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THE CONTRACT TO WILL

How to Protect an Inheritance for your Children

Even if the parents have seemingly appropriate estate plans, children are frequently disinherited. How does this happen?

If a married couple's assets pass outright to the surviving spouse – absent any agreement to the contrary – that surviving spouse can leave not only his or her assets, but also their deceased spouse's assets, to anyone he or she pleases.

Thus, children can be disinherited, intentionally or otherwise. Let's look at a few examples of how this may happen:

Example #1

Bill and Carol had been married for over forty years and had three children. Their estate was not large, consisting of their home, IRAs, and a few investments. Their wills left everything to each other, and on the second death, equally to their children.

A few years after Carol died, Bill remarried. Bill and his new wife sold their homes and purchased a new home in joint tenancy. Before long, Bill named his new spouse as the beneficiary of his IRA.

When Bill died several years later, all of Bill's assets passed to the new wife and were not controlled by Bill's old will. When the new wife died ten years later, her estate, which then included Bill's assets, went to her family and not to Bill and Carol's children.

Example #2

John and Mary have been married for more than 25 years. Each has two children from a previous marriage. All the children were adults when John and Mary were married.

Like Bill and Carol, John and Mary's estate consisted of a home in joint tenancy, IRAs which named each other as beneficiary, and a few other assets. Also, like Bill and Carol, John and Mary's primary goal is to provide for each other and, only thereafter, for all four of their children.

John and Mary realized that without a will, on the survivor's death, all their assets would pass solely to the survivor's children. So, John and Mary prepared wills that left their estate to the surviving spouse and, if none, then equally to all four children.

Several years after John dies, Mary's relationship with John's children has deteriorated. She rarely hears from them and feels certain that John would have disinherited them under these circumstances.
So, she signs a new will that leaves her estate (which now includes John's estate) to her two children and nothing to John's children. Even if Mary didn't change

her will, if on Mary's death her original will can't be found (perhaps her children destroyed it), the result is the same: John's children get nothing.

What if Mary names her two children as the beneficiaries on most of her assets. Again, little or nothing passes to John's children on Mary's death, as such assets pass outside of the will. If Mary remarries and puts everything in joint tenancy with her new husband, then on Mary's death, her children, as well as John's children, get nothing.

Married couples often do not understand that, absent a specific agreement or trust arrangement, children can be disinherited, sometimes unintentionally.

State Law

Under the laws of most states, including Colorado, the fact that a couple signed essentially identical wills does not constitute an agreement by either spouse not to change or revoke his or her Will at any time.

Self-help and online programs, and even some attorneys, often do not advise couples of this potential problem. However, even if so advised, many couples comment that they trust each other not to disinherit their children. But as we discussed above, that isn't what always happens on the second death, intentionally or otherwise.

What can be done to provide for the surviving spouse, yet still give the children of the first to die the legal right to receive an inheritance when that surviving spouse dies?

The Unacceptable Trust Solution

Many attorneys would suggest, on the first death, the decedent should leave his or her estate to a trust that can provide for the survivor's needs. On the death of the survivor, the remaining trust assets can pass to his or her children.

At first glance, this trust solution sounds attractive. But to be effective, John and Mary would need to sever their joint tenancies and retitle such assets half in his name and half in hers, or otherwise in the name of their revocable living trusts.

They would need to name the trust (and not each other) as the beneficiary of their IRAs. Mary commented that this planning is starting to sound like a divorce!

Unless properly funded revocable living trusts are used, probate would need to be opened on the first death, as well as the second death, for this estate plan to work. Each spouse would need to name a trustee to serve after such spouse's death, and preferably not the surviving spouse or a child. A bank could serve as trustee and distribute the decedent's assets to the survivor only as needed.

If John died first, Mary would have to demonstrate to the trustee that she did not have other assets for her needs. To the extent not needed, on Mary's death, those trust assets would be distributed to John's children. But if Mary's assets were spent down, and John's were not needed by Mary, the bulk of their estate would end up going to John's children and not Mary's children.

Conversely, if Mary serves as trustee and receives the income, and is able to use the principal for her living expenses, the trust could be greatly reduced during Mary's lifetime, thus resulting in far more passing to her children than to John's.

In addition, there would be significant adverse tax consequences with respect to the IRAs and, possibly, other assets. IRAs might have to be withdrawn more rapidly, and the highest tax rate for trusts on undistributed net income is 37%.

John and Mary may object to the concept of trust planning because both want to provide for the other spouse's children as well as his or her own. John does not want Mary to have to get the consent of a bank before she can sell the house or write a check on "his half" of the family assets. Mary feels the same. Clients do not like the idea of having to pay a bank several thousand dollars per year to manage a small estate. Moreover, income taxes may be greater when relying on trust planning.

Not surprisingly, John and Mary found this "trust solution" totally unacceptable. Isn't there a better and preferably simpler way to provide for each other, yet have the children of the first to die be legally entitled to a reasonable share of the survivor's estate?

A Better Answer: The "Contract to Will"

The "Contract to Will" is a separate document that can be used to address the problem of a surviving spouse changing his or her estate plan, or at least disinheriting the children of the first to die.

Not only can this document be useful for couples like John and Mary in a second marriage, but also for couples like Bill and Carol, with common children, who are concerned that the survivor might remarry and leave little to the couple's children.

