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THE BLENDED FAMILY DILEMMA: ESTATE PLANNING FOR REMARRIED COUPLES WITH CHILDREN

The blended family is one where at least one spouse has at least one child from a prior marriage or relationship. Blended families, which are now quite common, come in all different shapes and sizes. For example, the husband may have his own children, the wife may have her own children and the couple may have children together. The dynamics will be different in the case of a husband and wife remarrying while they are younger and have minor children, rather than remarrying when the husband and wife are older and their respective children are all adults. Blended families are a diverse group of people and any estate planning must be done on a case-by-case basis; however, to follow are certain estate plans often recommended to blended families.

Reciprocal Wills (All to spouse at first death then equally to all children):

For any married couple, the most common estate planning goal is to provide for the surviving spouse after the death of the first spouse and then, upon the death of the last spouse, to provide for children. When all of the children are common to the marriage, this goal is most often met by use of reciprocal wills, whereby each spouse, upon death, leaves all of their property, either outright or in trust, to the surviving spouse, and then upon the death of the surviving spouse, the estate passes equally to their children. However, this type of estate planning may not provide a great deal of comfort when there are children from a prior marriage, because the first spouse to die has no guarantee that the surviving spouse will provide for his or her children when the surviving spouse dies. Nevertheless, many blended families use reciprocal wills as their primary estate plan. They do this for the sake of simplicity and to keep their estate planning costs at a minimum. But, as stated previously, this estate plan has some serious disadvantages.

The surviving spouse can make gifts of assets during his or her lifetime, can change beneficiary designations or can retitle assets joint with right of survivorship with his or her own children or perhaps even a new spouse, leaving little to no assets to pass under the reciprocal will of the surviving spouse. Therefore, the surviving spouse could defeat the intent of the deceased spouse without even changing his or her will. For example, if the deceased spouse named a surviving spouse as the primary beneficiary of his or her IRA or 401(k) retirement plan, the surviving spouse could roll this account into an account titled in his or her name. The surviving spouse could then name his or her own children as the beneficiaries to the exclusion of the children of the deceased spouse. This could occur despite the fact that the surviving spouse has a will leaving everything equally to the surviving spouse's children and the deceased spouse's children.

Of course, a major disadvantage of the reciprocal will estate plan is that a will is revocable. Therefore, after the death of the first spouse, the surviving spouse can change his or will to favor his or her own children, or charities, or a new spouse. Additionally, you must keep in mind that the surviving spouse as he or she becomes older, may become more susceptible to undue influence and exploitation by his or her own children or other people such as caretakers, thus causing the surviving spouse to change his or her will to favor them. Moreover, the surviving spouse could deplete the estate by overspending, incurring debts, or catastrophic health care costs, leaving nothing for the children of the deceased spouse.

Non-Reciprocal Wills (part of your estate to the surviving spouse and part to just your children):

Alternatively, each spouse could create non-reciprocal wills, that is, wills that are not exactly the same. Under this estate plan, each spouse could leave a percentage or dollar amount to the surviving spouse and a percentage or dollar amount to be divided equally between his or her own children, but not the children of the other spouse. An advantage of this estate plan is that the first spouse to die does not have to rely upon the surviving spouse to take care of his or her children. This type of estate plan also has several disadvantages. First, the children may not believe that they are getting their fair share of the estate. This should not be too big a concern because children oftentimes have that perception no matter what is done. It is also difficult to determine, at the time the will is made, the amount needed to provide for the spouse and an appropriate amount to go to the children. This may take some thought and may change as the estate grows or shrinks in the future. A big concern, depending on the size of each spouse's estate, is whether or not the economic needs of the surviving spouse can be met. Some surviving spouses may not be able to maintain their lifestyle if, at the death of the first spouse, a portion of the deceased spouse's estate passes to the deceased spouse's children. In this case a trust for the benefit of the surviving spouse may be warranted, which will be discussed later in this article.

Use of Life Insurance:

A third alternative is to purchase life insurance to either provide for the surviving spouse or to provide for the children of the first spouse to die. Oftentimes assets are titled jointly with the surviving spouse; thus, it is more common to purchase life insurance to provide for the children. The purchase of life insurance has the advantage in that it guarantees, as long as the life insurance policy remains in force, that the children will receive something upon the death of their parent. However, cost can be a factor. During younger years the purchase of term insurance is relatively inexpensive, but becomes increasingly more expensive as a person grows older. Additionally, if a person does not already own a life insurance policy or needs additional life insurance, depending on age and health risks, that person may not be able to purchase life insurance or may be required to pay a substantially higher premium. Employer provided life insurance may be utilized for this purpose, but there are limits to the amount of life insurance an employer provides and this life insurance coverage usually terminates when employment terminates or may not be available in such cases as an employer filing for bankruptcy. Therefore, relying solely upon employer provided life insurance may not be the best alternative.

