estate planning
in a second marriage

By Mark J. Morrise

Partners in a second marriage often have concerns about estate planning. Many of these concerns, which may be unspoken, go beyond the natural reluctance to face one's mortality and focus instead on sensitive marital and family issues. For example, a spouse may secretly ask him or herself:

"How stable is our marriage?"

"Would facing our estate planning now cause me to receive less of our property in a divorce if our marriage were to fail?"

"Would it be better not to bring up my desire to complete our estate planning to keep peace with my spouse?"

"How can I provide for my spouse's financial security after my death without creating conflicts with my children from my first marriage?"

Understandably, such underlying fears often deter couples in a second marriage from starting an estate plan. But couples that get past these concerns and deal openly with these issues almost universally report that this has helped strengthen their marriage and improve family relations. Ironically, failing to deal with these issues can result in the very problems that were originally feared.

Consequences of Inadequate Planning

To better understand the possible consequences of inadequate estate planning, consider these second-marriage scenarios:

Unintentionally disinheriting children from the first marriage.

After their marriage, John and Mary re-title all their major assets (including their home, bank accounts and investments) in joint ownership. John, however, wants to give a portion of the major assets he brought to the marriage to his children from his first marriage, and therefore he prepares a last will that purports to do this. Contrary to what John intended, however, upon his death his will does not control who receives the major assets; because they are jointly owned, they automatically pass to Mary — effectively disinheriting John's children.

Forcing the surviving spouse to sue for his/her share of the estate.

During his first marriage, John prepares a last will that gives everything to his first wife and, if she does not survive him, to his children. John's subsequent divorce automatically revokes the gift to his first wife, making his children the sole beneficiaries of his will. After marrying Mary, John intends to provide for Mary upon his death, but he does nothing to document his intent. Instead John leaves the title of his major assets in his sole name, and he fails to amend his will. After John's death, his children seek to enforce his will, and Mary is forced to file a lawsuit to assert her statutory right to a portion (approximately one-third) of John's estate. This results in bitter feelings and a permanent rift between John's children and Mary.

Unexpected reduction of surviving spouse's share of estate.

John wants to provide for Mary upon his death, and he attempts to do this without a last will, in two ways. First, John names Mary as the beneficiary of his life insurance policies and retirement accounts. Second, John expects that, because he has no will, Mary will receive half of his estate pursuant to the laws of inheritance (his children from his first marriage will receive the other half).

Unknown to John, however, is a technical legal rule (applicable in Utah) that mandates that the life insurance and retirement benefits must be "charged against," or subtracted from, Mary's share of John's estate. For example, if John's life insurance and retirement benefits total $1 million, and his remaining estate also totals $1 million, this rule results in Mary receiving only the life insurance and retirement benefits and nothing from John's estate. Upon John's death, his children enforce this rule, and Mary receives substantially less than John had expected.

Steps to Proper Planning

With proper estate planning, all of the above problems could be avoided. At a minimum, such planning will include:

>> Discussing and agreeing upon important planning issues
>> Formulating an estate plan
>> Documenting the plan with new wills or trusts
>> Re-titling major assets so they are controlled by the wills or trusts
>> Changing beneficiary designations on life insurance policies and retirement accounts to coordinate with the estate plan

For a couple whose assets could be subject to estate tax (currently, combined assets that exceed $2 million), proper planning will also include gift and estate tax-saving strategies that are consistent with the couple's non-tax goals and that can be implemented as part of the overall estate plan. One such strategy, frequently used in second marriages, is the Qualified Terminable Interest Property (QTIP) trust, which will hold the assets of the first spouse to die. The primary benefits of this trust in a second marriage are that it reduces estate taxes, it provides an income to the surviving spouse for life, and it ensures that the deceased spouse's children will eventually receive an inheritance of the remaining trust assets.

Topics to Discuss

The following topics are useful to discuss for a couple in a second marriage who are starting to plan their estate:

1. **What assets were brought to the marriage?** If possible, identify the property and debts that each spouse brought to the marriage and what is currently owned, both individually and as a couple.

2. **What financial support will each spouse need if he or she survives the other?** Typically, a surviving spouse will need to remain in the marital home or use the home's equity to purchase a new home. In addition, the couple should estimate how much they would each need for his or her financial support. The estate plan should take these needs into account.

3. **Should the length of the marriage affect the estate plan?** Initially, one or both partners in a second marriage may feel hesitant to completely blend their finances. Consequently, in the early years of a second marriage, a couple may choose to delay blending their finances and to delay providing for a surviving spouse's financial needs through other means, such as life insurance. Eventually, a gradual blending will occur until the two main considerations will be (a) the financial security of each spouse and (b) providing an inheritance to the natural children (or other beneficiaries) of each spouse.

4. **Can the surviving spouse's financial needs and the inheritance for the deceased spouse's children be provided for separately?** If an adult child must wait for a stepparent to die before receiving his or her inheritance, situations of resentment, animosity or even litigation may surface. To avoid this, consider ways to provide the adult children's inheritance sooner. For example, if life insurance can be used to provide cash to the children, this could become their entire inheritance and the deceased parent's entire estate could go to the surviving spouse.

5. **Are there any other agreements that affect the plan?** If a couple has a prenuptial or postnuptial agreement, it may contain promises regarding how assets will be distributed at death. The estate plan should be consistent with these promises.

6. **Are two lawyers necessary?** In a first marriage, using two lawyers to negotiate and prepare a couple's estate plan is usually overkill. In a second marriage, however, using two lawyers protects each spouse's interests and therefore may be a good idea.

Conclusion

A second marriage often creates unique challenges, including sensitive estate planning issues. A couple that deals with these issues will ultimately find that doing so has improved both marital and family relations. ■

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