



ESTATE PLANNING FOR COUPLES WITH CHILDREN FROM PRIOR MARRIAGES

Senior Connection

July 18, 2019

1. Common Estate Planning Issues for Couples with Blended Families
 - a. Children don't like or get along with the new spouse
 - b. New spouse's relationship with stepchildren may be strong while their spouse is alive and fade after the spouse dies
2. Use of Bypass Trusts
 - a. A marital trust that splits into two trusts, a Decedent's Trust and a Survivor's Trust, upon the death of the first spouse to die.
 - i. A-B trusts are generally used when one or both spouses has/have children from previous marriages, and/or to minimize estate taxes.
 - ii. The Decedent's Trust contains the separate property of the first spouse to die and the decedent's half of the community property or the amount of those assets in excess of the estate tax exclusion amount.
 - iii. The Survivor's Trust contains the separate property of the surviving spouse and the surviving spouse's half of the community property.
 - b. Separate property: real and personal property that is owned by a spouse before marriage or is acquired by that spouse during the marriage by gift or inheritance, and any income or increase in value on such property.
 - c. Community property: all property acquired by either spouse during the marriage, except property acquired by gift or inheritance.

- d. Benefits of the split:
 - i. Protects the testamentary intentions of the decedent;
 - ii. Provides some creditor protection to the surviving spouse;
 - iii. Growth on the Decedent's Trust is sheltered from estate tax;
 - iv. Decedent's generation skipping tax exemption can be applied to the Decedent's Trust assets.
- e. Downside to the split:
 - i. Split trust requires more administration. Community real property that is owned by the trust will need to be distributed to the Decedent's Trust and the Survivor's Trust in equal shares using a deed of distribution.
 - ii. Decedent's Trust assets do not get a step-up in tax basis at the surviving spouse's death;
 - iii. Undistributed income is taxed at the compressed trust tax rates.

3. "I Love You" Wills

- a. Each spouse's will leaves everything to the other spouse
- b. Survivor can leave assets to anyone they want and they may remarry, so stepchildren may get left out if surviving spouse changes their will
- c. Stepchildren who don't like the new spouse have no incentive not to challenge the will if they weren't going to get anything anyway
- d. Having the parent leave something to the kids as well as to the spouse and including a no-contest clause may prevent frivolous challenges because the challenger will be disinherited if they don't have probable cause for the challenge

4. Designated Beneficiary on Qualified Retirement Plans

- a. Spouse can rollover the funds to their own IRA and leave to their own beneficiaries
- b. Spouse can accept as inherited IRA, but can still take out more than the minimum distribution
- c. If Decedent's Trust is the designated beneficiary of the IRAs, you can limit distributions to minimum distribution amount

- d. Under the Employee Retirement Income Security Act (ERISA) plans, such as 401(k) plans, the spouse is automatically entitled to receive 50 percent of the money, regardless of what the beneficiary designation says, unless the spouse signed a waiver

5. Intestate Succession

- a. If there are surviving children who are not the issue of the surviving spouse, the surviving spouse gets one-half of the intestate separate property and no interest in the one-half of the community property that belonged to the decedent.
- b. The kids get the decedent's half of the community property

6. House Where the Couple Lives Together

- a. If the house is community property/joint tenancy, with right of survivorship, the surviving spouse gets the house and the kids get no interest in the house
- b. If the house is community property, but isn't titled with right of survivorship and the decedent dies intestate, the kids will own half of the house as tenants in common with the surviving spouse
- c. If the house is separate property of the deceased spouse and the surviving spouse isn't the beneficiary, the beneficiary can kick out the surviving spouse. This can be avoided through:
 - i. Life estate: gives the spouse the right to live there until they die (but what if they leave the house?)
 - ii. Personal residence trust: can appoint trustees and detail what expenses the trust will pay for and when the property can be sold

7. Problems with Making a Joint Trust Irrevocable

8. Contract to Make a Will

- a. Each spouse agrees to leave their assets to each other and the survivor of them shall leave their assets to the deceased spouse's beneficiaries
- b. Too easy to defeat
 - i. Gifting of assets during lifetime
 - ii. Wills are revocable until death
