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Estate Planning Considerations for Remarried Individuals

Individuals who have remarried, whether after a divorce or death, tend to have particularly complex personal financial affairs. Therefore, it is crucial...

By **Amy Neifeld Shkedy and Rebecca Rosenberger Smolen** | June 28, 2019 at 11:47 AM

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Individuals who have remarried, whether after a divorce or death, tend to have particularly complex personal financial affairs. Therefore, it is crucial for remarried individuals to have proper estate planning in place. Having an estate plan after or in contemplation of a remarriage helps avoid family conflict and can prevent assets from ending up in the wrong hands after death.

For couples planning to marry after prior marriages (particularly when there are children from a prior marriage), the first step is to evaluate whether a prenuptial agreement is advisable. For such a couple who has already tied the knot without a prenuptial agreement, a postnuptial agreement can be considered. A prenuptial agreement is a contract between two individuals before they are married that addresses their property rights upon divorce and death. If one or both of the parties

has strong feelings about passing assets to objects of their bounty other than the spouse, such as children who pre-existed the marriage, and wishes to pass certain property to such children upon such party's death, then a prenuptial (or postnuptial) agreement is key.

Without a prenuptial agreement in place, spouses may claim certain property interests over each other's assets at death or at divorce. In this article, we will focus on the assets at stake in the event of a death (rather than a divorce), and assume that after the marriage, the couple lived happily ever after (at least until the first dies).

If a remarried individual wishes to leave all of his assets at death to or for the benefit of his children (who pre-exist the current marriage) and leave nothing to the spouse, that generally cannot be guaranteed to work without having a prenuptial or postnuptial agreement in place. This is because of certain rights granted to surviving spouses under state and federal law. Under state law, a surviving spouse is granted an "elective share" right. In Pennsylvania, for example, a surviving spouse may elect to take one third of certain of the deceased spouse's property included in the "augmented estate." By taking an elective share (i.e., electing against the will), the spouse is deemed to be disclaiming all rights to certain types of assets that the spouse might otherwise have been entitled to, such as life insurance proceeds, retirement benefits, jointly owned property as well as other interests deemed to have passed from the deceased spouse. Also, under federal ERISA laws, a surviving spouse has a right to between 50% and 100% of the qualified retirement benefits attributable to the predeceased spouse.

An individual with an effective prenuptial or postnuptial agreement can avoid the possibility of having a disinherited spouse elect against the will, or receive all or any part of the individual's qualified retirement benefits, by controlling how much (if anything) he will leave to his surviving spouse at death. With respect to qualified retirement benefits, it is also essential for the spouse to have signed off on the forms designating an alternate beneficiary after the marriage (which may be required under the terms of the prenuptial or postnuptial agreement).

Although leaving a spouse out of an inheritance altogether is a possibility, it's more likely that spouses will want to provide for one another in some way. This is particularly the case in a long-lasting marriage where there is some degree of economic interdependence. While spouses may want to leave their assets outright to the other (often referred to as "I Love You Wills") for the sake of simplicity (or

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procrastination), that is almost always not desirable in situations where there are children from prior marriages or where each spouse wishes to benefit different beneficiaries after both spouses are deceased.

If a will passes assets outright to a spouse, then it's important to understand that the surviving spouse is free to leave those assets to the beneficiaries of his choice and can change his will at any time up until his death. For couples who insist on having the simplicity of an "I Love You Will," although not ideal, they could sign a contract to require that the surviving spouse leave the assets at death as directed in the contract and to restrict the spouse from making certain gifts of those assets during his or her lifetime. This approach is certainly not bulletproof, but it's the best that can be done for couples that cannot be dissuaded from leaving everything (or simply a significant share of assets) to the spouse.

For individuals who want to provide for the surviving spouse at death, we find that the best tool to accomplish that goal is to leave assets in trust for the surviving spouse. This approach allows the assets to be available for the surviving spouse for his health, maintenance, support and to maintain his standard of living (and perhaps for other broader purposes), but also helps to protect the assets so that the first deceased spouse can direct how the assets will pass at the surviving spouse's death. Thus, a decedent's will or revocable trust may leave funds in trust for the primary benefit of his spouse and then provide that at the spouse's death, the remaining balance will pass to or in trust for the decedent's own children (and not the children of the surviving spouse). It usually is advisable to appoint a trustee for such trust in addition to the spouse (or other than the spouse, in some situations) as a check and balance to make sure that the trust funds are properly administered and that an appropriate amount of funds will be left over for the children.

When leaving funds in trust for a spouse, a decedent may determine to leave his entire estate in trust for the spouse or a portion thereof (or sometimes, simply a shared residence). Many times individuals want to benefit their own children right

away after they die, rather than have the children wait for the death of the surviving spouse (the children's stepmother/stepfather). Determining what portion of the assets should pass to the decedent's spouse and the decedent's children is a very personal judgment call. Often clients divide the pot in half (50/50), but the percentages vary depending on the circumstances and the amount of wealth involved.

Once the prenuptial agreement or will or revocable trust are drafted to determine how much the surviving spouse will receive, and in what fashion, it is important to make sure that all of the assets are properly coordinated to effectuate this estate plan. Thus, beneficiary designations for retirement plans, IRAs, 401ks, life insurance and other assets passing by beneficiary designations should be properly tailored to dovetail with the estate plan. Often it makes sense to name a decedent's revocable trust (or testamentary trust under will, as the case may be) as the beneficiary so that everything flows through the will or revocable trust at death, and nothing is diverted in proportions that are different from the estate plan.

In addition to reviewing beneficiary designations for individually owned accounts, there may be joint accounts or assets with joint ownership, such as a house. Assets titled jointly between husband and wife would pass outright to the surviving spouse by operation of law. That is the case for assets owned jointly "with right of survivorship" or as "tenants by the entireties." Couples need to understand that this is akin to an "I Love You Will" passing outright to the spouse, which the estate plan may have been structured to avoid.

It may be advisable to shift those jointly owned assets to "tenant in common" ownership, so that each spouse owns a 50% interest (or a different designated percentage), or transfer an appropriate portion to individual accounts. It is important to carefully examine all accounts to make sure that the ownership interests are titled properly and beneficiary designations are in order, so as not to deviate from the intended estate plan.

Despite the mutual trust that may be appropriate (or at least manageable) while both spouses are living, there are unavoidable (and understandable) "out of sight, out of mind" type human nature tendencies that kick in after the first spouse dies. As one of our clients correctly predicted before his death, his wife would be like a "lioness protecting her cubs." It's always a mystery who will die first, but, since the odds are against a simultaneous death, careful planning and implementation is key for both spouses.

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