PLANNING PRIOR TO DISSOLUTION OF MARRIAGE

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A. Introduction. In addition to the execution of prenuptial and postnuptial agreements, there is planning that should be done by individuals prior to the dissolution of a marriage. Certain planning techniques can be used when divorce is contemplated. Other planning techniques can be used as a part of an individual's estate plan, regardless of whether divorce is imminent.

B. Property Settlement Agreements.

1. General Aspects of Property Settlement Agreements. A property settlement agreement is an agreement that is entered into in contemplation of divorce and dictates the division of the property owned by the two spouses after the divorce. These agreements usually cover property division, division of liabilities and any other issues related to the property of the spouses.

Property settlement agreements can be entered into at any time before the final judgment is issued by the court, and are often incorporated into a final divorce decree issued by the court. In fact, a pure property settlement (as opposed to a marital settlement agreement that may address alimony and child custody issues) is not subject to modification by the trial court without the consent of the parties[1] and, once incorporated into the final judgment of dissolution of marriage, is not subject to modification by the parties.[2]

2. Provisions Included in Property Settlement Agreements.

a. Asset Division. The property settlement agreement should specifically address each asset owned by the parties, whether owned by the parties jointly (as tenants by the entirety, as joint tenants with rights of survivorship or as tenants-in-common), in a party's individual name, in the name of a revocable trust of which a party is the settlor, or otherwise. The property settlement agreement should also specifically address any irrevocable trusts of which a party is the settlor, such as a life insurance trust. Often, the spouse will be named as a beneficiary and/or the trustee of such trust, which is not the intended result when the parties

[1] *Kirchen v. Kirchen*, 484 So. 2d 1308 (Fla.2d DCA 1986).

[2] *Karch v. Karch*, 445 So. 2d 1077 (Fla.3d DCA 1984).

are contemplating divorce. Finally, the property settlement should address any trusts or entities (such as family limited partnerships and limited liability companies) in which a party has an interest.

With regard to life insurance policies and retirement plans (and any other asset that may pass by beneficiary designation, such as an annuity), it is critical that the property settlement agreement specifically provides that each party waives his or her rights to the proceeds of life insurance policies and the death benefit of retirement plans, rather than merely waiving his or her rights to the life insurance policies and retirement plans themselves. The importance of such a provision is evidenced by the recent Florida Fifth District Court of Appeal decision in *Smith v. Smith*.[3] In *Smith*, the parties entered into a property settlement agreement prior to the dissolution of their marriage. The agreement was adopted by the Court and incorporated into the final judgment of dissolution. The agreement contained provisions relating to the equitable distribution of certain of the parties' assets, and contained a general release of claims. At the time the marriage was dissolved, each party was named as the beneficiary of certain life insurance policies and certain retirement plans.

The marital settlement agreement identified the insurance policies, as well as various retirement plans, and indicated that "Mr. Smith shall receive as his own and Mrs. Smith shall have no further rights or responsibilities regarding these assets." However, the agreement made no mention of the proceeds or death benefits of the policies and plans.

Mr. Smith died without having taken the steps necessary to accomplish a change of beneficiary on the life insurance policies and retirement plans, although he was authorized to do so by the property settlement agreement. Upon Mr. Smith's death, Mrs. Smith, as the named beneficiary, made claims to the proceeds of the life insurance policies and retirement plans.

Citing *Cooper v. Muccitelli*,[4] the Court concluded that "without specific reference in a property settlement agreement to life insurance proceeds, the beneficiary of the

[3] 30 Fla. L. Weekly D2845 (December 16, 2005).

[4] 661 So. 2d 52 (Fla. 2d DCA 1995).

proceeds is determined by looking only to the insurance contract." In this case, Mr. Smith did not complete new beneficiary designation forms with respect to his life insurance policies and, thus, Mrs. Smith remained the beneficiary of the proceeds of such policies upon Mr. Smith's death. Citing *In re Estate of Dellinger*,[5] the Court concluded that the same result applied to the retirement plans.

b. Division of Liabilities. The property settlement agreement should specifically divide the liabilities of each of the parties, and any joint liabilities of the parties. Common examples of such liabilities are mortgages, home equity loans and credit card debt.

