

Remarriage and Your Estate Plan: Tips for Getting Both Right the Second Time Around

If you've taken more than one trip down the aisle, then you probably know already that many issues are more complicated the second time around. Estate planning is just one of those areas that can become more challenging, especially if the new bride or groom -- or both -- have children from a previous marriage. Fortunately, you can enjoy wedded bliss without sacrificing the needs of your loved ones or your new spouse with just a little forethought and a few simple strategies.

The Biggest Mistake: No Plan at All

Some people avoid estate planning with more determination than a trip to the dentist. But unlike dental care, an estate plan happens whether you participate or not. If you fail to complete the task during your lifetime, the state in which you reside will write an estate plan for you when you die. But rather than take into account your wishes and the needs of your loved ones, the state's version of your estate plan will be based on its arbitrary rules of inheritance.

In Oklahoma, for example, when a spouse dies without an estate plan, the survivor is automatically entitled to an "elective share" of up to one half of the deceased's estate. The remaining half is split in equal shares among the deceased's children. If there are no children, the spouse may receive the entire estate, or one-third of property acquired prior to marriage. This arbitrary formula fails to consider the actual needs of each party. For instance, an elderly widow with health problems may need much more from her husband's estate than his grown children, all of whom may be well established and financially secure. Or conversely, a wealthy widower may not need his elective share from his late wife, while her young children need every penny.

In addition to a loss of control, there's another significant disadvantage to failing to plan: probate court. Death probate can be a time consuming and public legal proceeding. Adding insult to injury, all the costs associated with moving your estate through the probate court are borne by your estate itself. That leaves less of your legacy for your loved ones.

So, whether you have nine children or none at all, do yourself and your loved ones a favor: don't leave your estate plan to the government of Oklahoma. Work with a qualified estate planning attorney to create an estate plan that reflects your wishes and your family's needs.

The Trap of Joint Tenancy

Sometimes as bad as no estate plan at all is the use of joint tenancy. What is joint tenancy? It's a common form of ownership in which both joint tenants own 100 percent of the asset. The surviving joint tenant immediately inherits the other's ownership interests upon his or her death. Because it gives each joint tenant full control over the asset and avoids death probate when the first owner dies, many couples think of joint tenancy as the only estate planning strategy they need.

While joint tenancy offers a few advantages, its disadvantages are great, and for newlywed couples who bring their own children or debts into the marriage, joint tenancy can be an outright disaster. Here's how. Joint tenancy places the entire jointly owned asset at risk if one of the owners has debts, even if the other owner is completely innocent of the obligation. For example, Rita Kingman* didn't think twice about adding her new husband's name to her checking account, until six months later when her checks started bouncing. That's when she found out that the IRS had seized the account to settle back taxes her husband had incurred years before they'd even met. Even though Rita had absolutely no responsibility for her husband's prior tax liability, the IRS was within its rights in levying their joint account.

In the same way, jointly held assets are at risk if one of the joint tenants has bad credit card debts, judgments, or gets sued. The entire asset can be seized by creditors to satisfy the debt, even if one of the parties had nothing to do with the indebtedness.

But what if neither spouse brings debt into the new marriage? Is joint tenancy still a problem? Yes, especially if either spouse has children from a previous marriage.

Jake and Sondra Martinson* each had children from previous marriages when they tied the knot to each other. Without thinking through the implications, they did what most couples do: they added each other's names to their assets, including their checking accounts and Jake's home. Ten years later, Jake died, and Sondra immediately inherited Jake's ownership interests in their jointly held assets. His two young children, on the other hand, received nothing. Later, Sondra remarried, and once again, added her new husband's name as joint tenant on all her property -- which included not only her own assets, but also those

she inherited from Jake. A few years later, when Sondra was killed in an auto accident, her widower, Ben, inherited her ownership interests in all jointly held assets.

Ben wanted to do the right thing by Sondra's three children, but soon found himself in an expensive dilemma. Even though his desire was to do what Sondra herself would have wanted, he found that he couldn't give away any of her wealth away without incurring gift taxes or estate taxes. Of course, Ben could apply gifts over \$10,000 per child to his estate tax exemption of \$650,000 (as of 1999). But Ben has children of his own, and his estate is already greater than \$650,000. If he gives to Sondra's children the wealth he inherited from her, his own children may very well pay the price in the future when his estate is subject to costly estate taxes.

Better Planning Options

Fortunately, there are better planning options that allow husbands and wives in second marriages to protect their assets, ensure that their children receive a fair share of their legacy, and preserve the financial security of the surviving spouse.

In situations like these, I most often recommend the use of two revocable living trusts: one for each spouse, who become the Trustors of their respective Trusts. During their lifetimes, each spouse is free to spend, buy, sell, manage, invest, and otherwise use his or her assets just as before the trusts were created. The only difference is that their trusts actually own the assets, not the individuals themselves.

Upon the death of the first spouse, his or her revocable living trust is transformed into an irrevocable trust. It can go by several names, such as a "B" Trust, Family Trust or Credit Shelter Trust. But no matter how it may be called, it essentially serves this function: The surviving spouse continues to have full control over the assets in his own living trust. In addition, he can receive income from the Family Trust, and may even, under certain circumstances, access the trust's principal. But when the surviving spouse dies, the assets in the Family Trust are distributed to the Trustor's heirs, according to her wishes, just as the assets in the survivor's living trust are distributed on to his heirs at his death. In this way, the Family Trust protects the financial well-being of the surviving spouse, without sacrificing the legacy of the Trustor's children or other heirs.

The advantages to trust-based estate planning go well beyond helping to control how wealth is distributed. Another significant advantage is that they allow each spouse to take advantage of the individual estate tax exemption of \$650,000 per person, preserving more of their wealth for their loved ones, not the IRS.

Starting at 37 percent and rising to 55 percent on every dollar over the individual exemption, estate taxes can make a serious dent in your legacy. Although spouses can pass on unlimited wealth to each other, estate tax free, if they fail to use their individual estate tax exemption, it's lost forever. For a couple with an estate greater than \$1.3 million (as of 1999), that amounts to a \$211,300 mistake.

Trust-based planning provides yet another important benefit: it avoids probate. As I mentioned earlier, probate can be an unpleasant process, causing delays, unnecessary expenses and publicity, as your personal and financial affairs become a part of the public record. If all your assets are owned by a living trust, however, there's no need for probate. Instead, your legacy passes on to your heirs privately and without the intervention of the probate court.

Beginning the Process

Few of us start out on an adventure as wonderful as marriage with the thought of its ending foremost in our mind. That's why bringing up the subject of estate planning may seem like a fast way to put an end to the honeymoon. But for both spouses, planning ahead for every contingency is one of the most loving things each can do for the other -- and for their loved ones as well. Over the years that I've focused on estate planning, I've often found that helping my clients talk about these issues -- sometimes for the very first time -- is one of the greatest services I can provide them. As they share their hopes and dreams with me and with each other they take that critical first step in creating their own estate plan, a task that can give them far more peace of mind than any fleeting discomfort it may evoke.