

Chapter 7

SPECIAL CONSIDERATIONS

Most of this book deals with the "typical" estate-planning situation: a married couple of moderate income with children. But increasingly, there is no typical American living arrangement. This chapter considers less common situations that might require special arrangements in your will, trust, or other parts of your estate plan.

Taking against the will

In a perfect world, all marriages would be blissful, but the reality is that many aren't. Some spouses are shocked to learn that their partners, for whatever reason, wanted to cut them out of their wills. However, the law usually doesn't permit this. In the days when wives were totally dependent on their husbands, disinheritance could leave widows destitute. Even though the law may have originally been intended to protect widows, it applies both ways. Women can't cut their husbands out of wills either.

If a husband or wife dies and his or her will makes no provision for the surviving spouse, or conveys to that person less than a certain percentage of the deceased spouse's assets (the percentage varies by state), a widow/er can **take against the will**. This means he or she can choose to accept the amount allowed by law (usually a third or half of the estate) instead of the amount bequeathed in the will. The surviving spouse doesn't have to take against the will. If he or she chooses not to, the property is bequeathed as stated in the will.

This **elective or forced share provision** is troubling to many people considering second

marriages late in life. Many have avoided marriage out of fear that the surviving spouse of only a few years could take half their property, though they want to give it to their own children. Recent revisions to the Uniform Probate Code have adopted a sliding scale for widow/ers who take against the will--i.e., the longer the marriage, the higher the elective share. If the marriage lasted only a few years, the percentage could be quite low, minimizing one source of worry for older couples. Check with your lawyer to see if your state has adopted these revisions. Also, spouses in some states aren't entitled to a forced share of living trust assets--you can use living trusts in these jurisdictions to disinherit your spouse (see "Advantages of a Living Trust," [chapter five](#)). Your lawyer can tell you whether these options are available in your state.

Preuptial/postnuptial agreements

Another way to prevent a spouse from taking against the will is to execute an agreement in which the partners voluntarily give up the right to a statutory share of the other's estate and agree on how much--or how little--of the other's estate each will inherit. These agreements can be made before the marriage ceremony (**preuptial**) or after it (**postnuptial**). They usually supersede statutory set-asides for spouses.

Actually, any couple in which one partner is substantially older or wealthier than the other should consider such an agreement. To ensure fairness, each one should be represented by a separate attorney when drawing up these agreements, and each should make a full disclosure of his or her assets.

Contract to make a will

What if the statutory share is too little? The statutory protection for spouses is often inadequate, especially if one spouse thinks he deserves certain items of property, such as the family home. Married

couples in this situation might benefit from executing a **contract to make a will**, which guarantees how the property will be bequeathed (see below), or a prenuptial/postnuptial agreement.

SPLITTING UP: DIVORCE AND REMARRIAGE

Statistically about half of all marriages now end in divorce, making this an important consideration in estate planning. Depending on the details of your state's law, divorce or annulment either revokes the entire will or those provisions in favor of the former spouse. The same may be true of a revocable trust. Be sure to revise your will and trust if you get divorced, changing the provisions that relate to your former spouse and his or her family, especially the residuary clause. The high divorce rate is another good reason for both partners to have separate wills.

Recent revisions of the Uniform Probate Code also automatically revoke provisions of other estate documents, such as life insurance policies, in which the proceeds previously would have gone to the ex-spouse. But again, few states have adopted all provisions of the UPC; it's best to change any such documents, including living wills and survivorships, or have your lawyer do it. Trusts may need to be specifically amended, including names of trustees if they were members of your ex-spouse's family. Retirement benefits like pensions and IRAs will also have to be changed.

Couples who didn't execute a premarital agreement might consider a postmarriage agreement that accomplishes some of the same objectives: setting forth the division of property and estate plan in the event the marriage dissolves.

The so-called **marital deduction** is one of the most important parts of estate tax planning, and when you divorce, you lose it. If your estate is over \$1 million you will certainly need to revise your tax planning after a divorce.

Couples with children from different marriages

If you're one member of a couple in which both you and your spouse have children from a previous marriage, you might want to arrange things so your own money goes to your own children, and your spouse's money goes to his or her children. If those children are well off and earning their own incomes, then you might consider leaving more to your surviving spouse, or to other family members, such as by setting up a trust for your grandchildren. Here is a brief discussion of some of the transfer techniques.

