

Miller, Griffin & Marks

MGM LEGAL NOTES

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Last year our firm celebrated Harry B. Miller, Jr.'s 50th year in the practice of law. Since 1948, Harry has been providing the highest quality representation to our clients. In order to honor Harry and to celebrate this 50th anniversary, we are pleased to announce that we have established the Harry B. Miller, Jr. scholarship at the University of Kentucky College of Law. This scholarship will be awarded to a second or third year law student who not only excels academically, but also exhibits an interest in trial work.

I am pleased to be the editor of this installment of the Miller, Griffin & Marks, P.S.C. Newsletter on subjects related to estate planning and administration. The articles we have included are meant to give you practical information addressing issues that we hope will be of interest and use to you.

In drafting my article, and in choosing the topics of the other articles included herewith, I was influenced by a statement made by Roger Ebert in his review of the movie, "A Civil Action" with which I am firmly in accord: "When hiring an attorney, go for the most logical." In that spirit, we are striving to give to our readers helpful information and logical advice. That is the way we practice our profession.

Thomas W. Miller

SURVIVOR'S RIGHTS TO A PORTION OF THE ESTATE OF A SPOUSE

By Thomas W. Miller

As with Cinderella, the death of a father can lead to unanticipated problems between his children and their step-mother. Our recent experiences highlight issues that can arise with the death of a spouse in a second marriage. Planning for those issues can minimize the risks of disputes at death; and precautions can be taken to protect estates for loved ones.

In Kentucky, the surviving spouse has the statutory right to receive outright up to 50% of the estate of the deceased spouse. If the decedent has no Will at death, the surviving spouse automatically gets 50% of the Estate. Even if the decedent has a Will which leaves the bulk of his or her Estate to another, the surviving spouse can "renounce" the Will which, if done appropriately, will require the personal representative of the deceased to transfer to the surviving spouse half of all property in the Estate, except that only 1/3 of the real estate must be transferred.

In order to "renounce" a Will, a written document must be prepared, properly executed and properly filed with the appropriate County Court Clerk, all within six months after the decedent's Estate is opened. A technical failure to properly and timely execute and file an appropriate document can mean the right is lost forever. And, there are other pitfalls which can cause the renunciation to fail as well.

For the past three years I have been involved in court proceedings challenging the effectiveness of a widow's renunciation on behalf of the Estate of a decedent. We contended that the execution of the renunciation was improper, and the trial court agreed. On appeal, the Kentucky Court of Appeals also found the renunciation was ineffective for another reason, which we had argued. In the decedent's Will, he bequeathed a small percentage of his Estate outright to his wife, gave her all of his personal property (household goods and automobiles), with the balance of his Estate being left half to his children by a previous marriage and the other half in a trust which ultimately went to his children, but with all income being produced going to the widow during her lifetime.

After an effective renunciation, a widow is deemed to have pre-deceased her husband when construing his Will, so in this case most of the personal property of the decedent would have gone to his children. According to the Court of Appeals, the error made by the widow was in executing a document in which she acknowledged the receipt of the decedent's personal property as given to her in his Will and in signing a bill of sale for the automobiles. The Court held that the widow's accepting all the personal property bequeathed to her in the Will was inconsistent with a renunciation, under which she would have received only one third of it. Because the widow cannot accept the benefits given to her in her spouse's Will and also renounce, the Court concluded she had to take only what was left to her in her husband's Will.

The moral to this story is that upon the death of a spouse, the survivor should address his or her rights with an attorney if dissatisfied with what has been bequeathed in the Will. That will often mean the survivor needs an attorney different from the one representing the Estate.

It is noteworthy that spouses can avoid any dispute between their spouses and their children with advance planning. An agreement between the spouses that neither will renounce the Will of the other spouse can be binding on both, as can an agreement to make a certain will, or not to revoke a will. This may be true even if the terms of the agreement are not reduced to writing. But, to be sure there will be no dispute, the better practice is that any agreement should be in writing. Both spouses should consult with their own attorneys regarding their legal rights, and it is advisable to have an attorney draft the document, to be executed by both parties.

We are currently litigating another renunciation dispute between the step-mother and the children of a deceased spouse. Both came into the marriage with substantial assets of their own. The widow acknowledges both she and her husband agreed that each of their independent estates would go to their respective children. Both had Wills drafted consistent with their agreement. However, it does not appear any writing was prepared to codify all the terms of their agreement. We have taken the position that a renunciation of her husband's Will by the widow is inconsistent with the agreement the two of them had reached. By renouncing, the widow is trying to prevent all of her husband's property from going to his children (because she gets 50%) which is required in his Will and their agreement. We have argued that the renunciation should not be effective, as it prevents their agreement from being fulfilled. This issue is pending before a trial judge. Obviously, it would have been much better for the parties to have set forth their entire agreement in writing rather than leaving it up to the courts to deal with their informal actions.

In short, it is very important to plan carefully and to explicitly set forth any agreements made between husbands and wives if either is going to be bequeathing less than 50% of his or her Estate to the other in a Will. It is also very important for the survivor to promptly consult with an independent attorney to determine what his or her rights are, and how to effectively enforce those rights, in the event he or she is dissatisfied with the portion of the Estate received in the deceased spouse's Will. And the other moral of the story is that the children of the deceased party may be able to prevent a renunciation that adversely affects them from being effective.

Thomas W. Miller graduated with high distinction from the University of Kentucky Law School in 1973. He has a general litigation practice.

Probate Law:

DISPENSING WITH ESTATE ADMINISTRATION

By Thomas C. Marks

Administration of a decedent's estate is often a lengthy process requiring numerous documents to be filed with the Probate Court. One of the primary reasons why an estate cannot be administered quickly is KRS 395.190. That statute provides that distribution of the estate assets to the beneficiaries is not to take place until six months after the appointment of the executor. This provides creditors of the decedent an opportunity to present their claims against the estate. KRS 396.011.

