CONNECTICUT BAR ASSOCIATION

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VIEW FROM THE CHAIR

BY JOHN R. IVIMEY

Thank you to George Smith, Jim Funnell and the Communications Committee for organizing another newsletter, and thank you to all who wrote articles. To continue the newsletter, we need all Section members to take the time to write articles about different aspects of the law. I encourage you to submit articles when you encounter interesting issues in your practice.

Kelley Peck and the CLE Subcommittee put together excellent programs this year. Please attend the annual Connecticut Bar Association meeting on June 11 and our program "Conservatorships in the Wake of Gross v. Rell." Later this year, on September 28, Frank Berall will lead an all day seminar for the Federal Tax Institute of New England. At open meetings earlier this year, Paul Knierim spoke on probate court consolidation and the development of a new probate practice book, and Brad Gallant discussed special needs trusts and offered insight as President of the Connecticut Bar Association. The subcommittee also worked with the Bar Association on programs on contested conservatorships and estate planning issues in divorce proceedings.

On the legislative front, we are pleased to report the passage of the Uniform Adult Protective Proceedings and Jurisdiction Act. Our Section worked for its passage for many years.

Thank you for your involvement with our Section.♦

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How to Appeal a Probate Decree in the Age of E-Filing

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The process of filing a Connecticut probate appeal has undergone substantial revision in the last few years. Before 2007, CGS §45a-186 required the filing of a motion for appeal of an adverse decree in the Probate Court and obtaining an order allowing the appeal. The order allowing the appeal would include an order of notice to the interested parties and directing return of service of the appeal to Superior Court. The Probate Court set the return date in the decree. The appellant served the motion seeking appeal and the order allowing the appeal on the interested parties. After receiving the sheriff's return of service, the motion for appeal and the order allowing the appeal were filed in the Superior Court. Within 10 days of the return date, the attorney filed a document entitled "Reasons of Appeal" with a copy of the will attached. Connecticut Probate Book §10-76 (1998).

With the passage of Public Act 07-116, the Connecticut General Assembly significantly amended CGS §45a-186. The appellant no longer has to seek Probate Court approval to appeal an adverse decision. The appeal is commenced by filing a Complaint in the Superior Court. CGS §45a-186(a); 3A Conn. Prac., Civil Practice Forms, Form 1004.7 (Thomson Reuters)(4th ed. 2011) (hereinafter "Form 1004.7"). The Complaint must state the reasons for the appeal and include a copy of the decree that is the subject of the appeal. CGS §45a-186(a). Unlike the old motion for appeal, the Complaint should state whether the hearing was on the record. Form 1004.7. Appeals from decisions rendered after a statutory recording of the proceedings are on the record and not trial de novo. CGS §45a-186(a). The appellant must also include a Certificate of Financial Responsibility with the Complaint. See, 3A Conn. Prac., Civil Practice Forms, Form 101.2 (Thomson Reuters)(4th ed. 2011). Connecticut Practice Book §8-4 requires the recognizance of a third party with personal knowledge as to the financial responsibility of the plaintiff to pay the costs of the action. The attorney signing the Complaint cannot be the attorney signing the recognizance. Connecticut Practice Book §8-4(c).

Unlike filing a petition or motion in Probate Court, the filing of the Complaint to commence the probate appeal is done electronically in Superior Court. In 2009, the Superior Court made e-filing of civil cases mandatory. Probate appeals are not civil actions per se but they are treated like civil cases for e-filing purposes. To e-file, attorneys and law firms enroll in E-Services (https://eservices.jud.ct.gov) and obtain a secure password. Procedures and Technical Standards for E-Services, December 6, 2011. Once enrolled, the law firm can designate an authorized individual to file case initiation documents. Id. To e-file the Complaint, it must be converted to a pdf document and the attorney filing the Complaint must pay the filing fee (currently $300) online by using a credit card or other acceptable method.

Care should be taken in naming the plaintiff and defendant for purposes of e-filing a probate appeal. To just name the estate does not fit the e-file format. An estate is not a legal entity that can sue or be sued in its name. Isaac v. Mount Sinai Hospital, 3 Conn. App. 598, 600, cert. denied, 196 Conn. 807 (1985). In a Will dispute appealed by an heir, the plaintiff should be the heir and the defendant the executor of the estate. If the executor is appealing a probate court ruling, the plaintiff should be the name of the Executor and the defendant should be opposing party. For instance, the opposing party for a claim would be the name of the creditor.