OTIP trusts--for heirs, not ears. Providing for children from different marriages may conflict with tax planning. The marital deduction allows spouses to leave their entire estates to each other without paying taxes. What if you and your spouse have children (especially grown children) from other marriages? You might naturally prefer that your biological children receive more of your estate than your spouse's children from a previous marriage. If you leave your entire estate to your spouse, he or she might not agree--but has the final decision after you're gone.

That's why some "patchwork" families are using QTIPs. The **Qualified Terminable Interest Property Trust** allows you to leave your property in trust for your spouse, but then it goes to whomever you wish after your spouse dies. You still get the marital deduction, your spouse gets to live off the income from the trust, and your children get the property upon his death. The problem: no one else can benefit from the assets in the trust until your spouse dies, which might not leave other family members enough money for their comfort until then. Insurance can ease the blow. If you have a large enough estate, you can leave up to \$1 million (tax-free under current law) to your children or into a trust for their benefit on your death, and put the rest into the QTIP trust.

Mutual wills. Mutual wills provide another option where children from different marriages (or

anyone else that you want to inherit some of your property) are involved. Each spouse leaves all property to the survivor, who after death will leave specified property to the friends or relatives the other designates. Warning: use of mutual wills might jeopardize the marital tax deduction and also involves issues of contract law that vary among states. Get professional advice before using this strategy.

Don't confuse **mutual wills** (two separate wills that refer to each other and are trying to accomplish the same purpose) with a **joint will**, which is one will that attempts, usually unsuccessfully, to cover two people.

Life estates. What if you want your surviving spouse to be able to live in the family home, but want to make sure that the house will ultimately pass to your children? A life estate is an option. A **life estate** means that the recipient only gets to use the property for as long as he or she lives, then it is passed to a third party (or occasionally reverts to your estate). It can't be sold or substantially modified by the life tenant. Your will can include this provision, but check with a lawyer before trying such property conveyances; they can be quite complex. A better method is to leave it in trust for your spouse so long as he or she is able and desires to occupy it.

Life insurance. Life insurance is another tool you can use to distribute assets among children from different marriages. You can set up an irrevocable trust for your children that will ultimately be funded from the proceeds of a life insurance policy. You pay the premiums, but the trust actually owns the policy. When you die, your children receive the benefits from the trust tax-free, while your spouse gets the rest of your estate.

Trusts. The versatility of trusts makes them useful instruments for allocating assets among different families, because you can set up a separate trust for the children of different marriages, or even for each family member. Imagine the complexities of the Brady Bunch trooping down to their lawyer's office and trying to decide who gets what!

Prenuptial or postnuptial agreements. If you're an older person with grown children from another marriage, you should strongly consider asking your lawyer, as part of your estate plan, to prepare a pre- or postnuptial agreement that specifies that the separate property of each party remains separate at death. Then your wills or will substitutes can leave your assets directly to your respective children on your death. They're already adults, and it's unlikely your spouse will survive you long enough to require large amounts of money from your estate to live on.

Contracts to make a will. Such a contract prevents your spouse from changing arrangements in his or her will without your knowledge and consent. These can supersede any updated will, and can be written so that they expire if the marriage officially ends in divorce or annulment. In effect, such a contract guarantees that each person will stick to the jointly agreed estate plan, instead of changing a will without the other's knowledge. Their obvious drawback is that since they cannot be changed without the other person's permission no matter how much your circumstances change, they surrender the flexibility that a will provides. These contracts are usually prepared in anticipation that some conflict will occur; therefore, a lawyer should be involved.

One thing to keep in mind: patchwork families are a prime category for will contests, as children from different marriages may be more likely to disagree about the distribution of estate assets. People in this category should be especially careful that their wills, prenuptial/postnuptial agreements, or contracts to make a will, are properly prepared.

Joint tenancy. If your combined estate falls under the \$1 million limit, and you don't expect it to exceed that amount by the time the second spouse dies, it's sometimes simpler just to leave all the property in joint tenancy, because then the surviving spouse receives all the assets without worrying about estate tax and there's no probate. However, you still need to take into account the drawbacks of joint tenancy discussed in chapter two: the fear that the surviving spouse will squander the money

instead of spending it on the children, or will remarry and leave all the money to the new family. Since joint tenancy doesn't let you control the distribution of your money after you die, you will have to use a trust or will if you want the money to go to anyone but your spouse.