Among the documents that generally have to be filed with the Probate Court are the Petition for Appointment of the Personal Representative, Fiduciary Bond, Inventory, and Final Settlement.

However, KRS 395.455 provides for a simplified procedure for administering estates in certain instances. If an estate qualifies for the simplified procedure, there is no need for the appointment of a personal representative, assets can immediately be transferred to the beneficiaries, and none of the documents referred to in the preceding paragraph have to be filed with the Probate Court.

Estates which qualify are those where the exemption pursuant to KRS 391.030 together with the preferred claims paid pursuant to KRS 396.095 equals or exceeds the amount of "probable assets" of the estate.

What does this mean? Under KRS 391.030, up to \$7,500.00 of "probable assets" may be exempt from creditors and distribution and can be set aside for the benefit of the surviving spouse or children. KRS 396.095 lists preferred claims as the costs and expenses of administration, funeral expenses, and debts and taxes with preference under federal and Kentucky law. Thus, if the "probable assets" are less than \$7,500.00 (the KRS 391.030 exemption) plus the amount of the preferred claims paid (KRS 396.095), then you can qualify for the simplified procedure and dispense with administration.

Disposing with administration is not limited to small estates because of the definition of "probable assets". Generally, "probable assets" are those assets which the personal representative must take control of and ultimately distribute to the beneficiaries. Real property is usually not considered a probable asset as it normally passes directly to the beneficiary named in the Will. Similarly, all real property that is owned jointly with right of survivorship is not a "probable asset" as that property immediately passes to the

survivor. Since most married couples own virtually all real estate and bank accounts jointly with right of survivorship, even large estates may qualify for the simplified procedure.

The procedure is available to both testate (i.e., the decedent had a Will) and intestate estates.

There are many nuances in not only determining what assets are "probable assets", but also in applying KRS 391.030 and KRS 396.095, so an attorney should be consulted in determining whether an estate qualifies for dispensing with administration. However, if an estate qualifies, it can significantly reduce the time and expense normally attendant to estate administration.

Thomas C. Marks is a director of Miller, Griffin & Marks and a 1981 graduate of the University of Kentucky Law School where he graduated with distinction.

SIMPLE PLANNING TO AVOID FEDERAL ESTATE TAXES

By Jennifer H. Acklen

Recent changes in the tax laws have had an impact on estate planning. Most taxpayers can take advantage of the laws and minimize or avoid federal estate taxes simply by having a Will that maximizes the use of available credits and deductions.

One such deduction is the unlimited marital deduction. The Internal Revenue Code provides that an estate may deduct an amount equal to the value of any interest in property which passes from the decedent to the surviving spouse. This means that the decedent's entire estate can be passed to a spouse without being subject to federal estate taxes. Most spouses own their property jointly; therefore, one-half of the joint property is considered to be in the deceased spouse's estate, and that amount, plus any additional property, can be passed to the surviving spouse free of federal estate tax.

In addition to the marital deduction, each estate is allowed a unified credit. This can be used during the lifetime

of the taxpayer to offset gifts and avoid gift tax, or can be used upon death to decrease the gross estate. If the taxpayer has not used the full amount of the unified credit, the unused portion is automatically deducted from the estate. Currently, the unified credit amounts to a deduction of \$650,000 from the taxpayer's estate. Therefore, if an estate is not in excess of \$650,000, no federal estate tax is imposed. Under the Taxpayer Relief Act of 1997, this amount was increased from \$600,000 and will continue to increase until the year 2006, as follows: \$675,000 in 2000-2001; \$700,000 in 2002-2003; \$850,000 in 2004; \$950,000 in 2005; and finally \$1,000,000 in 2006 and thereafter.

For most married taxpayers, the combined use of the marital deduction and the unified credit will avoid federal estate taxes. However, it is important to have properly drafted Wills that specify the maximization of these two deductions. Most spouses have mirror wills, leaving everything to the surviving spouse. In this case, the first spouse to die will not incur any federal estate tax. However, this could subject the surviving spouse to federal estate tax upon his or her death. Therefore, in larger estates, it is advisable to make use of lifetime gifts, particularly if the spouses' estates are not equal, and to make maximum use of the unified credit to avoid leaving the surviving spouse with a very large estate, which, upon his or her death, would only be reduced by the unified credit amount.

The majority of taxpayers will never need more than a Will that specifies how the deductions are to be used. However, if the taxpayer has a large life insurance policy, he or she needs to be aware that the insurance proceeds are generally included in the estate of the insured. One way to avoid this is to set up a Life Insurance Trust, which will own the policy. Upon the death of the insured, the proceeds are distributed directly to the beneficiaries without waiting for probate and without being subject to federal estate taxes. If you have large life insurance policies which could cause your estate to go over the deduction(s) available to you, a Life Insurance Trust is a good idea.

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Use of the marital deduction, and/or the unified credit amount will allow most taxpayers to avoid federal estate tax, or at least significantly reduce it. For larger estates, lifetime gifts to trusts can provide for children and spouses, while decreasing the surviving spouse's estate. Additionally a Life Insurance Trust can be used to pass life insurance proceeds outside of the insured's estate. These goals can be accomplished through a Will and, if necessary, a Life Insurance Trust. Because each of us is in a different situation, an attorney should be consulted in order to assure the proper drafting of documents and use of all available credits and deductions.

Jennifer H. Acklen is a 1997 graduate of the University of Tennessee College of law. Jennifer is an associate with Miller, Griffin & Marks.

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