The appeal deadline is usually 30 days from the date the Probate Court mailed the decree. CGS §45a-186(a). Certain conservatorship and guardianship matters have 45-day appeal deadlines. Id. An adult who was not present at the hearing on which the decree was entered, who did not waive the right to the hearing, and who did not have notice of his or her right to request a hearing usually has 12 months to appeal. Public Act No. 11-128, Sec. 11; CGS §45a-187. Certain types of hearings require shorter appeal periods for persons who had no notice of the hearing (e.g. – adoptions, termination of parental rights). Counsel should confirm with the Probate Court the date that it mailed the decree so counsel knows when the appeal period commences. Once the Complaint is successfully e-filed in Superior Court, counsel should print out the Confirmation of E-Filing and retain it to prove that the appeal was filed prior to the deadline.

Once the Complaint is filed, the appellant has 15 days to electronically file in Superior Court a document containing the name, address and signature of the person making service and a statement of the date and manner in which a

copy of the Complaint was served on the probate court and each interested party. CGS §45a-186(c). Service of the Complaint must be made by a state marshal, a constable, or an indifferent person. CGS §45a-186(b). Thus, it is usually the marshal's return of service that satisfies this 15-day filing requirement. Service on the Probate Court is by mail but service on interested parties is in hand or by leaving a copy at the interested party's place of residence or at the address for the interested party on file with the probate court. Id. Thus, it behooves the attorney filing the appeal to get the list of addresses for all interested parties from the Probate Court. What if a beneficiary lives in another state? Counsel will need to hire an indifferent person in that state to serve the Complaint on that party. Usually e-mailing a copy of the Complaint to a process server in the other state will expedite service on the out-of-state party.

Fortunately, the failure to make service on an interested party does not deprive the Superior Court of jurisdiction over the appeal. CGS §45a-186(b); Heussner v. Hayes, 289 Conn. 795, 802, 961 A2d 365, 369 (2008); Godin v. Estate of Bucholz, 2010 WL 4944269 at 1 (Conn. Super. 11/18/2010). It is the filing of the appeal with the Superior Court that confers jurisdiction. Branch v. Grogan-Barone, 2010 WL 2682164 at 2 (Conn. Super. 4/15/2010). If service has not been made on an interested party, the appellant can make a motion to the Superior Court for such orders of notice as are reasonably calculated to notify any party not yet served. CGS §45a-186(d).

At the time of commencing the probate appeal, counsel for the appellant must also consider two additional motions. The filing of a probate appeal does not stay enforcement of the decree. CGS §45a-186(f). Consequently, the appellant may wish to move for a stay of the decree either in Probate Court or the Superior Court. Id. In addition, the Superior Court can refer the probate appeal to a special assignment probate judge unless a demand for hearing by the Superior Court is filed within 20 days after service of the appeal. CGS §45a-186(a). Will a special assignment probate judge be as likely to overrule a sitting probate judge as a Superior Court judge? Maybe or maybe not but appellant's counsel must consider who they want to hear the probate appeal at the commencement of the appeal because the deadline is so soon after filing. A relic of the old procedure remains in the Connecticut Practice Book that may leave counsel wondering if the next pleading after filing the Complaint is a separate Reasons of Appeal. Connecticut Practice Book §10-76(a) states that "in all appeals from probate the appellant shall file reasons of appeal, which upon motion shall be made reasonably specific, within ten days after the return day; and pleadings shall thereafter follow in analogy to civil actions." Given that the reasons for the appeal must appear in the Complaint, however, most experienced counsel just disregard the separate filing of Reasons of Appeal required by this outdated 1998 Practice Book section. In an analogy to civil actions, an Answer is the next pleading to file after the Complaint. Thus, after the commencement of the action, the next pleading to be filed is an Answer and that is done by the appellee.