c. Waiver of Rights by Spouse in Event of Death of Other Spouse. The property settlement agreement should provide that in the event a party dies prior to the final judgment of dissolution of marriage being entered by the Court, the spouse waives all rights she would otherwise have as a result of the death of the deceased spouse, and that she shall be treated as predeceased for all purposes of construing the deceased spouse's Will, Revocable Trust and Irrevocable Trust, if any, and any beneficiary designation of life insurance policies, retirement plans, annuities and any other asset that may otherwise pass pursuant to a beneficiary designation. Examples of the rights a spouse may have are provided in Paragraph C.8. of the Section herein entitled "Prenuptial and Postnuptial Agreements."

d. Tax Issues. The wealthier spouse may want to include a requirement in the property settlement agreement that the parties file joint federal income tax returns until the year subsequent to the final judgment of dissolution of marriage.

In addition, as discussed in the context of nuptial agreements, above, the wealthier spouse may want the property settlement agreement to provide that the other spouse must consent to split gifts for federal gift tax purposes under Section 2513 of the Code in order to use the other spouse's annual exclusion amount, which is the amount an individual can gift per year per donee without using a portion of his or her federal gift tax exemption or incurring gift tax.[6] The annual exclusion amount is

[5] 760 So. 2d 1016 (Fla. 4th DCA 2000).

[6] I.R.C. § 2503(b).

currently $12,000 annually per donee, or $24,000 annually per married couple per donee. This way, the wealthier spouse could increase the amount of the gifts made until the year subsequent to the final judgment of dissolution of marriage.

In addition, the wealthier spouse should consider including a provision in the property settlement agreement that would require the other spouse to consent to gift split under Section 2513 of the Code in an amount not to exceed the lifetime gift tax exemption amount (currently $1 million per person).[7] The wealthier spouse could then gift up to $2 million prior to the year subsequent to the final judgment of dissolution of marriage, and the other spouse would be required to split such gift with him or her.

Regarding Section 2513 of the Code, it is an "all or nothing" rule, meaning that either all gifts are split or no gifts are split. Moreover, it is important to note that the Treasury Regulations to Section 2513 of the Code provide that in order for a spouse's consent to gift split to be valid, he or she cannot remarry during the calendar year.[8] In order to ensure that the spouse does not remarry during the calendar year in which the gifts are made and the divorce occurs, it may be possible to postpone the effective date of the divorce until December 31 so that the remarriage would not occur until the following calendar year.

In addition, the spouse's consent must be made on a federal gift tax return, which is not due until April 15 of the year following the year during which the gift is made. It is possible that the spouse agrees to consent to gift split, the gifts are made, and the spouse revokes such consent prior to April 15 of the following year. In order to avoid this result, the property settlement agreement should specifically address this issue by providing that the spouse irrevocably consents to gift split under Section 2513 for any gifts made during the year of the divorce.

C. Re-Titling of Assets. Section 689.15 of the Florida Statutes provides that upon dissolution of marriage, tenancy by the entirety property shall become property owned as tenants-in-common. Accordingly, care must be taken by each party to ensure that tenancy by the entirety assets are

[7] I.R.C. § 2505.

[8] Treas. Reg. § 25.2513-1(a).

retitled in accordance with the terms of the property settlement agreement, which typically will not provide for the ownership by the parties of such assets as tenants-in-common.

D. Last Wills and Testaments. In contemplation of dissolution of marriage, each spouse should execute a Codicil to his or her Last Will and Testament (or, preferably, execute an entirely new Will) to provide for the following:

1. If the Will provides for the appointment of the spouse as personal representative of the estate, the Codicil or new Will should provide for one or more other individuals, rather than the spouse, to serve as personal representative of the estate.

2. To the extent allowed by the property settlement agreement, the Codicil or new Will should revoke any beneficial interest of the spouse thereunder, and should provide for different beneficiaries. While Section 732.507 of the Florida Statutes provides that any provision of a Will executed by a married person that affects the spouse of that person shall become void upon the dissolution of such marriage, and the former spouse shall be treated as predeceased, such provision does not apply until the divorce has become final. Accordingly, it is recommended that each spouse execute a new Will or Codicil prior to the final dissolution of marriage to further the terms of the property settlement agreement.

