

Follow Estate Planning Laws in Second Marriages

Many of Florida's seniors have entered into a second (or third or more) marriage.

Many of these folks have children from a prior marriage to whom they would like to leave their estate. Further, a large number of these seniors would like to leave some or all of their estate to their children instead of their current spouse (who may or may not have his or her own children).

In my practice, I run across many seniors who have attempted to leave their estate to their children by doing what I call "poor man's estate planning." Poor man's estate planning consists of using beneficiary designations, "pay on death" accounts, "transfer on death" accounts and joint accounts with survivorship rights to pass on an estate. This may be a fatal error.

In Florida, a surviving spouse has rights in a deceased spouse's estate, regardless of whether the surviving spouse is named as a beneficiary in a will or trust, as a beneficiary on an account, or as a joint owner with rights of survivorship.

If you have children from a prior marriage and are intent on leaving them your estate, you need to be aware of two Florida laws: Homestead and Elective Share.

Florida law states that if a homestead is owned as other than a tenancy-by-the-entireties (as husband and wife with the survivor getting the homestead upon death of the other spouse), then upon the death of the owning spouse, the surviving spouse automatically gets a life estate. The remainder of the interest goes to the decedent spouse's children.

Remember this includes homesteads held in revocable living trusts. I see this pattern arise when the married couple has more than one house and decides to live in one spouse's residency but fails to add the new spouse to the deed. The only way around this is to have the new spouse execute a waiver of homestead rights.

Another interesting law is the Florida Elective Share law. This law states that a surviving spouse is automatically entitled to 30 percent of a decedent spouse's entire estate. For purposes of the elective share statute, the decedent spouse's estate consists of not just what goes through probate but trust assets, life insurance, annuities, pay-on-death accounts, transfer-on-death accounts, and jointly titled assets with survivorship rights.

The elective share is in addition to any homestead rights the surviving spouse may have.

The only way around this law is to have the spouse execute a pre-or postnuptial agreement waiving their rights to the elective share. Consult an estate planning or elder law attorney for advice.

There are very specific ways a pre- or postnuptial agreement must be written and handled to be enforceable.