

GV News  
Question for November, 2011 Article

*This article will appear monthly in this newspaper as a public service. It is not intended as legal advice, and will address only general propositions. If you have a question about a matter which affects you, you should contact an attorney.*

Q: My wife and I are seniors and we both have children of a previous marriage. I have three children from my prior marriage and my spouse has one child. We want to leave all of our assets to the surviving spouse on the death of the first. What is the most equitable way to distribute the remaining estate upon the death of the survivor?

A: From a legal perspective, each spouse is able to dispose of his or her share of the assets as that spouse chooses, whether the disposition be to that spouse's children or grandchildren, or to a third party, such as a charity picked by that spouse. Some believe it would be unfair to the spouse who has fewer children if the combined assets were divided equally among all the children, as such a plan would favor the spouse who had more children. There are, of course, instances where people want to treat all the children equally, and want all the children to receive equal shares. This is often true in situations where the couple has been married a long time and the spouses treat each other's children as their own. What it really comes down to is a personal decision between you and your spouse.

This question leads to a second issue, which is how to make sure that the beneficiaries of the first spouse to die actually receive their share. By leaving all of the assets outright to the surviving spouse on the death of the first, you leave open the possibility that the surviving spouse will change his or her Will, and leave everything to that spouse's children, or the possibility that the survivor might blow all the money in a series of ill-advised wagers at the dog track. There are a couple of ways to avoid such a result. First, the assets of the first spouse to die could be held in a Trust for the lifetime benefit of the surviving spouse. The surviving spouse could receive the income from the Trust, and could access the Trust principal, but only if he or she needs it. The assets in such a Trust would not be available for pleasure or for luxury items. Upon the death of the survivor, what remains of those Trust assets would be disposed of according to the wishes of the first spouse to die as the spouse has set forth in the Trust. The surviving spouse would still have complete access to his or her share of the assets.

Another possibility would be to come to a contractual agreement between the spouses in which they agree to dispose of their assets in the manner set forth in their existing Wills or Trust. In other words, the couple would contractually agree not to disinherit the heirs of the first spouse to die. Such a contract could be enforced by the beneficiaries of the first spouse to die as third party beneficiaries of that contract.

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