   To the extent that the property settlement agreement does not provide for the omission of the spouse as a beneficiary under the Will, the new Will or Codicil could establish an "elective share trust" for the spouse. Such trust is discussed in detail in Paragraph J. of this Section.

3. If the other spouse has descendants that are not common descendants with the testator spouse, and if the Will names such descendants as beneficiaries, the individual should consider whether he or she wants to change or revoke such beneficiary provisions.

   There are two additional pitfalls of which practitioners should be aware when reviewing the Will of a party contemplating divorce. First, a Will often establishes trusts which contain powers of appointment. It is important that, if intended, the descendants of the spouse be removed as donees of such powers of appointment. Second, a Will may provide that the remote contingent beneficiaries of the trusts created under the Will (the individuals that would inherit if all beneficiaries named in the Will are deceased) are the testator spouse's intestate heirs (as to one-half)

and the other spouse's intestate heirs (as to one-half). If intended, it would be important to remove the other's spouse's intestate heirs as remote contingent beneficiaries under the Will.

4. If the parties have children (either separately or together), the Codicil or new Will should name one or more guardian(s) of the children. While the other spouse would presumably become the guardian of any mutual children, in the event that the spouse dies, such guardian designations may be considered. In addition, in the event the other spouse predeceases, it is critical that one or more guardians are named.

E. Revocable Trusts. In contemplation of dissolution of marriage, each spouse must be sure to execute an Amendment to his or her Revocable Trust (or, preferably, execute a restated Revocable Trust) to provide for the following:

1. If the Revocable Trust provides for the appointment of the spouse as successor trustee, the Amendment or restated Revocable Trust should provide for one or more other individuals, rather than spouse, to serve as Successor Trustee. Similarly, if the spouse is serving as a trustee, he or she should be removed.

2. To the extent allowed by the property settlement agreement, the Amendment or Restated Revocable Trust should revoke any beneficial interest of the spouse thereunder, and should provide for different beneficiaries. While Section 737.106 of the Florida Statutes provides that any provision of a Revocable Trust executed by a married person that affects the spouse of that person shall become void upon the dissolution of such marriage, and the former spouse shall be treated as predeceased, such provision does not apply until the divorce has become final. Accordingly, it is recommended that each spouse execute a restated Revocable Trust or Amendment prior to the final dissolution of marriage to further the terms of the property settlement agreement.

   To the extent that the property settlement agreement does not provide for the omission of the spouse as a beneficiary under the Revocable Trust, the restated Revocable Trust or Amendment could establish an elective share trust for the spouse, as discussed in Paragraph J. of this Section.

3. If the other spouse has descendants that are not common descendants with the testator spouse, and if the Revocable Trust names such descendants as beneficiaries, the individual should consider whether he or she wants to change or revoke such beneficiary provisions.

As discussed above in the context of Wills, there are two additional pitfalls of which practitioners should be aware when reviewing the Revocable Trust of a party contemplating divorce. First, a Revocable Trust often establishes trusts which contain powers of appointment. It is important that, if intended, the descendants of the spouse be removed as donees of such powers of appointment. Second, a Revocable Trust may provide that the remote contingent beneficiaries of the trusts created under the Revocable Trust (the individuals that would inherit if all beneficiaries named in the Revocable Trust are deceased) are the testator spouse's intestate heirs (as to one-half) and the other spouse's intestate heirs (as to one-half). If intended, it would be important to remove the other's spouse's intestate heirs as remote contingent beneficiaries under the Revocable Trust.

F. Durable Powers of Attorney/Designations of Health Care Surrogate/Living Wills. In contemplation of divorce, the spouses should revoke any existing Durable Power of Attorney, Designations of Health Care Surrogate and Living Wills in favor of the other spouse, and prepare new documents in favor of one or more other individuals. In addition, pursuant to Section 709.08(5) of the Florida Statutes, written notice of revocation of the Durable Power of Attorney must be provided to the agent named therein (i.e., in this case, the spouse).

G. Irrevocable Trusts. It is important that any irrevocable trust created by a spouse which names the other spouse as a beneficiary include a provision whereby the spouse would be removed as a beneficiary thereunder if they are no longer in a relationship. In order to effectuate this intent, the settlor spouse can provide in the irrevocable trust that if the beneficiary spouse is no longer married to or is legally separated from the settlor spouse, the beneficiary spouse shall be treated as predeceased for purposes of construing the irrevocable trust. If the irrevocable trust does not contain such a provision, the property settlement agreement and/or divorce decree should specifically provide that the spouse shall be treated as predeceased for purposes of construing the irrevocable trust.

