



What Happens After the First Death

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The loss of a spouse is often one of the most devastating experiences a person will encounter. Avoiding a costly and uncertain future from that point forward involves proactively planning for that eventuality with a competent and concerned estate planning attorney. Getting from the graveside to a fulfilling life for the surviving spouse requires careful advance preparation.

REMARRIAGE

Perhaps the most overlooked aspect of “first death planning” is what happens if the survivor remarries. Nothing can bring more joy or more devastation than remarriage. The loss of a life-long spouse can be accompanied by depression, loneliness, and isolation. Men particularly seem vulnerable. No estate planning, a simple Will, accounts held in joint tenancy, or naming a new spouse as a beneficiary on life insurance and retirement assets can lead to a “Bimbo-Gigolo” problem. Because the surviving spouse has full control of this property if no prior planning is in place, he or she is perfectly capable of redirecting it to someone outside of your “family.” Experienced estate planning attorneys have heard numerous stories of wealth and heirlooms lost to a new husband or wife who seems to have little connection with the original family.

One real life example involved an older couple who had accumulated a substantial estate. Mom died first, and the adult children arranged for a housekeeper to take care of dad. The housekeeper did an excellent job of taking care of dad, and soon enough dad and the housekeeper were getting married. A few weeks following their wedding they visited a lawyer to re-draft their Wills. No long after that, dad died. Then a few weeks later, the housekeeper died. According to the new Wills, the housekeeper’s children inherited ALL of Mom’s and Dad’s property, including the large and valuable family home and all of their heirlooms. Mom’s and Dad’s kids received nothing!

How could this have been prevented? First, Mom and Dad could have included a Bypass trust and/or a QTIP trust in their Will or their revocable living trust. These trusts have certain tax savings features that will be discussed below, but in addition to the tax savings, such trusts can give the surviving spouse control over the entire estate, while prohibiting him or her from transferring the deceased spouse’s share

of the couple's assets to a new spouse either during the survivor's lifetime or at the second death.

Another option, growing in popularity, is to include a requirement in the Will or revocable living trust that the surviving spouse must have any subsequent fiancé sign a prenuptial agreement prior to getting married. A prenuptial agreement is an agreement in which prospective marriage partners outline their respective rights in the assets each brings into the marriage and the status of money earned during the marriage. The real advantage of including this type of provision in the Will or revocable living trust is two-fold. It gives the surviving spouse an excuse to obtain a prenuptial agreement because their "hands are tied" by the estate plan. This takes the emotional "heat" off of a potentially explosive conversation. Furthermore, when there is a remarriage, the adult children often see the new spouse as a threat to their inheritance. Having a valid, binding prenuptial agreement in place can go a long way toward making the second wedding a joyful, rather than a painful event.

PROPERTY ISSUES

The surviving spouse's emotions following the funeral are complex and confusing. Having access to money is often the highest priority because of the feeling of vulnerability that almost always seems to occur. With up-to-date documents in place, the pain and frustration can be minimized, although probably not completely eliminated. The first order of business is ascertaining what property the couple owned, and how it was titled at the date of death. Property titled in the sole name of the deceased or in the name of the deceased and another person as tenants-in-common will almost always involve probate proceedings. This happens because the name of the deceased must be removed so that the heir — the surviving spouse in most instances, can have title to that property put in his or her own name so that he or she can control it.

Assets held in joint tenancy with rights of survivorship, or assets with beneficiary designations, automatically become the property of the beneficiary or joint tenant, but transferring these types of assets can present estate tax problems, as well as the type of remarriage problems outlined above. Many people, in their quest to avoid probate, inadvertently create large tax bills and other vulnerabilities that could otherwise be easily avoided with proper advice from a competent estate planning attorney. Revocable living trusts are designed to make the transition of assets from one spouse to the other as smooth as possible while avoiding probate, saving on taxes, and protecting the estate from a predator. Most people have never been to court, or at least do not relish the thought of doing so under the cloud of death. A properly funded revocable living trust can achieve most, if not all of a couple's goals in this regard.

TAX PLANNING

The best opportunity married couples have to save significantly on federal estate taxes is at the first death. Through the use of a properly implemented Bypass trust

(sometimes called a Credit Shelter or “B” Trust) a married couple can legitimately shelter millions of dollars in wealth from onerous estate taxes. However, unless a couple’s Will or revocable living trust is designed to create a Bypass trust on the date of the first death, the ability to save significant taxes and keep the surviving spouse in control of the entire estate cannot be achieved.

Most estate plans containing Bypass trusts also have a QTIP trust. A QTIP trust is a special trust that allows the deceased spouse to provide for the future needs of the survivor, but be assured that the money passes according to his or her wishes on the second death. The property in the QTIP trust remains in the estate of the survivor for the imposition of estate taxes on the second death unless the couple has engaged in other estate tax reducing techniques.

Bypass trusts and QTIP trusts are highly technical, both in terms of their creation and in terms of their implementation. After the first death, the role of the estate planning attorney, in concert with the family CPA and financial advisor is to first value the property of the deceased, and to decide which property is to be placed in the Bypass trust, which property is to be placed in the QTIP trust, and which assets are to remain under the complete and absolute control of the survivor.

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