UNMARRIED PARTNERS--STRAIGHT TALK AND OTHERWISE

The law is almost always written with conventional families in mind. That's why it has provisions like the **spouse's elective share** and the **rules of intestacy**, which leave your property to your family if you die without a will. For unmarried couples to do all that married couples can do in the eyes of the law, they must have a will or trust and use contractual agreements that set out the rights and responsibilities of each partner.

If you're an unmarried couple, you'll probably have many of the same estate planning objectives as married couples. For example, each of you will probably want to provide immediate help for your partner if you die, possibly through life insurance. Depending on what assets you have, you may want a revocable trust with a pourover will, just as married couples do.

You'll have to figure out what will happen to your bank account, to your partner's bank account, to a joint bank account, and other property should one of you die. It's especially important to make provision for property acquired while you and your partner have been living together. The real problems in cases like this are often expensive items of personal property: collectibles, art collections, furniture, and so on.

Wills. It's especially important for unmarried partners to have wills because state intestacy laws presume that your blood relatives will inherit your property after you die, when in fact you may want your property to go to your partner.

Cohabitation agreements. Cohabitation agreements, which can cover a wide range of topics, are also worth considering.

To deal with each partner's possible disability, for example, **cohabitation agreements** often contain **mutual powers of attorney** that enable partners to act on each other's behalf. However, you'd better be careful. **Durable powers of attorney**, which are usually used for business transactions, enable the other person to spend your money, sign your name to binding documents, and so on. Many unmarried people might want their partners to have this kind of authority if they should become disabled by age, injury or disease, but not when they are in full possession of their faculties. If you don't want your partner to have all this power (and you may not if the relationship is tenuous), have your lawyer write the power of attorney so it is **springing**; that is, that it takes effect only when you have been certified incompetent by your physician. But make sure your state's law allows this.

Another option is to execute a **health care power of attorney** that allows your significant other to make medical decisions if you should become incapacitated, but doesn't provide him or her control over your bank account and other non-medical affairs.

Guardianships or conservatorships. A cohabitation agreement might also provide for **mutual guardianships**, so that if one partner becomes disabled, the other can take care of him or her. This is especially important if one partner's family doesn't accept the validity of the alternative lifestyle; should you become disabled, the courts can appoint a guardian, and will often lean to a family member over someone with no legal status.

Contract to make a will. Anyone can change a will at any time. But each partner in a married couple is somewhat protected against sudden, capricious changes of mind by state laws that allow spouses to take against the will. The law doesn't yet extend this sort of protection to unmarried partners.

Suppose you're putting your partner through medical school and you stand to inherit a lot of her

property. After making such a sacrifice, you don't want her to change her mind without your knowing it and rewrite her will leaving her property to someone else.

To prevent this, you might, as part of your cohabitation agreement, execute a contract to make a will, which legally binds both of you to its terms. The contract can only be changed by attacking the contract in court, a much more difficult procedure than rewriting a will. Usually, these contracts contain a provision that dissolves them when the partners agree in writing that the relationship is over. They might also provide that the wills of both parties be kept at the lawyer's office, and that neither can obtain access to them without the other being present. Obviously, these documents should be custom-tailored to the particular concerns and circumstances of each relationship, and require a lawyer to do them right.

Trusts. Unmarried couples with sufficient assets and a cohabitation agreement might find living trusts useful, if they can stand the inconvenience of keeping track of which property goes into which trust. Each might set up a separate living trust for his or her separate property, and possibly a third one for shared property. Each individual trust can be used to make gifts for friends or relatives of each partner. The shared trust can leave property to the couple's mutual friends, as well as to the surviving partner.

A final word. The law frequently revokes wills (and sometimes other documents) when a couple's marriage ends. It doesn't provide such a fail-safe for the wills of non-married partners, or their cohabitation agreements, contracts to make a will, etc. You can write into the cohabitation agreement or a contract to make a will a provision that alters the will and other documents if the parties agree that the relationship is over. If you don't, you must remember to deal with these documents should the relationship dissolve.

In any event, you should certainly rewrite your estate plan when this happens, as with any other major life change.

GAY COUPLES

Most of the information in the preceding section applies to gay and lesbian couples as well as to unmarried heterosexual partners. Since gay couples face legal barriers that heterosexuals don't, estate planning is even more critical for them.

When it comes to relationships, the law is basically written for people who are married. You may recall the Sharon Kowalski case, in which the courts gave custody of a nearly comatose young woman to her family, despite evidence that she would have preferred that important decisions be made by her lesbian partner. Had she been married, a court would probably have given custody to her husband.

