

DIVORCE, REMARRIAGE AND BLENDED FAMILIES

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Estate, Legacy and Business Planning

An Estate Planning Wake-Up Call BY GARY ALTMAN, ESQ.

How would you like your ex to inherit your property, your bank accounts and your retirement benefits despite the fact you willed them to your children? What if your mother's estate wound up in the hands of your stepbrother even though they were intended for you? These are just a few of the possible outcomes that can occur when family structures change because of divorce, remarriage and blended families.

The "D" Word

If you are a blended family member, then you're in good company. Blended families outnumber traditional nuclear families. And the number is likely to grow, based on current divorce statistics and trends:

- About 75% of divorced persons eventually remarry.
- 60% of all remarriages eventually end in legal divorce. Untold others will experience emotional divorce and unsatisfying relationships.
- About 65% of remarriages involve children from the prior marriage and form blended families.

Not surprisingly, divorce is not only expensive, but researchers consistently rank it as one of the most stressful life experiences. Fortunately, there are numerous organizations and support groups dedicated to helping blended families with these challenges. However, little attention has been paid to the critical Life & Estate Planning challenges of blended families. These challenges include disinheriting your ex-spouse, protecting your own children, providing for your new spouse and minimizing your estate taxes.

The "Ex" Factor

Will your ex-spouse inherit your retirement money, even

if the laws of your state automatically extinguish their interest in the assets of your estate?

It depends. In *Egelhoff v. Egelhoff*, 121U.S. 1322 (2001), the United States Supreme Court held that federal law under the Employee Retirement Income Security Act of 1974 (ERISA) preempted state law regarding the retirement plan of a recently divorced and deceased man. Mr. Egelhoff had failed to replace his ex-spouse with his children as the named beneficiaries of his retirement plan prior to his death. State law automatically disinherited ex-spouses. In a 7-2 decision, the Court found that the retirement plan administrator must follow the ERISA statutes requiring distributions to the named beneficiary, even when the end result conflicts with state law. Bottom line: Mr. Egelhoff's former spouse inherited the sizeable ERISA retirement plan instead of his own children.

Assuming you have removed your ex-spouse as the named beneficiary of your ERISA retirement plan, does the rest of your Life & Estate Plan protect the inheritance of your children from your ex-spouse?

Without proper legal planning, your ex-spouse (as surviving parent/guardian) would likely be appointed by the probate court to manage the inheritance you leave to your children. To make matters worse, what if your children later predecease your ex-spouse, and are single and childless at that time? Who would inherit your assets then? That's right... your ex-spouse, as the next-of-kin of your children.

Penny Wise, Pound Foolish

Regardless whether children are reared in a traditional nuclear family or in a blended family, great care should be given to protect any inheritance both for them and from them. For starters, wealth representing a lifetime of your hard work and thrift can be squandered in very short order.

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Dollars earned just spend differently than dollars inherited. In addition to good, old-fashioned squandering, an inheritance can quickly vanish through divorces, lawsuits and bankruptcies.

If You Remarry

In the absence of a Pre-Marital Agreement to maintain separate assets, most spouses in blended families tend to blend their wealth. For example, titling their respective assets in the names of both spouses and designating one another primary beneficiary of their respective retirement plans and life insurance policies.

Warning: If you predecease your new spouse, then you may forever disinherit your own children from your share of such blended wealth! Thereafter, upon the death of your new spouse, your assets may be inherited by your step children, or even by your new spouse's next spouse and their children.

Your Estate Taxes

Aside from disinheriting your own children, blending your wealth with your new spouse may unnecessarily enrich the IRS.

How? The Internal Revenue Code provides an exemption to each taxpayer for purposes of sheltering a certain dollar value from estate taxes (with marginal rates exceeding 40 percent). However, this is a use it or lose it exemption and you lose it when title to your blended assets vests in your new spouse upon your death. In addition to disinheriting your own children, this mistake alone can trigger hundreds of thousands of dollars in unnecessary estate taxes.

The Bottom Line?

While there is no one-size-fits-all solution, there are a few alternative solutions you might want to consider:

- Disinherit your ex-spouse by replacing them as the named beneficiary of your ERISA retirement plans.
- Create a *Long- Discretionary Trust (LTD Trust)* to administer the inheritance for your children and appoint

a party of your own selection to serve as trustee. That way, even if your children reside with your ex-spouse, your trustee will control the inheritance through the LTD Trust and ensure its use only for your children. Should your children predecease your ex-spouse, the inheritance would remain in trust for your grandchildren, your surviving children or for other beneficiaries of your own selection. Your LTD Trust does double duty by securing many additional tax and non-tax benefits. For example, protect the inheritance for and from your children (and their potential squandering, divorces, lawsuits and bankruptcies) through Spendthrift Provisions contained in your LTD Trust.

- Create a *Qualified Terminable Interest Property Trust (QTIP Trust)* to provide income and even principal to your new spouse for life, while protecting the inheritance for your new spouse in the event of a subsequent remarriage and divorce. Thereafter, the QTIP Trust assets may pass to the LTD Trust you established for your own children. Create an Estate Tax Exemption Trust to shelter the maximum available exemption amount upon your death. Often used in conjunction with the QTIP Trust for your new spouse, this trust can help you leave more wealth for your loved ones.

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