spouse where federal estate tax is a possible concern, but quite often a good many assets will be owned outright by the surviving spouse or jointly with right of survivorship, and IRA and qualified retirement plans are typically best left to a surviving spouse to enable postponement of having to take taxable distributions.

The planner must therefore explain that those assets that are not naturally captured under a trust system on the first death of a spouse will need to be either: (1) contributed to a trust system by the surviving spouse, as encouraged or required by planning documents, and possibly a Marital Asset Preservation System (MAPS) Agreement; or (2) have the surviving spouse contractually bound by a MAPS Agreement requiring them to maintain existing marital assets, and any income derived from those assets for the surviving spouses life, and also direct that those assets be left for only common descendants upon the surviving spouse's death.

The author commonly uses one or both of these alternatives. These techniques are often coupled with carefully drafted trust provisions, as well as an explanation in the trust document to ensure that every possible step is satisfied and that the MAPS objectives are met.

One issue for couples having more than the $10,860,000 exemption level situation, or expectation thereof, is whether limitations placed on inherited assets would cause loss of the federal estate tax marital deduction and consequent income tax to be paid on the first death. Each individual presently only has a $5,430,000 estate and gift tax exemption amount, which must be considered. This issue is especially important when the surviving spouse is contractually bound to preserve and leave the assets for subsequent descendants, as opposed to receiving the assets as the sole owner without any legal entanglements.

Generally, there is no marital deduction allowed for dispositions that do not at least allow the surviving spouse to have all income from marital deduction trust property and to be the sole beneficiary of a trust holding such property for his or her lifetime. A marital deduction may also not be received for assets that are paid outright to a surviving spouse who has significant contractual limitations on what he or she is able to do with the property.

In states that do not recognize community property, most planners will use separate revocable trusts for affluent husbands and wives for estate planning, because of established customs and the complexities associated with using joint trusts. In such situations, it is possible to have the revocable trust of the surviving spouse become irrevocable upon the death of the first surviving spouse. For purposes of federal estate and gift taxes, this event will be considered an incomplete gift because it provides the surviving spouse with the right to veto payments to any person other than the surviving spouse during their remaining lifetime, and the power to appoint trust assets to common descendants of the married couple.

Alternatively, in states that do recognize community property, we find that joint trusts are becoming more prevalent.

An objective for many estate and tax planners, regardless of the state in which they live, is to have the first dying spouse's death cause a step-up in the income tax basis to a fair market value for any and all family assets. This strategy should be utilized to the extent that the family would benefit from having an increased basis, which would essentially take any property that appreciated during the decedent's lifetime and provide the surviving spouse with the ability to not recognize any gain on such property when they come into possession.

Many planners in non-community property states are using Joint Exempt Step-Up Trusts ("JEST"), which may enable clients to receive this stepped-up basis on all joint trust assets upon the death of the first dying spouse. When the first spouse dies, assets held by the joint trust are used to fund a credit shelter trust for the benefit of the surviving spouse and descendants. These assets now held by the credit shelter trust will receive a full step-up in basis, and escape tax liability upon the surviving spouse's death.

Life insurance can also be integrated into the arrangement by having the death benefit payable to an irrevocable trust, which may be a separate trust that owns the policy so as not to be subject to federal estate tax on the death of the first dying spouse.

Waiver of Marital Rights.

Most states have statutes which provide a surviving spouse with a minimal outright disposition, most commonly known as the Elective Share. In addition, some states provide a surviving spouse with homestead inheritance and other rights which may be waived during the estate planning process while both spouses are living.

The estate planner will have to be very careful with respect to disclosing conflict of interest issues and evaluating whether one or both spouses should be required, or at least strongly urged, to seek independent legal counsel before being legally bound to have limited access and control to marital and inherited assets after the death of one spouse. In the event that a conflict of interest does arise, the estate planner should withdraw and require the spouses to retain separate counsel. Furthermore, because the planner represented both spouses, they are prohibited from representing
either one of them against the other, even with informed consent.

ABA-Model Rule 1.7 addresses the rules for Current Client Conflicts of Interest. In essence Rule 1.7(a)(1) states that, a lawyer shall not represent a client if representing one client will be directly adverse to another client. However, this Rule is not an absolute bar to representing a client when there is a conflict. Subsection (b) provides that a lawyer may represent a conflicted client if (1) they believe they can provide competent representation; (2) it is not prohibited by law; (3) it does not involve one client asserting a claim against another client, both of whom are represented by the lawyer; and (4) each client gives informed consent. In the context of marital inheritance, subsection (b)(3) will almost always bar the attorney from representing one client over another, even with informed consent.

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