



Will Power

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KEEPING OUT THE NEW SPOUSE

“Henry” and “Lisa” came into my office to prepare revocable trusts and related estate planning documents. They have been married over forty years and have three children. Over the years, Henry and Lisa have accumulated significant wealth. One of their concerns, as expressed to me, included what would happen if one of them died and the other remarried. Would this new spouse have access to the estate? Could the new spouse effectively disinherit their children and grandchildren?

Henry explained that he witnessed a friend who had remarried and then became quite ill. After the friend’s death, the children discovered that they were effectively disinherited as apparently the new spouse took the friend to an attorney and had all the documents changed to benefit her. Henry said that if his friend were of sound mind this never would have happened and he wanted to prevent the same occurrence in his own family.

I concurred that these are questions and challenges that must be addressed. Various of these issues might be satisfied by creating trusts that become irrevocable upon the first spouse’s death. There are disadvantages to this scenario in that certain gift tax transaction expenses may apply, and that once you make a trust irrevocable, you end up “handcuffing” the surviving spouse.

Moreover, certain assets such as amounts held in qualified retirement plans or IRA accounts have adverse income tax ramifications if you attempt to hold distributions in trust. Florida homestead properties are difficult to keep out of the hands of any new spouse due to the Florida statutes on the descent and devise of homestead.

Who one selects as a trustee to the various trusts is also very important. A strict trustee might make the surviving spouse’s life miserable. A loose trustee might not follow through with the parties’ intent. I like to suggest that the parties consider a trustee committee. You might want to appoint one of the children, your CPA or other trusted friends and advisors to sit on the committee along with a professional, such as a bank or trust company, to ensure that the plan is being carried out.

The surviving spouse also has to be ready and willing to enter into a prenuptial agreement with any new spouse. A properly drafted nuptial agreement will go a long way in preserving the original intent of the parties. Without a prenuptial agreement, a new spouse may have legal rights to properties or assets even if they are not included in a will or trust.

Although Henry and Lisa’s concerns are quite valid, you can see from this short column that these are complex issues that aren’t easily answered. Careful thought and consideration is required, with an analysis as to the potential dangers and opportunities for each strategy considered.

I suggested to Henry and Lisa that not only should they come up with an estate plan that will address as many of their concerns as possible, but before implementing any plan, they should include their children in the planning process, assuming that the children are responsible, self sufficient adults. I have found this minimizes misunderstandings and promotes family harmony for whatever may occur.

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