H. Beneficiary Designations. If allowed by the property settlement agreement, the parties must revoke all beneficiary designations in connection with life insurance, retirement plans, annuities and similar assets that name the other spouse as beneficiary, and execute new beneficiary designations. The importance of taking the steps to remove the spouse as beneficiary of such assets is especially critical if the property settlement agreement fails to mention the proceeds and death benefits of such assets, as discussed in *Smith, supra.* As addressed in the context of nuptial agreements, federal law requires a waiver to be executed by the spouse who is not being named as the primary beneficiary of the

retirement plan, except in the context of an IRA, in which case a waiver may still be required by the financial institution.

I. Request that Parents Create Dynasty Trusts. If an individual anticipates receiving gifts or an inheritance from such individual's parents, he or she should request that his or her parents create a "dynasty trust" for such individual, and make the gifts or leave the inheritance to such trust, rather than outright to the individual. The dynasty trust could provide that the individual is the sole trustee, and could provide for discretionary distributions of income and principal for the individual's health, education, maintenance or support needs. By gifting to or leaving an inheritance to a dynasty trust for the individual, rather than outright to the individual, such assets should be protected as separate property in the event of a divorce.

J. Elective Share.

1. Definition of Elective Share. Florida law provides that the surviving spouse of a person who dies domiciled in Florida has the right to a share of the elective estate of the decedent.[9] The elective share of the spouse is thirty percent of the elective estate.[10]

2. Elective Estate. Florida Statutes Section 732.2035 sets forth the following categories of property that are included in determining the elective estate:

a. Probate Estate. The elective estate includes the decedent's probate estate, which is defined as "all property wherever located that is subject to estate administration in any state of the United States or District of Columbia."[11] The probate estate does not include homestead property.[12] The value of such assets is the date of death value, less mortgages, liens and security interests, and any other claims payable from the estate.[13]

b. Jointly Held Property. The elective estate includes the decedent's ownership in jointly-owned accounts and securities, and pay/transfer on death accounts. The value of the decedent's interest in any accounts or securities owned as tenants by the entirety is one-half of the value of such

[9] Fla. Stat. ch. 732.201.

[10] Fla Stat. ch. 732.2035.

[11] Fla. Stat. chs. 732.2025(1) and 732.2025(7).

[12] Fla. Stat. ch. 732.2045(1)(i).

[13] Fla. Stat. ch. 732.2055(5).

accounts.[14] In all other cases, the value of the decedent's ownership interest is the portion of the account or securities that the decedent had the power to access immediately before death without having to account to another person.[15] With regard to property other than accounts and securities that is held as joint tenants with rights of survivorship or as tenants by the entirety, the elective estate includes the decedent's interest in any property, which is valued by dividing the value of the property by the number of tenants.[16]

c. Revocable Trusts and other Revocable Transfers. The elective estate includes any property transferred by the decedent to the extent that the transfer was revocable by the decedent (either alone or in conjunction with another person) at the time of the decedent's death.[17] Assets held in a revocable trust are not subject to the elective share if (i) the property was an asset of the trust at all times between October 1, 1999 and the date of the decedent's death; (ii) the decedent was not married to the surviving spouse when the property was transferred to the trust; and (iii) the property was a nonmarital asset (as defined in Section 61.075 of the Florida Statutes) immediately prior to the decedent's death.[18]

d. Irrevocable Transfers. Irrevocable transfers by the decedent are included in the elective estate if at the time of death the decedent retained the right to or enjoyed the possession or use of the income or principal of the property.[19] The amount included is the value of the portion of the property to which the decedent's right or enjoyment related to the extent it passed to or for the benefit of a person other than the decedent's probate estate.[20]

e. Life Insurance Policies. The elective estate includes life insurance to the extent the decedent possessed a beneficial

[14] Fla. Stat. ch. 732.2035(2).

[15] Fla. Stat. ch. 732.2035(2).

[16] Fla. Stat. ch. 732.2035(3).

