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BLENDED FAMILIES: UPDATE YOUR TRUST TO PROTECT YOUR CHILDREN'S INHERITANCE!

Did you know that the law requires judges to “re-write” parts of your written will or trust under certain circumstances?

For instance, there are common sense laws providing that if you get divorced (or are murdered by your spouse), the ex-spouse (or murderer) is generally denied inheritance rights (though Mr. Hitchcock would like to point out that the homicidal spouse rule only applies if your spouse gets found out).

But there is one exception that does not necessarily make sense in modern society regarding omitted spouses. With somewhere around half of marriages ending in divorce, re-marriage between spouses

with children from previous marriages (“blended families”) is quite common.

In first marriages, spouses generally plan for their estate to go first to their spouse, then to their children. However, estate planning for couples with children from previous marriages is much less predictable:

- Many (if not most) of such middle-age couples split the assets of their trust to provide for the surviving spouse, and then the remainder of their share goes to their children upon the death of the surviving spouse. For example, those who own a home as their main asset may provide that their new spouse can reside in their home for life, but the home is eventually distributed to the kids from the first marriage of the spouse who brought the house into the marriage.
- Some parents provide for an outright distribution to their children upon the parent’s death.
- Some older newlyweds opt for each to have their own plan. They keep their assets separate by prenuptial agreement and give their own assets to their own children at death.
- Estate plans for younger re-married couples who have additional children can get very complicated. Separate trusts for the children from the first marriage are not uncommon—even if the re-married couple otherwise blends their families and assets.

Both the common law of England and the statutes adopted in California have long protected omitted spouses. The general rule in California is that if the will or trust of a married person fails to mention one’s current spouse, the law will generally *presume* that the omission was inadvertent and give the spouse a share *as if no will or trust existed*. This means the spouse receives a one-third to one-half share of the separate property (*e.g.* pre-marriage property, any inheritance from parents and grandparents, plus one-half of any community property).

But what about the divorced person who makes a will or trust giving everything to their kids, and then re-marries without changing their will or trust?

You might think the law would continue to honor the will or trust as written. But you would be wrong. The general rule still applies!

Moreover, unlike the ex-spouse scenarios, the presumption cannot be overcome by clear and convincing evidence such as statements or letters from the deceased spouse indicating the will or trust should be honored as written.

Thus, even if you have told the whole world that you intentionally did not re-write your will or trust because you want your children to get everything, your new spouse will still get a one-half to one-third share.

By statute, the only ways for your children to prove you intentionally omitted your new spouse is by (1) proving the existence of “a valid agreement waiving the right to share in the decedent’s estate” (*e.g.* a pre-marital agreement meeting onerous statutory requirements such as being signed upon the advice of independent counsel), or by (2) proving the decedent “provided for the spouse by transfer outside of the estate passing by the decedent’s testamentary instruments and the intention that the transfer be in lieu of a provision in said instruments is shown by statements of the decedent or from the amount of the transfer or by other evidence.”

If you think the second option sounds vague, you are right.

More abstractly, what business is it of the government to mandate that re-married spouses give each other *anything* contrary to their existing estate plans?

In modern times, it is doubtful that the “omitted spouse” rule is consistent with the intent or expectation of those in blended families. However, until the Legislature sees fit to repeal or amend the law to address the modern blended family, the children from prior marriages may receive one-third to one-half less than their parents planned for them to receive.

If you have re-married, particularly if you have remarried into a blended family, it is advisable for you to immediately seek legal counsel to update your estate plan to express your current actual wishes. Unless your current will or trust specifically mentions your new spouse by name and specifies your intent as to what, if anything, your new spouse is to receive, the State of California will generally *presume* any omission was a mistake and give your spouse a one-third to one-half share of your estate as if no will or trust existed.

The estate planning attorneys at Hoge Fenton can work with you to review and update your existing estate planning documents so your wishes will be honored.

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