Agreement to Make a Will:

Florida Statute 732.701 allows Florida residents to enter into a written agreement signed by the agreeing parties in the presence of two witnesses to agree (1) to make a will, (2) to give a devise, (3) not to revoke a will, (4) not to revoke a devise, (5) not to make a will, or (6) not to make a devise. A husband and wife could enter into reciprocal wills whereby the last to die under each will is legally

obligated to make provision for the other spouse's children. The husband and wife could also contractually agree not to revoke their wills or not to revoke the gift to the other spouse's children.

This sounds great in theory but is difficult in practice. These types of wills give a false sense of security and are fodder for post-death litigation. The reason for this is that the surviving spouse can easily defeat the contractual provisions of the will by making gifts of assets during his or her lifetime or by retitling assets as joint tenants with right of survivorship with his or her own children or with a new spouse. You must also keep in mind that there are numerous assets which oftentimes do not pass under a will, such as life insurance, IRAs, 401(k) plan accounts and other employer sponsored retirement plans and assets titled jointly with right of survivorship. Additionally, the surviving spouse can simply breach the agreement by creating a new will which does not provide for the deceased spouse's children. It would then be up to the children of the deceased spouse to bring a legal action against the estate of the stepparent to enforce their deceased parent's contractual rights.

The Use of Testamentary Trusts:

Another viable option is to create a testamentary trust (or trusts) that becomes irrevocable upon the death of the first spouse. The testamentary trust could provide for the surviving spouse during his or her lifetime and, upon the death of the surviving spouse, the remaining trust assets could pass equally to the children of the deceased spouse.

This type of trust arrangement meets the dual goals of providing for the surviving spouse during his or her remaining lifetime and then passing the remaining assets to the children of the first spouse to die upon the death of the surviving spouse. This type of testamentary trust could provide that all the income be paid to the spouse on a monthly or quarterly basis and that the surviving spouse have access to the principal for his or her health, maintenance and support. The disadvantage to this approach is that it is more complex and more expensive to implement.

Thought also needs to be given as to who would be the trustee of this testamentary trust. The most common options of who should serve as trustee are the surviving spouse, a child of the deceased spouse (that is a stepchild of the surviving spouse) or a bank or trust company. Each of these choices have their own advantages and disadvantages. Something that should not be overlooked is that the stepchildren of the surviving spouse, as vested contingent remainder beneficiaries of the trust, are entitled, under Florida law, to an annual accounting by the trustee, unless a designated representative is named to receive trust accountings. Therefore, the stepchildren of the surviving spouse would know each year how the trust money is being spent by the surviving spouse. This may not make the surviving spouse feel very comfortable, although it does provide a check and balance on the administration of the trust.

Pre-marital or Post-marital Agreement:

Another option for a couple who is considering marriage where there are children from prior marriages, and there are substantial assets to protect either by one or both of the spouses, would be to consider entering into a pre-marital agreement or a post-marital agreement. Couples certainly have a better chance of working out these issues before marriage rather than after marriage. Marital agreements, among other things, can resolve the various property interests that a surviving spouse is given under Florida law in the other spouse's estate. These property interests include an elective share, homestead rights, rights as a pretermitted spouse, rights to exempt property and rights to a family allowance.

It is beyond the scope of this article to explain in detail the substance of these rights other than to say that a surviving spouse is given substantial rights in the other spouse's estate merely by the act of marriage. Florida Statute 732.702 allows any or all of the aforementioned rights, to be waived in whole or in part by a written agreement signed by the waiving party either before or after marriage. If this agreement is signed after marriage, each spouse is required to make a full and fair disclosure to the other spouse of his or her estate.

If approached with a positive attitude a pre-marital agreement can be used to address important issues that are of concern to both spouses, reduce anxiety and confusion, and hopefully help build a strong marital foundation. The disadvantages of a pre-marital or post-marital agreement are that they are more complex and somewhat expensive to implement, and oftentimes are emotionally charged. Nevertheless, a marital agreement can be an extremely useful document.

Summation:

There is no "perfect" estate plan for a remarried couple. The dynamics of a blended family preclude a simple "off the shelf" estate plan. You must look at both the personal and economic aspects of your family and devise a plan that works for both spouses. Remember, although your estate plan may work today, your family and your assets are dynamic and subject to change; therefore, your estate plan needs to change with it. This is especially true for blended families.