[17] Fla. Stat. ch. 732.2155(6).

[18] Fla. Stat. ch. 732.2155(6).

[19] Fla. Stat. ch. 732.2035(5)(a)(1).

[20] Fla. Stat. ch. 732.2035(5)(b)1-2.

interest in the net cash surrender value of the policy immediately prior to death.[21]

f. Pensions and Retirement Plans. The elective estate includes the amounts payable because of the decedent's death to any person from pensions, retirement plans, deferred compensation plans and similar contracts.[22] The amount that is included is the transfer tax value of such assets on the date of the decedent's death.[23] Note that the statute section does not provide guidelines as to the includable amount in the event there is no transfer tax at the time of the decedent's death. Under existing law, the personal representative has a choice of applying the 5 million estate tax exemption equivalent or having no estate tax in 2010 and the use of the carryover basis.[24]

g. Transfers and Gifts Made Within One Year of Death. The elective estate includes gifts made within one year of death.[25] The value of the property included is the value of the property on the date of the gift, less mortgages, liens or security interests on the property.[26] It is important to note that transfers of assets for medical and educational expenses that are excluded from federal gift tax under Section 2503(e) of the Code[27] are excluded from the elective estate. Furthermore, the first $10,000 of property (which is not adjusted for inflation, even though the gift tax annual exclusion under Section 2503(b) of the Code is indexed for inflation[28]) transferred to a donee during the one-year period prior to the decedent's death is excluded to

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[21] Fla. Stat. chs. 732.2035(6), 732.2045(1)(d) and 732.2055(1).

[22] Fla. Stat. ch. 732.2035(7).

[23] Fla. Stat. ch. 732.2055(3).

[24] I.R.C. § 2210 and Section 301 of the Tax Relief Unemployment Insurance Reauthorization, and Job Creation Act of 2010.

[25] Fla. Stat. ch. 732.2035(8)(b).

[26] Fla. Stat. ch. 732.2055(4).

[27] I.R.C. § 2503(e) excludes from the federal gift tax any amount paid on behalf of an individual as tuition directly to an educational organization for the education of the individual, and any amount paid on behalf of an individual to any person who provides medical care (including with respect to such individual as payment for such medical care. Treas. Reg. §25.2503-6(b)(3) provides that qualifying medical expenses for purposes of I.R.C. § 2503(e) includes medical insurance paid on behalf of a donee that is not reimbursed by the donee's insurance.

[28] I.R.C. § 2503(b)(2).

the extent such transfer is also excluded under Sections 2503(b) or 2503(c) of the Code.[29]

h. Termination of Includable Rights or Interests. The elective estate includes the value of property transferred as a result of the "termination" of a right or interest in property within one year of death that would otherwise be included if the termination had not occurred.[30] The amount included in the elective estate is the value of the property on the date of the termination, less liens, mortgages and security interests.[31]

i. Transfers to Elective Share Trusts. Irrevocable transfers made to an elective share trust to satisfy the elective share are included in the elective estate.[32] An elective share trust is any trust under which (a) the surviving spouse is entitled for life to the use of the property or to all of the income payable at least as often as annually; (b) the surviving spouse has the right under the terms of the trust or state law to require the trustee either to make the property productive or to convert it within a reasonable time; and (c) during the spouse's lifetime, no person other than the spouse has the right to distribute income or principal to anyone other than the spouse.[33] The requirements to qualify as an elective share trust are essentially the same as the requirements to qualify as a qualified terminable interest property ("QTIP") trust under Section 2056(b)(7) of the Code, except that no QTIP election must be made to an elective share trust on a federal estate tax return.

If the spouse has only a mandatory income interest in the elective share trust, 50% of the value of the property in such trust is counted toward satisfaction of the elective share.[34] If the elective share trust includes a qualifying invasion power, which is a discretionary power held by the spouse or trustee to invade the principal of the trust for the health, support and maintenance of the spouse (a "qualifying invasion power"),[35] 80% of the property in

[29] Fla. Stat. ch. 732.2035(8)(b)(2).

[30] Fla. Stat. ch. 732.2035(8)(a).

[31] Fla. Stat. ch. 732.2055(4).

[32] Fla. Stat. chs. 732.2025(10) and 732.2035(9).

