Estate Planning for Blended Families

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Family structures have changed significantly in recent years and it is not uncommon for people to enter a second, third, or even fourth marriage. Some who have been through a traumatic divorce may decide not to marry their current partner, but instead to live in a common-law relationship. If one or both partners have children, the family dynamic may become quite complicated, so it is important to have a proper estate plan in place.

When multiple families come together to form a family unit, there may be confusion with respect to the intended estate distribution if a well documented estate plan is not in place. Children from previous relationships may expect to receive all, or a large portion of the estate of their parent, while the new partner may also have similar expectations. It is important to engage in open and candid discussions with all family members to avoid any surprises when an unexpected death occurs. Proper planning may alleviate some of the potential complications that occur when a spouse or common-law partner[1] dies in a blended family.

This article focuses on the estate planning issues and situations that should be considered where multiple or blended families are concerned.

Relationship status

In some provinces and territories marriage automatically revokes a Will, except in specific circumstances. Although there appears to be a movement away from this rule[2], this law is still applicable in some jurisdictions. Entering into a common-law relationship generally does not have this effect. For example:

> *Mrs. Widow has an existing Will that leaves the residue of her estate to her children. She marries Mr. Right and does not make any changes to her estate planning documents because she believes they are still valid. Her domicile is in Manitoba, one of the provinces where marriage automatically revokes a Will. If she were to pass away in these circumstances, Mr. Right and her children would share the inheritance in certain proportions pursuant to the intestacy laws of Manitoba.*

The status of prior relationships must also be considered in establishing an estate plan. Ongoing obligations in a separation agreement or divorce order must be complied with, including support obligations and requirements to maintain life insurance. It is not uncommon for a divorced person to be required to maintain a life insurance policy with the ex-spouse designated as the beneficiary. If, for example, a deceased spouse had changed the life insurance beneficiary to the new spouse in violation of an agreement or order, the ex-spouse may make a successful claim against the estate or the new spouse. This could have a significant effect on the estate administration, adding cost and delay.

Intestacy

In blended family situations, it is particularly important to ensure that all estate planning documentation is in order. If there is no "Marriage Contract" and the deceased spouse does not have a Will (an "intestacy"), it is almost certain that an undesirable result will occur. Without a Will, no one has the authority to administer the estate, an application to the court may be necessary, and there may be disagreement between the various family members with respect to who should act as "Executor" (or "Liquidator" in Quebec). Further, the legal distribution scheme will depend on the default succession laws in the province or territory. In some jurisdictions, a common-law spouse is not entitled to receive a portion of the estate regardless of the length of the relationship. If proper estate planning documentation is not in place, there could be an awkward situation where an ex-spouse is the lawful heir to the estate[3]. It is also important to ensure that succession to the family home is properly planned. Depending on the jurisdiction and marital status, special rights to possession of the family home on the death of a spouse may exist.

Marriage contracts

Many couples enter into an agreement that will govern the division of assets on death or a breakdown of the relationship. These agreements are commonly referred to as prenuptial agreements, cohabitation agreements or marriage contracts[4]. In a "Marriage Contract" a spouse

may agree to waive the right to make a claim against the estate of the other spouse. It is common in a "Marriage Contract" to include a clause that confirms that assets jointly owned by the spouses will pass to the survivor, and that all individually owned assets will pass in accordance with the terms of a deceased spouse's Will. Where a "Marriage Contract" is in place, spouses may keep their finances separate and have their own lineal descendants as the heirs of their respective estates. This may be an effective plan to provide for one's own family. If there is no "Marriage Contract," there is a risk that the surviving spouse may make a claim against the estate of the deceased spouse.

Special planning for blended families

If there are shared assets in a blended family, the planning may become complicated. Children from a prior relationship may not be comfortable with the new spouse acting as sole executor. A common planning strategy is to have the surviving spouse and one of the deceased spouse's children as co-executors. After the surviving spouse has died, one child from each family may be appointed. This will ensure that each family is represented and can provide more transparency in the estate administration.

It is common for spouses with common children to have mirror Wills, where the Wills are essentially identical on all important terms. Although this may appear to be an effective plan for a blended family with shared assets, the surviving spouse may be under no legal obligation to retain the estate distribution scheme in subsequent Wills. In this situation, the children of the first spouse to die may receive little, if any, of the ultimate estate. An alternative is for the spouses to enter into a Mutual Wills Agreement. This includes a legally binding agreement not to alter the distribution scheme in a spouse's Will without the other spouse's consent. Accordingly, after a spouse has died, the surviving spouse is locked into the agreement and may not alter the distribution scheme. If the surviving spouse does so, the children of the first spouse may enforce the terms of the contract.