The filing requirements of a probate appeal continue to evolve. Technology, Probate Court and Superior Court changes and the increasing rights of parties have caused a revolution in the commencement of probate appeals. Unfortunately, legal treatises and the Connecticut Practice Book do not always stay current in this area that straddles two separate court systems. The practitioner must master the evolving statutes and case law of probate appeals to avoid unpleasant surprises.♦

FREQUENTLY FORGOTTEN FACTORS IN PRE-NUPTIAL PACTS

by

Jeffrey L. Crown

"Waiver" of spousal rights in retirement plans

The Retirement Equity Act

The **Retirement Equity Act** was supposed to ensure that the spouse of a qualified plan recipient receives survivor benefits from the plan even if the participant dies before reaching retirement age. Pub. L. 98-397, 98 Stat. 1426 (1984), amending 26 USC §401. The REA **established clear criteria for a waiver of benefits by the spouse.** No waiver shall be effective unless the participant's spouse consents in writing. The election may not be changed without the spouse's consent unless she has agreed to allow amendments.

The issue becomes whether, and **to what extent, a spouse may waive her rights in a prenuptial agreement?**

Effect of waivers – divorce

Several courts have held that, in the context of divorce, spousal rights in qualified plans may be waived prior to marriage. *Critchell v. Critchell, 746 A.2d., 282 (D.C. 2000); In re Marriage of Rahn, 914 P.2d. 463 (Colo. App. 1995); Richards v. Richards, 640 N.Y.S. 2d. 709 (1995).*

Effect of waivers – death

Death benefits under pension and profit sharing plans are treated differently. The statute states that, absent an effective waiver, a surviving spouse is automatically entitled to receive a "qualified pre-retirement annuity". The Treasury Regulations are specific that those benefits **may not be waived, except by a spouse**. "[A]n agreement entered into prior to marriage does not satisfy applicable consent requirements." Treas. Regs. 1.401(a)-20.

Since the parties to a prenuptial are not yet spouses, a waiver will most probably not be effective. See, e.g., *Hagwood v. Newton, 282 F. 3d 285 (C.A. 4, 2002); National Auto Dealers v. Arbeitman, 89 F. 3d 496 (C.A. 8, 1996); Pedro Ent. v. Perdue, 998 F. 2d 1214 (C.A. 7, 1993); Howard v. Branham & Baker Coal Co., 968 F. 2d 1214 (C.A. 6, 1992) Hurwitz v. Sher, 982 F.2d 778 (C.A. 2, 1992); Hawxhurst v.Hawxhurst, 723 A. 2d 58, 64 (N.J.Super. Ct., 1998).*

For an excellent discussion of REA and Pre-Nuptial Agreements, see Fields, "Forbidden Provisions in Prenuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer," 21 J. Amer. Acad. of Matrimonial Lawyers, 413, 415 (2008) [www.aaml.org/sites/default/files/MAT210.pdf]

A possible solution

Perhaps a variation of a "no contest" clause would be useful. If the spouse agrees to waive her rights after marriage and has not done so, other provisions for her would be reduced by the value of the retirement benefits she received.

Note re subsequent marriage

REA does not just apply to beneficiaries designated during marriage. Marriage essentially voids all existing beneficiary designations.

> EXAMPLE: Smedley is divorced with two children, whom he's named as beneficiaries of his profit sharing plan. After a two week whirlwind courtship, he marries Velveeta. The children are out. Velveeta is in.

You CAN take it with you

What is "Portability?"

Until the beginning of 2011, a person's unused estate tax exemption [properly called either a "unified credit" or "applicable exclusion amount") died with him or her. It could not be used by his or her surviving spouse. We now have "portability" and a new acronym, "DSUEA," – Deceased Spouse's Unused Exemption Amount."

At least until the end of 2012, "excess" estate tax exemption can be, essentially, transferred to one's spouse.

> EXAMPLE: Elmer has $2 Million of assets. His wife, Elsie, has cashed in on her commercial success and is worth $7 Million. Assuming that Elsie doesn't remarry and that Elmer's executor prepares and files certain documents, Elsie could use a portion

> estate tax. With today's $5 Million exemption, Elsie could pass her entire estate to her beneficiaries tax free.

What to do

In order to take advantage of portability, the deceased spouse's executor has to prepare and file a Federal estate tax return. In many cases, that return would otherwise not be required. This could create more work and expense for his executor, possibly with no benefit to the deceased spouse's beneficiaries. Since the surviving spouse will benefit from this effort, she should be paying for it.

