

Second Marriages

by Attorney Michael Hooker

There is a complex framework and formula for how much a surviving spouse inherits where the decedent left no Will. In order to avoid such complexity and potentially unfair disposition, it is critical that a second marriage elder engage in estate planning. Second marriage estate planning is far trickier than in first marriages where reciprocal wills, with the children as equal contingent beneficiaries are the norm. Second marriages have become commonplace because people are living longer and divorce is now generally accepted. The typical approach for elders who have respective children of their own is for each spouse to leave his or her estate to his or her children. But what if one spouse has substantial assets and the other minimal? The wealthy spouse may want to leave at least some money to the other. This can be achieved by creating a Trust which gives the income to the surviving spouse and the residual to the children upon the surviving spouse's death.

But how long will that be? What if the surviving widow is only 59 years old? Those funds could be locked up in a Trust for 25 years or more. The same could be said about leaving the survivor a life estate in your house. Are you creating the potential situation where the residual beneficiary children are waiting around for step mom to die? Does that matter to you? What if the surviving spouse remarries? Does that mean he or she relinquishes the life estate? If these considerations trouble you, you might want to consider simply leaving the survivor a lump sum of money that would carry him or her in an apartment for many years.

A couple about to enter a second marriage should consider a prenuptial agreement that makes provisions for death or divorce. If you are already in a second marriage you may want to consider a post-nuptial agreement, although they are not as readily recognized as pre-nuptial agreements. It is extremely important to know that these agreements DO NOT protect assets should the "poor" spouse enter a nursing home and the wealthy spouse remain in the community. The wealthy spouse is vulnerable to such care costs.

Can you prepare a Will which disinherits a spouse? Yes, but in Massachusetts a surviving spouse can waive the Will and take a statutory share. What if you don't have a will? Can you exclude the spouse establishing a non-probate estate (annuities, life insurance, IRA beneficiaries, transfer of the house to children etc?). Massachusetts law is unsettled.

What about medical decisions? Should you name your spouse as your Health Care Proxy? Your children? Name the spouse and child as Co-Proxies? Whichever path you choose, you should have a discussion with your second spouse and your children to express your wishes and ask that whoever is the Proxy enlist the input of the family member (s) who is not the Proxy. What about a Power of Attorney? Should you name your spouse to manage your funds while you are alive? This can also be very tricky. It is one thing to leave money to a surviving spouse, it is another to leave him or her in charge of your finances if you are incapacitated. What if you name a child as Power of Attorney and they penny pinch on the surviving spouse in order to maximize their inheritance? There are no right answers to these questions. Your quest to be fair to your spouse and your children is often unattainable.