Yours, Mine and Ours: Estate Planning for a Blended Family

Casey Lawson
clawson@mwlaw.com
(479) 464.5657

02/08/2021

When William Shakespeare wrote "What's mine is yours, and what is yours is mine," he likely was not thinking about a blended family. Blending families offer a myriad of challenges, one of which is how the spouses' assets will be distributed at death. If you are a spouse in a blended family, the first step in estate planning is to determine what you want to happen to your assets if you are the first spouse to pass and what you want to happen to your assets upon your surviving spouse's death. Your answers to these questions will help guide the ultimate estate plan.

If you want to leave all of your assets to your children from a previous marriage and not to your new spouse, there are several issues that you need to consider. Simply executing a Will that leaves all of your assets to your children may not be enough. This is because a Will does not (a) act to change ownership of property during your life, (b) alter beneficiary designations or (c) guaranty that your spouse will not receive part of your estate.

Spouses often own property as joint owners with right of survivorship or as tenants by the entirety. The issue with this type of ownership is that upon the death of the first spouse the asset automatically becomes owned solely by the surviving spouse. The surviving spouse would then be the one to determine what happens to the asset at his or her later death. As such, if you want your share of the asset to pass to your children at your death, and not to your surviving spouse, joint owners with right of survivorship will not accomplish this goal. Likewise, a statement in a Will that you want jointly held property to pass to your children will not overturn the joint ownership and the asset will still pass to your surviving spouse. Thus, it would be best to avoid this type of ownership and instead own the property as tenants in common, in your individual name or in a trust.

Just as a Will does not change jointly owned property, it cannot change a beneficiary designation on an asset. Assets such as retirement plans and life insurance all provide that they will pay at death to the beneficiary on record. Numerous other assets, such as bank accounts and investment accounts, now also allow for you to name a beneficiary. These assets will pass according to the beneficiary designation on file, regardless of whether your Will requests a different distribution. Upon remarriage it is important to review all beneficiary designations that you have in place to make sure that they correctly reflect your wishes. It is important to note that in the case of a 401k, federal law requires your spouse to sign a waiver if you wish to name someone other than them as beneficiary.

Even if you have no jointly owned property, have checked all your beneficiary designations and have executed a Will that leaves everything to your children, your spouse may still receive part of your estate. Most states have a law that allow a surviving spouse to make an election against the Will of their deceased spouse, if the surviving spouse did not receive a minimum amount of property from the deceased spouse at death. Thus, even if you did not want your spouse to receive anything, they can take

the affirmative step of electing against your Will and receive the state mandated minimum amount. There are two ways to avoid an election against the Will. The first is to leave your spouse the minimum mandated by your state's laws, and the second is by executing a prenuptial or premarital agreement prior to marriage.

Prenuptial or premarital agreements are documents that are executed by the parties to a marriage before the marriage occurs. These agreements are entered into by future spouses to provide for how their assets will be divided not only in the event of divorce but also in the event of death. agreements set forth the minimum that each spouse must provide the other in the event of divorce or death. A prenuptial agreement can provide that spouses will be required to leave nothing to the surviving spouse at death and that the surviving spouse explicitly waives their right to make an election against the Will of the deceased spouse. This will prevent the surviving spouse from being able to make an election after your death. Even though a prenuptial agreement may provide that neither spouse is required to leave the other anything upon death, a spouse can later decide to provide for their spouse at death. The prenuptial states the minimum required, but it does not prevent a spouse from providing more.

Each state has specific requirements that must be met in order for a prenuptial agreement to be valid and enforceable, as such, if it is important to consult with an attorney. It will also be important to begin the process of negotiating and drafting the prenuptial agreement well before the wedding date.

What if you want to provide for your new spouse after your death, but you also want the remaining assets to pass to your children at your spouse's death? While joint ownership with right of survivorship or tenants in the entirety will allow your surviving spouse to own and use the property after your death, your spouse will decide how to transfer the property at his or her later death. There is no requirement that your surviving spouse transfer any part of the jointly held assets to your children. Thus, joint ownership with right of survivorship is not the best option to accomplish your goals.

In regards to real estate, one option is to own the real estate in your individual name and provide that at your death your surviving spouse will receive a life estate in the property. A life estate allows your spouse to continue to reside at the property until his or her later death. After your spouse's death, your the children would be free to sell the home or keep it for themselves.

While life estates are an option with real property, to accomplish the same goal with other assets a more viable option is a trust. A trust would also be suitable for real estate. With a trust you have the ability to allow the assets to be used for your spouse's benefit during his or her remaining life and then also control the disposition of assets after the death of your spouse. Trusts can be fine tuned to meet your wishes and desires. A trust can provide a set amount to your surviving spouse each year or it can provide assistance to your spouse only in particular circumstances. Your surviving spouse can be the trustee or you can choose someone else to manage the trust and make distributions to or for your spouse. The trustee could even be one of your adult children. If you are part of blended family and want to provide for your surviving spouse but also ensure that your children from a previous marriage receive an inheritance, then a trust is an option you should consider.

Whereas estate planning is something everyone should consider, when you are in a second or subsequent marriage, it becomes even more important as you and your spouse may have different goals and considerations in regards to how you want your estate distributed. The worst thing one can do is not plan and simply hope for the best. With the numerous options available there is a way to accomplish your goals if you take the time to plan.