You might want to provide, in a Pre-Nuptial Agreement, that:

▶ If, when the first spouse dies, they are married to each other, the deceased spouse's executor will, upon the survivor's request, sign and file a Federal estate tax return.

▶ If that return would otherwise not be necessary, the surviving spouse will pay the costs of preparing it, including all fees for lawyers, accountants, appraisers, etc. If a return is necessary, the survivor agrees to pay the incremental cost of complying with the portability provisions.

▶ The executor will file all documents necessary to make an election under Section 2010(c)(5) of the Internal Revenue Code.

▶ Each spouse agrees to provide that her or his executor is authorized or required to make the election.

Income and gift tax returns

Allocation on joint income tax returns.

Consider language similar to this:

> "If JOHN and MARY file a joint income tax return for any year, each of them shall pay his and her proportionate share of the taxes reflected on that return, and any interest and penalties on it. That proportionate share shall be based upon their respective incomes, reduced by their respective credits and deductions. Any income tax refund for any year for which JOHN and MARY have filed a joint income tax return shall be allocated between them in the same proportion that the tax paid by each of them bears to the total taxes paid. The term 'income tax return' includes all Federal, state and local income tax returns reporting any one or more items of income, gains, profits and avails, including earned income, dividends, interest and capital gains."

Gift splitting

Generally. Gifts made to third parties may be treated as having been made one-half by the donor's spouse by signifying her consent on a gift tax return.. Especially if one spouse will never need her entire gift tax exemption, it might make sense to have her agree to consent to gift splitting. The agreement should provide that the donor spouse pay the costs of preparing her gift tax return.

Annual exclusion gifts only. Alternatively, the agreement might provide that each spouse consents to split gifts within the annual gift tax exclusion (currently $13,000 per donee.) NOTE: One cannot selectively split gifts, for example, by consenting only up to the annual exclusion. The consent applies to all gifts by the donor spouse in the applicable year.

What rights are being waived

Many pre-nuptial agreements waive the spousal elective share, support allowance and other monetary rights in a deceased spouse's estate. The parties may wish to consider waiving other "marital benefits" as well.

The following list is not exhaustive:

▶To contest provisions of a will, trust, conveyance or beneficiary designation.

▶ To be named as an administrator.

▶ To be a conservator.

▶ To receive proceeds of personal injury or wrongful death action.

▶ Homestead.

▶ To serve as a health care representative.

▶ To consent or object to anatomical gifts.

Miscellaneous provisions

- What are home maintenance expenses and who pays them?
- If joint or tenants in common property is sold, who is entitled to the proceeds?
- Community property and quasi community property.

Consider language such as:

"Section ?. Community Property.

All of JOHN'S and MARY'S respective assets, interest, incomes, gains, profits and avails shall remain separate property, and shall not be subject to any community property or marital property regime, if:

1. Either or both JOHN and MARY becomes a resident of, or acquires any assets in, a jurisdiction under the laws of which a husband and wife acquire a community property or marital property interest in the income and assets of the other spouse; or

2. Either or both JOHN and MARY reside in a jurisdiction which adopts a community property or marital property regime.

As used in this Section ?, the term 'marital property' includes a property regime based on the Uniform Marital Property Act or any similar legislation."

Further reading

For a discussion of additional estate planning issues in planning for marriage and remarriage, please see Crown, "Mickey Rooney Meets Liz Taylor – Planning for the Second Marriage and Beyond" at: http://trustlawyer.com/secondMARRIAGE.html.♦

Wait No Longer—Non-tax Reasons for Estate Planning

By Patricia R. Beauregard, Esq.
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Ever since the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") was passed, there has been a "wait and see" attitude among some practitioners and many individual estate planning clients. Since EGTRRA became law, the federal estate tax exemption has increased five times, the law was repealed and retroactively reinstated, and, if Congress does not act, the current legislation which implemented a $5 million federal exemption[1], a 35% top tax rate, and portability will sunset at the end of 2012 and revert to a $1 million exemption[2], a 55% top tax rate, and eliminate portability.

Many clients retreated from estate planning as a result of the uncertainty in the federal estate tax law, changes in the state estate tax law, and the declining economy, in order to wait and see what Congress would do. The problem is that the uncertainty continues. Are clients right to wait and see? The answer is a resounding no. There are a myriad of reasons why everyone needs to continue planning for their estates, regardless of whether there is a federal estate tax, what the exemption might be, or whether there is portability or not.

