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Estate Planning For Second Marriages

One who is considering a second (or third) marriage often has more complicated estate planning needs than a client who is single or one who is or has been married only once. One or both of the parties may have children from an earlier marriage. They may have continuing relationships with family members of the first spouse - the grandparents, aunts, uncles and cousins of their children. They may own a home or other real property and be reluctant to relinquish control. They may want their children, rather than the new spouse, to be the beneficiary of retirement accounts. A premarital, or prenuptial agreement can be key to protecting your assets, but it is important to make sure the agreement is integrated with your estate plan.

The most pressing issues include: who to name on the power of attorney and as a health care agent, what right to give to a surviving spouse regarding the use and occupancy of a house, who should be the beneficiary of retirement accounts, and what responsibility may later exist to support an ill spouse if long-term care is required.

When designating an agent for the power of attorney and health care proxy, and even to serve as executor of the estate, it is wise to select an individual who is responsible and trustworthy, one who you feel confident will carry out your directives. Often these documents give broad powers, including the power to give away assets. For some, the agent is the new spouse. Others choose to defer the appointment of the new spouse until the new marriage has some history.

Even if one appoints the new spouse, it is wise to ensure that the power of attorney does not give the new spouse the authority to amend the prenuptial agreement! Concerning the residence, one option is to allow a surviving spouse to continue to reside in the home for a period of years, or even for life. If this is the plan, it is essential that the documents, the prenuptial agreement and the estate plan, are consistent.

Imagine the consequences if the prenuptial agreement affords the surviving spouse the right to remain in residence and the house has been transferred to a trust that leaves it to the children. Also, consideration should be given to how costs and expenses relative to the property will be paid. If real estate taxes, insurance, maintenance and the like are to be paid by the surviving spouse, does he or she have the wherewithal to carry these expenses? What will happen if the expenses fall into arrears? Should

provision be made for the payment of some or all of the expenses from the estate? It is important to be as specific as possible about the responsibility for the expenses as ambiguities fuel discord among the family members. And, what happens if the surviving spouse wants to remarry? This must be considered and resolved.

Regarding retirement accounts, under ERISA, the spouse is entitled to receive these benefits unless he or she voluntarily waives them. The prenuptial agreement is frequently the vehicle in which the spouse waives the right to retirement accounts but it is important, after the marriage, to make sure that the appropriate forms are actually completed and filed.

Estate planning for couples who have been previously married is a minefield. It requires creativity, deliberate attention to detail and sensitivity to the needs of the parties involved. Changes in the ownership of property, whether the property is sold, gifted or transferred to a trust, can create conflicts with prior agreements. It is imperative that any ownership change or modification to an estate plan be reviewed by an attorney familiar with these issues. Berwitz & DiTata LLP is available to ensure that your wishes are carried out and that there are no unintended, costly and time consuming consequences.