[33] Fla. Stat. ch. 732.2025(2).

[34] Fla. Stat. ch. 732.2095(2)(b)(3).

[35] Fla. Stat. ch. 732.2095(1)(c).

such trust is counted toward satisfaction of the elective share.[36] If the elective share includes a qualifying invasion power and a qualifying power of appointment, which is a general power of appointment that only the spouse may exercise, 100% of the value of the trust is counted toward satisfaction of the elective share.[37]

3. Satisfaction of Elective Share. Unlike many states, Florida law provides that, absent a contrary provision in the decedent's Will or Revocable Trust, property otherwise distributable as a result of the decedent's death is first used to satisfy the elective share.[38]

4. Planning with the Elective Share. If an individual is contemplating divorce, he or she should consider the possibility that he or she may die prior to the divorce becoming final. Absent a nuptial agreement or property settlement agreement that would allow the individual to omit the spouse as a beneficiary of his or her assets, or in which the spouse waives all rights to the individual's property, and subject, in certain cases, to the spouse's decision to take the share to which he or she would be entitled as a pretermitted spouse, as discussed below, the spouse would be entitled to 30% of the elective estate if the individual dies prior to the final dissolution of the marriage. Clearly, this would not be the intended result. Accordingly, it is recommended that the individual plan by using the elective share rules to his or her advantage, as follows:

   a. Create Elective Share Trust. Rather than allow for an outright distribution to the spouse of 30% of the elective estate, the individual could create an elective share trust within his or her Will or Revocable Trust. As indicated above, the elective share trust would provide that the spouse is entitled to all income from such trust. If the individual felt comfortable doing so, he or she could also provide that the spouse would be entitled to principal for health, support and maintenance needs. A third party trustee could be named to make such discretionary distributions of principal. The governing instrument could also provide that the trustee may consider other resources of the spouse prior to making such distributions of principal.[39] By including the qualifying invasion power,

[36] Fla. Stat. ch. 732.2095(2)(b)(2).

[37] Fla. Stat. ch. 732.2095(1)(b).

[38] Fla. Stat. ch. 732.2075(1)(a)-(f).

[39] Fla. Stat. ch. 732.2095(c).

80%, rather than 50%, of the trust assets would count toward the satisfaction of the elective share. The elective share trust could also provide the spouse with a general power of appointment over the assets upon his or her death, so that 100% of the trust assets would count toward the satisfaction of the elective share. Such a provision, however, is rarely included in an elective share trust, as the settlor usually does not want his or her spouse to have ultimate control over the disposition of the trust assets.

b. Create Entity. The individual could create an entity, such as a family limited partnership or a limited liability company, and provide for the distribution of interests in such entity to his or her spouse upon death. Such entity interests would be of little utility because of the restrictions on transferability, participation and liquidation. Query as to whether the lack of marketability discount and a minority discount would be applied to the value of the entity interests, so that a larger amount of entity interests would be distributed to the spouse? This clearly would not be the intended result.

c. Include Provision in Testamentary Document Regarding Satisfaction of Elective Share. If an individual plans to leave certain assets to his or her spouse, but fears that the spouse may elect against his or her estate, the individual could include a provision in his or her Will or Revocable Trust that provides for the distribution of less desirable assets to the spouse if the spouse makes such election.

d. Make Gifts. As indicated above, assets transferred to an irrevocable trust in which an individual has not retained the right to or enjoyed the possession or use of the income or principal of the assets would not be included in the elective estate. To the extent possible, the individual should gift to such an irrevocable trust to remove assets from his or her elective estate.

In addition, the individual could make gifts in the amount of $10,000 to various individuals each year, and to educational institutions and medical providers under Section 2503(e) of the Code, in order to remove assets from the elective estate.