A typical estate plan consists of a will, a trust or trusts, powers of attorney, and advance directives. We advise clients on asset ownership, beneficiary designations, and in what form and timeframe they should transfer assets to their beneficiaries. Trusts are used effectively as tax shelters, and they save thousands, if not millions, of dollars in estate taxes with IRS blessing. However, clients can use trusts to give assets away, during life or at death, while still controlling how the assets are utilized and when. Tax planning is an important factor in many estate plans, but it is only part of the overall estate plan. Following are many of the non-tax reasons why our clients should not wait any longer to update or create an estate plan:

1. **Intestacy**. If an individual has no estate plan in place when he or she dies, the laws of intestacy will govern how the estate will be distributed. These laws are meant as a last resort, and few people would be happy with the result[3]. In addition to the potential for assets to pass to the wrong beneficiaries, the assets may pass outright when they should be in trust, and if the beneficiaries are minors, the probate court will establish a guardianship for the minor. The individual also loses the right to name his or her own Executors, Trustees, and Guardians. Many married couples own all of their assets jointly, and some believe this eliminates the need to plan because the assets will simply pass to the survivor without the need for a Will and there will be no estate tax due to the marital deduction. While this is true, the problem is that the surviving spouse will die intestate unless he or she establishes an estate plan. In addition, with the first spouse already deceased, the surviving spouse has lost forever the opportunity to address many of the issues discussed below, including incapacity, the use of trusts, and a subsequent marriage.

2. **Incapacity**. All of us face the risk of either a temporary or permanent incapacity due to illness or injury at some point during our lives. Most individuals will be incapacitated for at least a short period of time prior to death. Our clients' loved ones need to have a durable power of attorney to handle financial affairs and advance directives to make health care decisions for the clients and to honor their wishes regarding end of life choices. If our clients do not provide these documents to their families, the family members may need to go to court at some expense to seek a conservatorship, adding to the stress they are already facing. Instead of following the roadmap the documents would have provided, the spouse and children must guess at the client's wishes.

3. **Marriage and Remarriage**. There are two important considerations when a client decides to get married or remarry after a divorce or the death of a spouse. The first is that the client should enter into a prenuptial agreement to protect his or her assets acquired prior to the marriage and to establish how assets will be divided if the marriage ends in divorce. No one plans on divorcing, and a prenuptial agreement should be viewed as a smart financial decision and an integral part of the client's estate plan. The agreement can be filed away and put out of mind unless the unthinkable happens.
Second, the client's estate plan has to address how he or she will provide for the new spouse and children, especially the children of a prior marriage. Of course the client will want to provide for the new spouse, but if there are children from a prior marriage, or if the new spouse ultimately remarries after the client's death, the plan should be drafted to insure that when the spouse passes away the assets pass to the client's children. If the client fails to put this plan in place, he or she can only hope that the new spouse will do the right thing. I am no longer surprised at the rapidity with which a surviving spouse revises his or estate plan after the death of a spouse, cutting out the children of the first spouse.

4. **Management Trusts**. There are many beneficiaries, such as a spouse, a child, a parent, or loved ones with special needs, who are not able to manage their finances for one reason or another. Sometimes clients feel that putting assets in a trust for a loved one is cruel or that it somehow sends a message that they do not trust this person. On the contrary, giving assets outright to a person who cannot handle them is an act of denial and irresponsibility, and odds are that the funds will be mishandled and disappear far too rapidly to provide for the beneficiary or in some cases will reduce or eliminate government benefits to which the loved one is otherwise entitled. We can establish a trust to meet the needs of the individual beneficiary, provide a trustee who can properly invest the funds and make distributions in a manner that the client directs, and relieve the beneficiary from the responsibility of managing the assets.

5. **Creditor Protection**. Our clients spend their whole lives working hard and acquiring wealth and in most cases want nothing more than to give their children an easier life than they had. Sometimes, however, a child does not share the client's work ethic or his or her desire to avoid debt; they may suffer business failures or a bad investment. A child may marry an unworthy mate who wants to squander the client's hard-earned money or, worse, lay claim to half of it when he or she decides to divorce the child. For these reasons, more and more clients are considering the use of lifetime trusts for their children with creditor protection features (fully discretionary with an Independent Trustee). The use of such a trust can often mean the difference between passing on wealth to future generations and enriching a creditor or a child's divorcing spouse.

