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Remarried With Children? 5 Estate Planning Mistakes to Avoid

A second marriage can be a balm for the heartache of losing a spouse, be it through death or divorce. Nevertheless, if there are children or other heirs involved, you should consider carefully what will happen with your money and possessions when you pass on.

You can never guarantee that everyone in the blended family will be happy with the arrangements you have made with a second marriage. But you can at least avoid some mistakes so that your immediate family doesn't get shut out of an inheritance — or worse, that an ex-spouse gets an inheritance that you didn't plan on giving.

Most people mean well: They want their spouse to inherit their possessions when they die, and their heirs to split what's left when the spouse dies. And they want everyone, including their children and their spouse's children, to be happy. No one wants a brawl to break out when the will is read. Here are five ways to prevent that.

Mistake #1: Not changing beneficiaries

"The most common mistake we see is that people never change their wills or their beneficiary designations," says Mark Bass, a financial planner with Pennington, Bass & Associates in Lubbock, Texas. "You should see the look on their face — or their new spouse's face — when you ask, 'Did you know your first wife is still the beneficiary of your 401(k)?'"

One advantage of changing the name of the beneficiary is that the money will go directly to the intended person — often, the surviving spouse — without probate, which is the legal process of settling an estate. You should go through all of your financial accounts — checking, savings, retirement — to make sure that your spouse is designated the beneficiary if that's your intention. Check life insurance beneficiaries, too, since these payouts also bypass probate. You can also designate your children as secondary beneficiaries, so they will receive the assets in the event you have both died.

"Basically, change everything with a beneficiary designation," Bass says. In some instances, federal or state laws may require spousal consent if the primary beneficiary is anyone other than the current spouse.

While you're poring over important documents, remember to update legal directives — such as a medical power of attorney — to make sure that, say, it's your current spouse and not your ex who is charge of making medical decisions in case you're incapacitated.

Mistake #2: Not changing your will

Although changing your beneficiary on financial documents will avoid leaving your 401(k) balance to your ex-spouse, your will determines much of who gets the rest of the assets you and your spouse accumulated during your lifetimes. You probably don't want your ex-spouse to get your home, either.

Typically, people on their second marriage decide that the surviving spouse gets all the assets, and upon the death of the second spouse, the remaining assets will be divided evenly among all of the children. This assumes, of course, that in five or 20 years everyone will still be getting along — and that your spouse, upon your death, won't write a new will that shuts out your side of the family.

You could also draw up a contract that would require your surviving spouse to maintain the will as it is. Although some estate lawyers use them, will contracts have their drawbacks. "They're not valid in every state, and not every state will recognize them," says Letha Sgritta McDowell of Hook Law Center in Virginia Beach, Virginia. "And the biggest problem we have is that sometimes contractual will provisions can be blurry and not as clear as everyone thought they were when they were first written."

You should also figure out in advance who will get important family items — even if their value is largely sentimental. You may not want your spouse's children to inherit your great-great grandfather's Civil War sword or your mother's coin collection. You can make those determinations in a codicil to your will or a letter of instruction to your executor, Bass says.

Mistake #3: Treating all heirs equally

Most spouses aren't financial equals when they marry, and this is particularly true for second marriages. If your new spouse moves into your house, for example, you may want your children to get the proceeds when the house is sold, rather than your spouse or your spouse's children. Similarly, if you brought more assets to the marriage, you may want more of the money to go to your heirs than your spouse's heirs.

"There's no rule that says all children have to be treated equally," says Jason Smolen, a principal in the Vienna, Virginia, firm SmolenPlevy Attorneys and Counsellors at Law. "There are a number of reasons why parents don't treat children equally — sometimes it's an unfortunate situation where a child is disabled, either mentally or physically." In those cases, you'll have to discuss with your spouse how to ensure that child is cared for, perhaps through an ABLE (Achieving a Better Life Experience) account or a trust.

Other times, Smolen says, the problem is conduct. A child may have a gambling problem, suffer from addiction or be a compulsive spender. Some parents may simply decide that after death children are responsible for their own actions, and if they lose their inheritance by betting on Seabiscuit in the fourth race at Pimlico, well, that's the way things go.

Other parents may not be able to stand the thought of an inheritance being squandered. "Essentially, you want to regulate the flow of money to a child like that," Smolen says. Doing so costs money: You'll need to create a trust and appoint an executor to manage the assets. A so-called "spendthrift trust" is one solution. It doles out money at regular intervals to the beneficiary and deters creditors from getting the money in the trust.

Mistake #4: Waiting until you're gone to give

If you're planning to leave money to your children, you might consider giving it to them now, rather than in your will. You'll get the pleasure of seeing them use that money while you're still on the planet.

You can give up to $15,000 per person without having to pay the federal gift tax or deal with the IRS. (Recipients typically don't pay tax on gifts.) It's an enormous break.
If you and your spouse have four married children, you can give each child and their spouse $15,000, or $30,000 per lucky couple, without triggering federal gift taxes.

In addition, the giving limit is per giver: Your spouse may also give the same amount. If you and your spouse have four married children, you and your spouse can give $60,000 per couple, for a total gift of $240,000 per year for all eight people, without triggering the gift tax.

You won't have to alert the IRS unless you exceed the $15,000 per person limit. If you do, you'll have to file Form 709. But even then you probably won't have to pay taxes on the gift because of the lifetime gift exclusion of $11.7 million per person (in 2021), or double that ($23.4 million) for married couples. If you exceed those limits, you'll owe gift taxes on the amount above the lifetime limit.

Mistake #5: Skipping the lawyer
If your assets are few and your circumstances uncomplicated, you can probably get away with going online and drafting a do-it-yourself will. It's a simple, inexpensive option — and it beats having no will at all.

But if you're older and on your second marriage, odds are good your life is anything but uncomplicated. Ex-spouses, blended families and comingled assets up the complexity quotient, as does a child with special needs or an aging parent. It may be wise to invest the time and money in getting a thorough estate plan drawn up by a professional.

While consulting an attorney comes at a cost, you'll get the comfort of knowing that you, and not a probate judge, will decide who gets what when you're gone. And you'll also know that your ex won't be spending your 401(k) money.

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