Tying The Knot A Second Time: Prenuptial Agreements and In-Tandem Estate Planning



For parties looking to tie the knot a second time, especially those 55 and older who make up 50% of the Americans who remarry, they may be coming into the union with prior children, established careers, and likely far more complicated finances and assets than those entering their first marriage. There is significant value for those establishing blended second-marriage families to consider how to adequately provide for both a new spouse and a party's children from a prior relationship.

Many think of prenuptial agreements solely as legal instruments that protect against the possibility of a future divorce. However, prenuptial agreements can also be a critical estate planning tool when used in conjunction and properly coordinated with wills or trusts to assure that assets are passed on in the desired intention of a party.

There are many estate planning concerns that arise in second marriages, many of which will be fact-sensitive to the specific parties, their prior families, their assets and lifestyle. However, included below are a few common issues and tips which demonstrate the utility of a prenuptial agreement in tandem with estate planning:

Specify how separate property will be used during the marriage, if one party predeceases the other.

The owner of the separate property residence which is then used as a marital residence, may want to leave the home, upon his or her death to his children from a prior marriage. However, that could leave the surviving spouse without a place to reside, depending on the children's intentions with the home. If the owner leaves that same residence to his or her surviving spouse, the surviving spouse has the ability to leave the residence to whomever he or she designates, which may not necessarily be the owner's children from the prior marriage. If the owner wants to ensure that the surviving spouse can live in the residence and the expenses are paid for, but leave the asset to his or her children, he or she can memorialize this intention in a prenuptial agreement. To carry out that intent the owner should set up an Irrevocable Life Insurance Trust (ILIT) enabling the surviving

spouse to continue to live in the residence for his or her lifetime with the remaining interest, i.e., the property itself, passing to the children or other named beneficiaries.

Review and designate beneficiary designations on retirement accounts.

A judgment of divorce, from a party's prior marriage, does not void beneficiary designations. The first step is for parties to ensure their prior spouses are not still listed as beneficiaries. Thereafter, a prenuptial agreement should be the next step in expressing the specific intent of the parties regarding the beneficiary designations of their retirement assets. Parties should be careful in naming beneficiaries and understanding how the designations will play out in the future. For example, naming a new spouse as the primary beneficiary and a party's children from a prior marriage as the secondary beneficiaries may not guarantee that the children inherit the retirement asset. The new spouse, as the primary beneficiary, has the ability to withdraw the entirety of the asset or if it is an IRA, roll over the balance to another IRA, which the children would not be a beneficiary to.

Utilize trusts as an asset protection instrument.

Revocable and irrevocable trusts, which can own almost any type of asset, are useful asset protection instruments for parties entering into a second marriage. They can be contracted for in a prenuptial agreement as a way for parties to keep the assets they each brought into the marriage separate and ensure those assets are left to a party's children from a prior marriage or other intended beneficiary. Certain irrevocable trusts, such as a Qualified Terminable Interest Property Trust (QTIP), allow a party to leave the income derived from an asset to the surviving spouse during his or her lifetime and the asset itself to be inherited by a designated beneficiary, such as the grantor's children from a prior marriage. A key benefit of a QTIP Trust is that the assets are protected from the surviving spouse's creditors, ensuring that third-party creditors will not seize the asset effectively disinheriting his or her children.

Parties entering a second marriage should thoughtfully consider their intentions — not only with respect to their new union but also, each parties' estate. Each blended family will have specific circumstances and needs, which can be carefully planned for beginning with a prenuptial agreement and in-tandem estate planning.

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