You can't count on the law or a judge to be sympathetic to gay relationships. If you are gay and in a relationship with someone whom you want to include in your estate plan, you have to take extra steps to prevent family members (some of whom mightn't approve of homosexual relationships) from interfering with your wishes.

Much of what heterosexual partners take for granted--the ability to take out family life insurance policies, file joint tax returns, inherit pension benefits, or make medical decisions for each other in the event of disability--will not automatically apply to homosexual relationships. You have to take extra, affirmative steps to protect your rights and make certain you have an estate plan that meets your needs. While some people dislike bringing prosaic legal concerns into a romantic relationship, think of these procedures as legal recognition of your commitment to the relationship, as marriage is for heterosexuals.

Wills. It's especially important to write a will if you're involved in a same-sex relationship, because a will lets you leave your property to anyone or any organization you wish, even though the law does not recognize gay relationships. Most important, a will lets you name an executor for your estate to

supervise distribution of your assets. If, as is likely, you want your partner to inherit a good share of your property, naming your partner or someone sympathetic to the relationship as executor will help assure that your wishes are carried out.

Beneficiary designations. As important as it is to write a will, remember that that's not enough to assure that all your property goes to your partner. As discussed in chapter two, many assets pass by means other than a will. So if you want your partner to receive the proceeds from a life insurance policy, IRA, bank account, and so on, you need to name your partner as the beneficiary in each of those documents separately.

The advantage of using beneficiary designations and other nonprobate arrangements (such as holding property in joint tenancy with your partner) is that the transfers take place automatically on your death; no disgruntled relative can hold up your desires, as they can in a will contest.

Funeral instructions. Funeral instructions can be especially important subjects for homosexual couples. Since the law often gives the deceased person's blood relatives--not the same-sex partner--the right to determine what will be said at the funeral, what will appear in a newspaper notice, and so on, many surviving partners have been disappointed to find that no mention has been made of the relationship, or even the fact that the deceased was gay. To prevent this, write up a list of funeral instructions as indicated in chapter eleven, naming your partner (if that's what you want) as the person responsible for carrying out those instructions. You might mention the instructions in your will as well, although you should remember that sometimes a funeral is over before the will is read. Still, the mention of your wishes in a will and a signed statement of funeral instructions should go a long way toward convincing funeral directors of your partner's authority in the event of a dispute.

Powers of attorney. A durable power of attorney gives your partner, or anyone else you choose, the legal authority to handle your financial affairs, pay the bills, deposit and withdraw money

from the bank, and so on if you become incompetent. A health care durable power of attorney lets you decide who has the right to make medical decisions for you should you become incapacitated. See chapter twelve.

For all these arrangements, especially cohabitation agreements, you should seek out a lawyer who's experienced in nonspousal domestic partnerships. Your local gay-rights organization may keep a listing of attorneys who specialize in such situations.

[See chapter twelve](#) for information on estate planning for people with AIDS.

BUSINESS OWNERS

Small business owners have a host of special needs. Who will take over the business after you die? Which child gets control of the stock? Which ones run the company, and which merely share in the profits?

The principal issues your estate plan should address are: Do you want the business to continue after your death? If so, who will run the business after you die? What's the best way to transfer ownership to the new owners? Will your beneficiaries be capable of taking over the business--and will they even want to? Before you meet with your lawyer to plan your estate (and the legal issues involved here are so touchy that a lawyer's expertise is essential), you should sit down with your beneficiaries and business partners to try to answer these critical questions.

If your beneficiaries (usually we're talking about a spouse and children) are interested in taking over the business and, in your judgment, possess the expertise to do so, it's relatively simple to transfer your interest directly to them. If stock is involved, you might want to leave voting stock to the children who will be involved in operating the business, and leave nonvoting stock to the others. Or you can

leave the child who will be running the business enough cash (perhaps through life insurance proceeds) to enable him or her to buy out the rest of the estate, and thus avoid conflicts.

Sometimes your beneficiaries will want no part of the business after you're gone. Things get slightly more complicated if you decide to pass management or ownership to people who are not beneficiaries of your will. If so, and if your business is a partnership, you'll usually want the other partners to remain in operational control of the company. The most common device used for transferring ownership of a business on the death of a partner is the **buy-sell agreement** in which all the remaining partners agree to purchase the interest of any partner who dies. This allows the business to continue running smoothly with the same people in charge, minus one.