The most important concern for many parents in blended families is to ensure that their own descendants will receive the benefit of their years of labour. Many families have been torn apart by a lack of proper estate planning. Consider the following situation:

Spouse 1 and Spouse 2 were legally married 20 years ago. Spouse 2 had a child (Child #1) from a prior relationship, and Spouse 1 has been treating the child as their own for the past 20 years, although the child was not formally adopted. They also have a child from their relationship (Child #2). Suppose Spouse 1 and Spouse 2 are in an accident and the Spouse 1 dies shortly after Spouse 2. Their Wills provide that the surviving spouse receives the residue of the estate of the first spouse, and that the "children" or "issue" receive the residue on the last spouse's death. These terms generally apply only to blood relatives or adopted children. As Spouse 1 is the last to die in this scenario, and since Child #1 is not a lineal descendant of Spouse 1, Child #1 may stand to inherit nothing from Spouse 1's estate depending on the language of their Will. If Spouse 1 died without a Will, it is also likely that Child #1 would not receive an inheritance.

In the absence of a "Marriage Contract" to confirm otherwise, the surviving spouse may be entitled to make a claim against the estate of the other spouse. One common planning technique in blended families is the use of a spousal trust, particularly where the spouses have kept much of their assets separate. A spousal or common-law partner trust may provide income for the surviving spouse while ensuring that the capital will ultimately pass to the children of the deceased. If proper terms are in place, there may be a spousal rollover available to defer income tax liability that would otherwise have been due on the death of the first spouse[5].

Issues often overlooked

A power of attorney ("Mandate" in Quebec) generally governs situations where a person is alive, but unable to make decisions with respect to personal care or property. Separation or divorce does not affect these appointments. Accordingly, if old power of attorney documents remain effective, an ex-spouse may have full legal authority over the financial affairs or health decisions of the incapable person. This may lead to a conflict between the ex-spouse, new spouse and children.

Although a spouse may remember to update their Will and powers of attorney, it is equally important to ensure that beneficiary designations are kept current on life insurance policies and registered plans, such as a Registered Retirement Savings Plan ("RRSP"). Since separation or divorce generally does not affect pre-existing beneficiary designations[6], if designations are not updated after a relationship breakdown, an ex-spouse may be entitled to receive the proceeds while the estate of the deceased spouse could be responsible for the associated income tax liability, if any.

A parent in a blended family may wish to earmark specific accounts for their children as part of the estate plan. If there is a deferred tax liability associated with the account (such as an RRSP), this may lead to immediate tax consequences on the death of the parent. Designating the new spouse as beneficiary may benefit from a spousal rollover, deferring the tax liability until the spouse dies or withdraws funds.

Seek advice

There are unique estate planning challenges in a blended family context. Beneficiary designations and all estate planning documents must be kept current. Candid discussions with loved ones in advance can help to ensure that the estate administration will not become contentious. As provincial and territorial requirements vary considerably, it is important to obtain legal advice in the appropriate jurisdiction to ensure that an estate plan aligns with current objectives while considering potential tax and family law obligations. Your BMO financial professional may be able to introduce you to an appropriate legal professional, who can assist you with your estate planning objectives.

For more information, speak with your BMO financial professional.

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[1] For ease of reference, spouse, common-law partner and same sex partner will be referred to as "spouse" in this article, unless the specific context suggests otherwise.

[2] For example, due to recent legislative changes, marriages in Saskatchewan after March 15, 2020 and in Ontario after January 1, 2022 will no longer revoke a Will.

[3] For example, in Ontario a separated spouse is still considered a legal spouse for succession law purposes, even if one or both spouses have entered into a new common-law relationship. If one of them were to die without a Will, the other would be a beneficiary of the estate pursuant to the intestacy laws of Ontario, while the new common-law partner would not.

[4] For ease of reference in this publication, all such contracts are referred to as "Marriage Contracts."

[5] For a detailed explanation of spousal and common-law partner trusts, ask your BMO financial professional for a copy of our publication, *Estate Planning For Spouses and Children Using Testamentary Trusts.*

[6] In Quebec, the designation of a beneficiary in a registered plan must be done in a Will or a marriage contract. With respect to life insurance policies, there are two kinds of beneficiary designations – revocable and irrevocable. In Quebec, unless a contrary intention is expressed, designation of a spouse is deemed irrevocable but is automatically revoked on divorce. In all other provinces, a designation is revocable unless otherwise stipulated.

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