



Yours, Mine and Ours

Estate Planning for Second Marriages

By Cynthia J. Crass

Are you in a second marriage? Do you have stepchildren? If so, you know the complexity of the emotional issues involved. However, are you aware of the complex financial and planning issues that can arise upon the death of one of the partners in that second marriage?

The failure of couples who have been married before to address, resolve, communicate and document what happens to property upon the death of one partner can strain often already fragile family ties. This failure can also cause unintended consequences that can't be fixed. If you care about the welfare of your second spouse and your children from a previous marriage, and want them to remain amicable after your death, then read on.

The following is what happens to the surviving partner in a second marriage when both have children from a prior marriage and when the first spouse to die has:

No Will. The surviving spouse has rights to more than half of the deceased spouse's intestate estate, which rights are superior to the rights of the children from the prior marriage.

A Will That Predates the Marriage. The surviving spouse has rights against the children of the prior marriage unless the will has specific language stating otherwise.

A Will That Names the Surviving Spouse as a Beneficiary. If the surviving spouse is unhappy with the will's provisions, the surviving spouse has a right to elect against the will for approximately one-third to one-half of the estate. Absent a waiver of this right, neither Utah nor Idaho law allows for the disinheritance of a spouse.

Retirement Benefits Such as a 401(k). The surviving spouse is automatically the beneficiary unless the surviving spouse's rights were waived after the marriage. This is true of some other pension and widow/widower benefits. This is not true of an IRA.

A Home in His/Her Name Alone in Which the Couple Resides. The surviving spouse will have no specific rights in the home even if he/she contributed to the mortgage or improvements. This means that the surviving spouse can be evicted by the deceased spouse's children from the prior marriage. This is also true of recreational property the couple may have enjoyed together.

A Home in Joint Tenancy With Rights of Survivorship. A deed naming husband and wife as the owners of real estate is presumptively owned as joint tenants. This means that upon the death of a spouse, the surviving spouse will own the home outright with no ownership in the home going to the children from the prior marriage.

Personal Property Brought Into the Subsequent Marriage and Personal Property Acquired During the Marriage. Who knows what property came into the marriage and what property was acquired after marriage? If these facts are not known, then determining who gets what can be very complicated. What property of the prior marriage goes to the children of the prior marriage? What property is intended to stay with the surviving spouse? What happens to that property when the surviving spouse dies?

Bank Accounts, CDs, Brokerage Accounts, Etc. in Just One Spouse's Name. A surviving spouse generally will have no specific rights in accounts that are just in

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the other spouse's name unless the deceased spouse's will leaves these accounts to the surviving spouse.

Bank Accounts, CDs, Brokerage Accounts, etc. in Joint Name. Joint accounts presumptively go to the surviving spouse.

Life Insurance With the Children of the Prior Marriage Named as Beneficiaries and Not Changed After Marriage. The surviving spouse has no specific rights to the policy proceeds paid out at the death of the first spouse.

An Ex-spouse That They Don't Trust Handling Money for Their Minor Child. The surviving natural parent of a minor child is his/her presumed guardian unless shown unfit. A guardian is responsible for the physical well being and care of the minor child. However, the natural parent of a minor child does not necessarily need to be the conservator of that minor child's inheritance. A conservator is someone who handles financial matters for a minor child.

Used the Unlimited Marital Deduction, Which Causes the Surviving Spouse to Incur Estate Tax at the Death of the Surviving Spouse. The children of the surviving spouse could end up paying estate taxes, and the children of the first spouse to die may escape paying any estate tax.

The Desire to Leave an Inheritance to Stepchildren (or Step Grandchildren) as Well as to Natural Children (or Grandchildren). Unless a will or trust specifically provides for this, or unless

they are adopted, stepchildren are not the same as and will not be treated like natural children for estate planning purposes.

All of these concerns can be easily resolved with forethought and planning. A pre- or post-marriage agreement is often useful; however, the agreement needs to cover death issues as well as divorce issues. Individually tailored wills and trusts are essential. Without these you will be left with the default state laws. Ignoring these issues is a recipe for surprise, disappointment and family conflict.

Discuss them with your heirs — your second spouse and the children of your prior marriage. Make conscious and clear decisions, manage expectations and communicate them to your family. Visit your lawyer to make sure your wishes are clearly documented so they can be carried out upon your death and you can truly rest in peace. ☐

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