The Contract to Will, unlike the trust arrangement discussed above, may provide couples with greater flexibility and greater assurance that all children will be entitled to at least a portion of the survivor's estate.

Authorized by Colorado law

Although a contract to make a will is not inferred by signing similar wills, Colorado law (C.R.S. 15-11-514) provides:

"A contract to make a will or devise, or not to revoke a will or devise, may be established by a writing signed by the decedent evidencing the contract."

A Contract to Will is also supported by case law. In Murphy v. Glenn, 964 P.2d 581 (Colo. App. 1998) the Court not only found the agreement to be enforceable, but also extended such enforceability to include the survivor's non-probate estate.

In this case, the court concluded that the Contract to Will implied good faith to include not only the survivor's probate estate, but also the non-probate transfers.

The court also concluded that such good faith permits the survivor to use the property for reasonable living expenses and even to make reasonable gifts during the survivor's lifetime, but not to transfer the bulk of the estate in a manner contrary to the terms of the agreement.

Do Percentages Have to be Equal?

No, the percentages of the estate required to be left to the children do not have be equal. John and Mary may want to provide the survivor with the flexibility to leave a little more to the survivor's children or even a new spouse.

For example, John and Mary may find it acceptable to require the survivor to leave only 40% to the children of the first to die. The Contract to Will does not automatically change the percentages stated in their existing wills.

It merely says that the survivor can make changes later, provided the survivor leaves at least the stated percentages to the children of the first to die. Even many "first marriage" couples find the requirement to leave at least 80% to their common children acceptable.

An Effective Deterrent

The advantage of legal documents is not only that they are enforceable, but also that the parties involved are encouraged to act in compliance therewith.
Once clients sign a Contract to Will, they may be less likely to try to avoid their obligations thereunder. In that regard, the Contract to Will offers families the desired flexibility, along with the moral and legal commitment not to disinherit a deceased spouse's children.

Increasing Popularity

The "Contract to Will" is becoming more widely used for several reasons. There are far more "blended families" today than there were, say, 30 years ago. People are living longer, and estates are larger due to inflation, retirement plans, and the like. Trust income tax rates and IRA withdrawal requirements have also changed over time.

"My Attorney Never Mentioned the Contract to Will"

Because of the "non-traditional" nature of second marriages and blended families, many attorneys are unaware of The Contact to Will. Of those that are, some feel that a Contract to Will encourages litigation and that it may fail to provide the desired protection to the deceased spouse's children.

But the trust arrangement that some attorneys often recommend do not offer greater protection. In fact, it may offer less flexibility for the surviving spouse and, depending on its specific terms, offer less protection to the children of the first to die.

Estate Tax Issues

There may be some estate tax issues with the Contract to Will. Because of this, we usually recommend it only for couples who are likely to have a combined estate under the exemption amount of $23+ million (2020), or possibly $12 million after 2025

Gifting

The Contract to Will should address the issue of gifting by the surviving spouse. Otherwise the surviving spouse could gift away all or most of his or her estate prior to death. It is suggested that gifting by the surviving spouse be limited to a specified dollar amount annually per donee (e.g. $10,000).

Flexibility

Stating in a will that both parties agree not to change their will poses several problems. For example, why should Mary, if she is the survivor, be locked into providing for her children outright and equally?

Perhaps, after John dies, one of Mary's children never sees her and the other is Mary's caretaker in her later years. Why shouldn't Mary have the flexibility to leave her share of the family assets in unequal portions to her children? In addition, perhaps one of her children later needs to have his share left in trust, perhaps to retain his eligibility for SSI or Medicaid.

The purpose of the agreement would not be defeated if Mary retained the right to rearrange the portion to go to her descendants any way she wanted. A separate Contract to Will can provide this type of flexibility.

Assets Excluded from the Agreement

The Contract to Will can be drafted to exclude specified property or to limit its scope to the value of the property owned on the first spouse's date of death.

Other Provisions

The Contract to Will can also be drafted to encourage discovery, sought by the children of the first deceased spouse, without requiring such children to file a court action.

Contracts can provide that revocation be achieved only via a signed document, such that destruction of the contract is not sufficient to void the contract. Multiple copies of the contract can be signed and provided to each side of the family (perhaps in a sealed envelope) so that the children will know they have enforceable rights.

A New Spouse

It's not the survivor's remarriage that concerns couples so much as the possibility that all their assets will end up passing to that new spouse (then, on that new spouse's death, to that new spouse's children). The Contract to Will may also encourage the surviving spouse to obtain a prenuptial agreement upon remarriage.

Conclusion

The Contract to Will is a relatively new estate planning document that is attractive to both blended families and first marriage families. It represents a cost-effective solution for providing the survivor with the maximum control and flexibility, while still protecting against children being disinherited on the survivor's death.

Please contact us if you would like to explore how The Contract to Will can be drafted to meet your estate planning goals.

This report is based upon an article written by Stewart Fleisher which appeared in the April 2000 edition of the Colorado Lawyer. It is offered as an informational summary only and is not a complete discussion of all the tax, legal, or other consequences nor does it constitute specific legal advice. You should consult with a legal or financial professional before acting on the advice contained herein.