

LAW WEEK

COLORADO

Talk Early, Often To Avoid Drama

By **Marilyn McWilliams**

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CINDERELLA'S wicked stepmother kept her away from her father and kept her in poverty. As lawyers, we are not trained to advise on the emotional aspects of a second or subsequent marriage on the adult children of a prior marriage. We do, however, often become involved in the disputes between family members after a death, particularly if the decedent was the wealthier spouse in a marriage to his or her children's stepparent.

The emotional and financial toll that estate litigation takes on family members is something we can at least try to avoid, forestall or minimize by advising our clients to make thoughtful plans about who will inherit from them, when they will inherit and who will be in charge of the estate.

The first step, likely the most difficult, is convincing people that planning their estates after a subsequent marriage is even more important for them than for a couple who share all of the same children and likely the same goals.

Many adult children fear that if a parent marries someone younger, the younger spouse is really just motivated to go after mom or dad's money. Don't we all remember Anna Nicole Smith? If a new spouse is close in age to the adult children, there is added distrust if the parent's estate planning is changed so that the children don't inherit until the death of the younger spouse.

Couples should, ideally, have thoughtful and thorough discussions about finances before they marry, including what they would want to happen to their assets if one or both died. Money is one of the most emotionally volatile and intimate subjects and people naturally shy away from discussing it. Not discussing it honestly, though, is risky in a marriage.

Marital agreements are now more common in subsequent marriages and can be signed before or during a marriage. They can include provisions about what the couple agrees would happen to their estates upon their deaths. They can also be amended by mutual agreement at a later time. If a couple



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enters into a marital agreement, they will need to disclose their assets and liabilities to each other as part of that process. This is a valuable step in itself, as it helps avoid misconceptions.

Some couples keep their assets separate throughout their marriages. They also agree to leave all of their assets to their respective children at their deaths. This might not work out as intended, though, unless both parties agree to waive their rights to inherit from each other, known as the right of election.

In Colorado, surviving spouses have the right to elect against a will and sue the deceased spouse's estate for an elective share, based on the length of the marriage and some other factors, which could amount to half of the couple's joint net worth.

Colorado law permits couples to enter into a contract to will in which they agree not to change their estate plans after the death of the first one of them to pass away to disinherit the predeceased spouse's children. These agreements can give adult children standing to contest a change made by a stepparent after a parent's death.

It is important for people to create estate plans when they are young and healthy enough to understand what they

are doing and how their planning will affect their family members.

Many of us have seen a flurry of estate-planning documents produced at the request of people other than the testator very late in the person's life. The documents are then signed by very elderly, vulnerable people. It is easy for the people harmed by these death bed documents to question how much the testator or testatrix understood about what they were doing and how voluntary the process was.

It often works well for spouses to create and fund inter-vivos trusts to hold their separate assets. These trusts provide for management during a long-term disability and after death. A common arrangement in second marriages, if one spouse is considerably poorer than the other, is for some or all of the wealthier person's assets to be set aside in a "QTIP" marital trust, which provides income and possibly principal, to the surviving spouse during her lifetime, but at her death, the remainder passes to the predeceased spouse's children.

If the surviving spouse is much younger, the children could have to wait until their own old age to receive anything from the trust, so the older/wealthier spouse may want to consider passing some assets to the children immediately on death, rather than making the children wait for years. Life-insurance policies can provide an immediate inheritance to either the spouse or the children.

These are not easy issues to discuss with spouses and children. People want to do the right thing but it is easy to put off talking about these issues and thus put off planning that can prevent problems. It can help to have a conversation with a sensitive and experienced estate-planning attorney who can help the couple see everyone's point of view. Not having the conversations or doing conscious planning can doom a new spouse's relationship with children of an earlier marriage from the start and result in painful and expensive estate litigation and destruction of family relationships. •

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