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Blended Families and Your Estate Plan

By James S. Rizzo, Esq.*

Anyone who ever grew up with or saw The Brady Bunch will recall the trials and tribulations, albeit humorous, of America's most famous blended family. What seemed like a rather novel concept in the 1970s is of course commonplace today. According to a recent Pew research study, 40% of married couples with children in the U.S. are step-couples, meaning at least one partner had a child from a previous relationship before marriage. The study further found over 100 million Americans have a step-relationship within their families and approximately one-third of all weddings in America today form step-families.

The prevalence of blended families can create unique and varied challenges when completing an estate plan. Who gets real property when a couple dies with step-children? If one spouse does not have a will, do step-children have any rights to assets? A person may have unique family heirlooms, collectibles, jewelry, real property, business interests, firearms, personal property, etc., that has been in a family for generations that he/she wants to keep in their respective bloodline.

While there are a multitude of issues and problems that arise when a person dies with no estate plan in place, the following are important factors to consider either prior to or if you are already in a marriage resulting in a blended family.

Consider a pre-nuptial agreement. When most people hear of a pre-nuptial agreement, they usually think of a high-profile divorce litigation over millions of dollars. However, there are very practical reasons why a couple bringing their children into a new marriage should consider this option. If the intention and goal is to keep family heirlooms and property within your bloodline, a well-crafted pre-nuptial agreement will specify such items and prevent them from being a disputed part of either a divorce or an estate proceeding when one spouse dies.

Ideally, both parties should have their own attorney to avoid any argument down the road that one party misunderstood the agreement or was biased or unduly influenced by the other. The agreement should specifically state, among other things, that the parties consulted with and had their individual attorneys review the agreement. A good practice is to also attach a summary of each party's assets to avoid any person later claiming they were not aware of how much the other person had. Keep in mind that a pre-nuptial agreement generally deals with assets upon the divorce of the parties but may be silent with respect to what happens when either party dies.

Waiver of "Right of Election". While a family law attorney would generally craft a pre-nuptial agreement, the critical component usually reviewed or created by estate attorneys is the "waiver of the right of election" form. In New York, by virtue of being married, a spouse has a right to a certain minimum percentage of assets regardless of what a Will or Trust document provides. While there are exceptions and even additional assets that can be obtained, under New York law a spouse is generally entitled to a minimum of either 1/3 or $50,000 from a decedent's net estate, whichever amount is greater. Thus, a spouse cannot be written out of a Will or Trust unless he or she specifically waives the "right to elect" against such an estate document.

Therefore, if the intention is that each spouse keeps within their bloodline what the respective party brought into the marriage, it is important to complete a prenuptial agreement and/or a waiver of right of election agreement. Again, it is recommended the documents be completed under the review and guidance of separate attorneys for each person.

Create Separate Trust Agreements. Each party should consider completing a separate trust agreement designating who they want to get their assets upon death. Trusts can be especially useful when dealing with multiple properties that may only be titled in one spouse's name. By putting real property in trust, it can avoid the lengthy and costly process of probate and ensure the property ultimately goes to the specified lineal (blood) descendants. Separate Trusts also make it clear how both real and personal property is being divided so there is no confusion over bequests to either the surviving spouse or step-children.

At minimum, complete a Will! While couples in a blended family should have their options explained to them in detail by an estate attorney, completing up to date Wills is critical. A primary example is if couples in blended families wish to leave their step-children any assets, they must list the specific bequest(s) to each step-child. Dying without a Will may inadvertently exclude a step-child who had a close relationship with the deceased. There also may be situations where a biological child has a more distant or adversarial relationship with the deceased but stands to inherit over closer step-children because no Will was completed.

It is human nature that family dynamics will always have degrees of complexity and blended families add another layer of complexity. Dying without a Will or estate plan in place can result in chaos, litigation and bitter family disputes which are easily avoidable. Proper estate planning simplifies and provides peace of mind that your assets can either be shared among "new" step-family members or kept separate within one's immediate lineal descendants.

James S. Rizzo is an attorney with the law firm of Hilton Estate & Elder Law, LLC, with offices in Rome, Utica, Boonville and Lowville, NY. He has over twenty-one years of legal experience and concentrates in Estate Planning matters, including Wills, Revocable and Irrevocable Trusts, Powers of Attorney, Health Care Proxies, Asset Protection, Nursing Home/Medicaid planning and related Litigation issues. He can be reached at jsr@hiltonlawny.com or (315) 624-9600 for a confidential, free initial consultation. Also visit us on the web at: www.hiltonlawny.com.

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