

Re-tooling the Estate plans for Blended Families >>>By: Kevin F. Bress, Esq.

Remarried couples pose unique challenges for the estate planner; especially when children are involved. One primary issue is how their pre and post marriage assets will be distributed to their respective children. There are so many variables to consider, it would take a book to cover all possible estate planning options given the plethora of scenarios and permutations. Prenuptial agreements will be of no help since they do not provide for testamentary dispositions.

Here are just a few of the most relevant questions that need to be posed to gain an understanding of the situation:

How many years has the couple been married?

Are there children from their first marriages?

What were the relative asset levels at the time of marriage?

Since the marriage how have each spouse's assets grown or shrunk?

If either spouse needed a long term stay in a facility, whose assets should pay for that?

Once this is sorted out and a plan is adopted, the real challenge comes in advising the couple how to make sure the couple's estate plan won't be undermined by the surviving spouse years after becoming widowed. What few people take into account is that wills are freely revocable. When a husband and wife set out to execute mirror image wills which treat all children fairly, the surviving spouse is free to change his/her mind any time after the first spouse deceased. There is no such thing as creating an irrevocable will.

Here's how the best of intentions of the blended family can go awry. Husband and wife own all assets jointly and make a pact to divide those assets equally among their respective children when the second spouse dies. Husband dies and wife comes into title of all assets. Over the passage of time, husband's children do not stay in touch with their step-mother, whose health now deteriorates. The mother's children consult with an elder law attorney and are advised that in order to protect the remaining assets from being totally consumed at a nursing home, the assets should be transferred out of mom's name. Upon mom's death, her children already own the assets and could decide not to share them with the step-brothers and step-sisters because they didn't keep in touch; a very common scenario.

Enter the revocable trust. This instrument can hold assets upon terms and conditions that can be made not so revocable. A revocable trust is often called a "will substitute." The trust provisions give control of its assets to one or more named trustees to carry out the terms of the grantor during life and after death. A couple that creates either joint or separate revocable trusts could provide that they retain the right to freely amend the trust but only up *until* the first spouse dies. Then a provision in the trust would be activated requiring the surviving spouse to obtain consent of some other person, named as a co-trustee, before making any change to the trust which affects the disposition of assets. In essence, portions of the trust become irrevocable.

To protect the children of the first spouse to die, consider having one of those children be elevated to that co-trustee position. While this will be a difficult sell to the surviving spouse, it is the only way to ensure that the step children are not written out of the document in the future.

Obtaining co-trustee status is critical for those children for another reason: the surviving spouse could thwart the trust by simply re-titling assets out of the trust and thus out of its control. With a co-trustee, two signatures could be required before any changes are made with the assets.

While this arrangement may sound dreadful to the surviving spouse, that is, being handcuffed to step-children within the trust, the trust assets may just be limited to those assets that the deceased spouse brought to the marriage. The estate planning attorney would need to probe the origin and growth of the assets to understand how to allocate them and use two separate revocable trusts to distinguish them.

Most people are not real anxious to have step-children yield so much power over their affairs. An independent third party is another option. Couples will want to consider who their “watch dog” will be once they pass on.

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