Buy-sell agreements typically provide that at the owner's death, his or her interest in the business will be acquired by the remaining partners or shareholders, leaving the dead partner's relatives with the proceeds of the sale. Life insurance is usually the vehicle used to finance these arrangements, which lets the business itself avoid a drain on its cash. The partners buy life insurance on each other's lives, and the proceeds go to the surviving spouses, children or whomever, in return for the deceased partner's share of the business.

There are two principal ways to structure such agreements. An **entity purchase** allows the business entity itself to take out a policy on the life of each owner and use the proceeds to purchase the share of a deceased owner. In a **cross-purchase**, the co-owners each take out insurance on each other and each buy a share of the dead partner's interest. While an entity purchase is simpler, a cross-purchase may provide a substantial tax advantage. Ask your lawyer which kind of agreement is best for your business.

Avoiding probate can be more important than usual where a business is concerned, since even relatively short interruptions in transferring title to bank accounts and other assets through probate can

be devastating to a business that must pay its bills on time. The people who take over from you might find they have to get probate court approval for major business decisions for up to three months unless you have made adequate arrangements to avoid this. So you might do well to arrange for the business assets to pass outside your will, usually through a trust or contractual agreement.

The estate tax rules for small businesses differ from those covering individuals, so you'll need to consult a lawyer or certified financial planner, chartered financial consultant, or other professional with experience in this difficult area of law and finance.

DEBTORS AND CREDITORS

Most estate planning assumes that you have assets to distribute when you die. But what if you're in debt, and even after the life insurance pays off beneficiaries, there's only red ink in your estate account?

First, don't fear that your family will "inherit" your debts through your will. Only if they co-signed on notes or otherwise made some contractual agreement to assume liability for debts can any of your beneficiaries be stuck with any of your debts. If you should will someone an asset that's burdened by debt (a house or business, for example), the recipient may **disclaim** the gift, and therefore not receive it-or the debt attached to it.

By law, estate debts must be paid before assets are distributed. If your estate's debts exceed the assets, they must be satisfied in a particular order set by your state's law. The executor of a debt-ridden estate will, under the court's supervision, pay off the debts in the prescribed order.

If the debts do not exceed the assets, then after the executor pays them the remaining assets can be distributed. The process of liquidating assets to pay debts might provide some of your beneficiaries with a windfall, others with a shortfall. If you gave your Texas bank accounts to your spouse and your

Alaska accounts to your brother, for example, and the Texas bank accounts were scoured first to pay the debts, your spouse might be left holding the empty bag as your brother drives away into the sunset.

This hardly seems fair, and to prevent such a problem, you can provide that all gifts in your will be proportionately reduced, so that after the debts are paid off, each beneficiary's gift is reduced by the same percentage. So if, after paying all debts, your estate contains only 50% of the money that you direct be distributed through the will, each recipient's gift amount would be cut in half.

If your estate is forced into bankruptcy when you die, it will be managed by a trustee just as any other bankrupt concern would be. Creditors will get in line to collect according to the bankruptcy law's priorities.

Sidebar

DIFFERENT STATES, DIFFERENT FATES

There are sometimes big differences between the laws in different states, and if you own property in different states, or if you've moved since you planned your estate, you should check to be sure your estate plan comports with the applicable state laws.

For example, what if you live in a separate-property state but own real estate in a community property state? Often, state laws will treat such real estate as community property for estate planning purposes. Thus, if you live in Arkansas (a separate-property state) but own land in Texas, an Arkansas court probating your will would treat the Texas property just as Texas would--as community property. But not every state would extend the same courtesy.

Obviously, this separate/community property division can get pretty complicated--and it's only one example of how state laws are different. If you own property in more than one state, use a professional advisor who is conversant with the estate laws of all of them.

Sidebar

FINE, FEATHERED OR FURRY FRIENDS

Every pet owner knows that pets are part of the family--in the hearts of their owners, if not in the eyes of the law. Law books are full of wills that tried to provide for pets people left behind. Especially in recent years, these provisions are almost always thrown out. You generally can't leave money or a property directly to an animal, nor can you make an animal the direct beneficiary of a trust.

The one way to provide in a will for a pet's care is to make an agreement with someone to take care of it after you die and bequeath an amount of money needed to pay for the care to that person. You also need to provide for what happens to that money after the pet dies.

A trust is usually a better way to provide for your pets; leave the animal and some money for its care, in trust, to a friend who is named beneficiary.

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