K. Pretermitted Spouse. In certain circumstances, a surviving spouse who is not included in the deceased spouse's Will may choose to take advantage of the share to which he or she would be entitled as a pretermitted spouse,

rather than the elective share. Pursuant to Section 732.301 of the Florida Statutes, when a person marries after making a Will and the spouse survives the testator, the surviving spouse shall receive a share of the estate of the testator equal in value to that which the surviving spouse would have received if the testator had died intestate, unless (1) provision has been made for, or waived by, the spouse by a nuptial agreement, (2) the spouse is provided for in the Will, or (3) the Will discloses an intention not to make provision for the spouse.[40] The intestate share to which the spouse would be entitled is as follows:

1. If there are no living lineal descendants of the decedent, the entire intestate estate;

2. If there are surviving lineal descendants of the decedent, all of whom are also lineal descendants of the surviving spouse, the first $60,000 of the intestate estate, plus one-half of the balance of the intestate estate; and

3. If there are surviving lineal descendants of the decedent, one or more of whom are not lineal descendants of the surviving spouse, one-half of the intestate estate.[41]

Accordingly, if the testator marries after executing his or her Will, and the Will does not provide for or specifically omits the spouse, and there is no nuptial agreement, the spouse may be entitled to the pretermitted spouse share. Depending upon the assets owned by the testator (the assets subject to the pretermitted spouse share are less expansive than those subject to the elective share), the spouse may choose to take the share to which he or she is entitled as a pretermitted spouse, rather than the elective share.

If an individual wants to ensure that his or her spouse is not entitled to the share to which the spouse would otherwise be entitled as a pretermitted spouse, it is essential that such individual either (i) enter into a nuptial agreement with his or her spouse, in which the spouse waives the share he or she would take as a pretermitted spouse, or (ii) amend his or her documents to specifically provide for the spouse or omit the spouse.

Attached as Exhibit A is a checklist regarding planning prior to the dissolution of marriage.

[40] Fla. Stat. ch. 732.301.

[41] Fla. Stat. ch. 732.102.

EXHIBIT A

CHECKLIST FOR PLANNING PRIOR TO DISSOLUTION OF MARRIAGE

1. Considerations for inclusion in the property settlement agreement:

    a. Division of Assets. Note that waivers of life insurance policies and retirement plans should specifically refer to the proceeds of such policies and retirement plans.

    b. Division of Liabilities.

    c. Waiver of statutory rights by the spouse in event of death of the client.

    d. Provision that the spouse will be treated as predeceased in the event of the death of the client (note that this is particularly important in connection with irrevocable trusts that do not provide that the spouse will be treated as predeceased in the event of a legal separation or divorce).

    e. Obligation to consent to gift split.

2. Revision of estate planning documents/re-titling of assets/beneficiary designations:

    a. If the client creates an irrevocable trust for the benefit of his or her spouse, language should be included in the trust to provide for the termination of such spouse's interest in the event of a legal separation or divorce.

    b. The client should revise his or her Last Will and Testament to (i) remove the spouse as a beneficiary and personal representative; (ii) remove the spouse's descendants as beneficiaries, if intended; and (iii) name guardians of minor children.

    c. The client should revise his or her Revocable Trust to (i) remove the spouse as a beneficiary and co-trustee or successor trustee; and (ii) remove the spouse's descendants as beneficiaries, if intended.

    d. The client should revise his or her Durable Power(s) of Attorney, Designations of Health Care Surrogate and Living Wills to remove the spouse as the nominated agent or surrogate thereunder.

    e. Assets should be re-titled in accordance with the property settlement agreement, if any.

    f. Beneficiary designations for retirement plans, life insurance policies, annuities and similar assets should be revised to remove the spouse, and the spouse's descendants, if any. Note that a waiver must executed after

marriage by the spouse with regard to qualified plan benefits. Consider rolling over qualified plan into IRA to avoid waiver requirement.

g. If the client anticipates an inheritance or gifts from his or her parents, he or she should request that the parents create and fund dynasty trusts for the client's benefit, rather than leave assets outright to the client.

h. Elective share planning:

   i. Provide for creation and funding of elective share trust under Will or Revocable Trust.

   ii. Create entity and provide for distribution of entity interests to spouse.

   iii. Include provision in testamentary documents regarding satisfaction of elective share.

   iv. Make gifts to an irrevocable trust, in the amount of $10,000 to various individuals each year (subject to one-year look back period), or to educational institutions and medical providers under Section 2503(e) of the Code in order to remove assets from elective estate.

i. If there is no nuptial agreement, the client should ensure that he or she executed a Will after marriage that either provides for the spouse or omits the spouse, as to avoid a claim that the spouse is entitled to a share of the estate as a pretermitted spouse.