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Estate Planning for the Sunset Marriage

By: Ken Bloom

It has been said that love conquers all. There may be no greater embodiment of this sentiment than the union of two people in marriage. For some, it may have taken a few false starts in order to find that perfect someone. For others, that someone may have died far too soon, but a new love has come to fill the void. It is easy for couples to throw caution to the wind when they are young, fresh, relatively penniless, and looking to build a life together. However, getting married becomes slightly more complicated when it occurs later in life after each person has achieved their own levels of wealth and may have children from a previous marriage to consider. Failing to properly plan your estate may put your loved ones at the risk of not receiving the portion of your estate you intend and may possibly burden them with the battle of 'who gets what.' Unfortunately, love only conquers some problems; the rest is left to smart estate planning!

Estate Planning Considerations before Marriage

When contemplating a marriage later in life, it is important to consider several aspects of your estate plan before taking the plunge. Generally, marriages that occur later in life involve parties with unequal financial standing and/or children from another marriage. Failing to take some basic considerations may cause your estate to be subjected to unnecessary estate taxes and a distribution of your property that may be very divergent from your actual intentions. Therefore, you may want to consider the following if you will be married later in life.

First, since most marriages that occur later in life include parties that enter the marriage with different amounts of savings, it is important to have a prenuptial agreement. A prenuptial agreement, prepared in consultation with each party's attorney to ensure fairness, will provide mutually agreed upon terms for which property will be distributed upon divorce and/or death. Although the division of property is most relevant here, a prenuptial agreement can also provide for any other terms that are agreeable to the parties, such as providing custody of offspring.

Second, a new will should be drawn that takes into consideration how you wish to provide for your new spouse and your children from a prior marriage, if any. An old will, or a will from a previous marriage, may not embody your current intentions for the eventual distribution of your estate. Additionally, you need to consider that upon your death, your new spouse may have a right to "renounce" your will to claim his or her statutory share, which can be as high as 50% of the estate.

Third, you may want to consider executing a living trust. A living trust is an instrument that holds title to your assets but still allows you to manage them. The trust will also provide for the distribution of those assets upon your death. A living trust can be a very effective estate planning tool that allows the beneficiary to avoid court-directed guardianship, eliminate probate proceedings on death, potentially reduce estate taxes and maintain privacy.

Fourth, a durable power of attorney for healthcare decisions should be executed. A person appointed with durable power of attorney for healthcare decisions is an agent that will make decisions on your behalf in the event you become incapacitated. Upon such event, your agent will make decisions regarding the provision for, and withdrawal of, medical treatment or life support. Generally, an agent with power of attorney for healthcare decisions is a spouse, adult child, relative or close friend. It cannot be your physician.

Finally, a durable power of attorney for financial/property decisions should also be appointed. Similar to your healthcare agent with power of attorney, your appointed agent will have the authority to make decisions on your behalf in the event you become incapacitated. Your agent, however, will be making decisions regarding the management of your assets instead of your healthcare. A spouse, adult child, relative or close friend can be appointed as your agent for power of attorney for property decisions, however, appointing such a person is cautioned. Since such a person will may have an interest in your property as an heir or beneficiary, he/she may have the potential to abuse this power. Therefore, in such a situation, you may wish to appoint an independent party.

Estate Planning Pitfalls when Getting Married

Now that you have a good idea of what to do regarding your estate planning before you get married, you should also be aware of certain pitfalls to avoid when planning your estate. The following are some things to avoid.

First, do not put assets in joint tenancy with your new spouse if you intend to leave those assets to children from a prior marriage. Assets held in joint tenancy with your new spouse will pass automatically to your spouse upon your death. If you wish to leave those assets to children of a prior marriage, the decision will be left to your new spouse, who will become the sole owner of the assets. However, if you wish to intentionally disinherit your children of such property, then placing assets in joint tenancy with your spouse is the simplest way to do so, as long as you have no estate tax concerns.

Second, do not rely on an old will from a prior marriage or from a different state. Such a will may be particular to your prior marriage arrangements or the laws of a different state. Relying on these wills as 'good enough' may bring about unforeseen circumstances that may be catastrophic to the eventual distribution of your estate and may leave loved ones embroiled in conflict and possible litigation.

Third, do not rely on oral agreements that your new spouse will 'do the right thing' and take care of your children from a previous marriage after you become disabled or die. Although your new spouse may grow to care deeply for your children from a previous marriage, know that your new spouse's love for his/her own children may be much stronger, even if your second marriage was long term. If your new spouse comes into the marriage with a substantially lower financial standing, it may be particularly tempting for him/her to try to increase the financial well-being of his/her biological children as much as possible. So how do you leave assets to your spouse while making sure that your spouse doesn't then leave these assets to her own kids? Instead of leaving him/her the assets outright, place them in trust for your spouse, with a mandatory payment of income for life, with perhaps, payments of principal in the discretion of the trustee. The payments of principal, if any, can be tied to a very narrow standard, such as for "emergency financial or medical need" or a very broad standard such as for "best interests and welfare and luxuries". Remember, even though your new spouse may love you and your children, these other significant influences may sway his/her intention of 'doing the right thing.' After all, blood is thicker than water, and money changes everything.

Fourth, do not name your new spouse as sole executor or trustee of your estate. Similar to appointing your new spouse as your agent with power of attorney for property decisions, there is a propensity for your new spouse to abuse the power of being the sole executor or trustee being that he/she has such a large stake in your estate. Therefore, it is also recommended that a disinterested party, such as a close friend or colleague, or even better, a bank or trust company, be appointed as sole executor or trustee or appointed as a co-executor or co-trustee with your new spouse.

Fifth, do not name your new spouse as the primary beneficiary of all your life insurance policies and retirement plans/IRA's. Doing so will completely disinherit your children from these policies and accounts. However, similar to placing assets in joint tenancy with your new spouse, such action may be acceptable if it is your intention to disinherit your children, or if you feel that you have provided sufficiently for your children with other assets. Be sure to speak with your estate planning attorney, though, because leaving your assets directly to your spouse "wastes" your own estate tax exemption, potentially subjecting more of your spouse's assets to estate tax upon his/her subsequent death. It is more tax-efficient to have a credit shelter bypass trust established upon the death of the first spouse.

A marriage can be the perfect event to enrich the best years of your life. It should be a time to celebrate each other and each other's lives. By following these few considerations you can rest assured that your estate plan is healthy and your future with you new spouse is bright.

Top 5 Do's:

- 1) Prepare a prenuptial agreement
- 2) Have a new will drawn up taking into account how you want to provide for your new spouse and your children from a prior marriage.
- 3) Consider executing a living trust
- 4) Sign a power of attorney for health care
- 5) Sign a power of attorney for property

Top 5 Do Not's:

- 1) Put assets in joint tenancy with your spouse if you want to leave money to children from a prior marriage.
- 2) Rely on oral agreements that your spouse will 'do the right thing' and take care of your children after you become disabled or die.
- 3) Rely on your old will from a prior marriage from a different state.
- 4) Name your new spouse as the sole executor or trustee of your estate
- 5) Name your new spouse as the primary beneficiary of all of you life insurance policies and retirement/IRAs unless you want to disinherit your children.