6. **Assets**. An important part of estate planning involves the transfer of assets, including real estate, vacation homes, family businesses, farms, and other hard-to-value and emotionally charged assets. The transfer of these assets often involves income taxes and all three types of transfer taxes--gift, estate, and generation-skipping transfer taxes. The succession of a business, farm, or even a cherished vacation, home,

when only some of a client's loved ones are involved in the business or enjoy the vacation property, raises issues of equality, fairness, and value. This planning is best accomplished over many years with family discussions, negotiations, and sometimes mediation to determine who will run the business or manage the asset and what assets the other children will receive. Failing to plan thoughtfully for these assets might result in equal distribution to the children, but this might be the absolute wrong result for many reasons.

7. **Portability**. Unfortunately, portability has provided an additional excuse for married couples to wait or fail to plan. Portability permits a surviving spouse to utilize the unused federal estate tax exemption of his or her deceased spouse, but there are some rather substantial exceptions to this rule that are often overlooked. Under current law, both spouses have to die in 2011 or 2012. This is because portability will sunset at the end of 2012, along with the $5.12 million federal exemption, unless Congress acts to prolong it. Portability will apply only to the last deceased spouse, so if a client remarries and is counting on utilizing his or her first spouse's exemption, the client has to hope he or she predeceases the new spouse. The client must also elect portability on a timely filed federal Form 706, which the client may not have had to file otherwise, and the time and expense of doing so would likely far outweigh what it would have cost to implement a proper estate plan that does not rely on portability. We counsel surviving spouses to make the portability election if the deceased spouse has federal exemption remaining, but some have decided to forgo the election due to the expense. It is important to remember that portability does not include the state estate tax exemption or generation-skipping transfer tax exemption, so if a deceased spouse did not take advantage of these exemptions at his or her death, they are lost forever. Finally, even if a spouse can utilize the client's federal estate tax exemption through portability, the client has lost the opportunity to protect the ultimate disposition of the assets to his or her children through the use of a trust and must hope that the spouse will honor his or her wishes.

While many individuals may have total assets that currently fall well below the federal estate tax exemption of $5.12 million, this will likely change either because the federal estate tax exemption will be reduced or because the client's assets may increase in value. No matter what the law is at the federal level, the state estate tax is not likely to disappear. The state estate tax exemptions are far less generous (at least at this moment in time) than the federal exemption. In Connecticut, the exemption is currently $2 million. Through the end of 2012, clients have the rare opportunity to make large gifts due to the federal gift tax exemption of $5.12 million[4]. However, if a client makes a gift of $5.12 million this year, he or she would have to pay Connecticut gift tax. While it might be worth doing so, that is a decision the client has to make carefully given his or her personal situation.

We know that our clients can think of many reasons to avoid planning—denial, wanting to avoid paying legal fees, hoping that legislation will save them from the planning process—but the wait can cost them more than they know. Estate planners have adapted to the landscape of uncertainty, and we include flexibility in our estate planning documents so that our clients do not have to change their estate plans every time the law changes. While clients should update their estate plans any time their family or life circumstances change, they should not wait until the estate tax laws settle down because the uncertainty in this area may be here to stay.

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[1]The federal estate tax and the generation-skipping transfer tax exemptions were indexed for inflation and increased to $5.12 million as of January 1, 2012.

[2]The $1 million exemption will be indexed for inflation.

[3] Under Connecticut law, the spouse would inherit all of the assets only if there were no children and no parents of the deceased. If there are no children but the parents of the deceased are alive, the spouse receives the first $100,000 and 75% of the remainder of the assets. If there are children of both spouses, the spouse would receive the first $100,000 plus 50% of the remainder. If there are children of decedent who are not the children of the surviving spouse, the assets are split 50% between the surviving spouse and the children of the decedent. CGS §§ 45a-437(a)(1)-(4).

[4]$5.12 million is the total amount that an individual can give away, and this takes into account all prior taxable gifts (gifts that exceed the annual exclusion, currently $13,000).♦

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