



## **Grandma's Dating! Romance and the Revocable Living Trust**

By Darlynn C. Morgan, Esq.

My 63 year-old mother just started dating again; she's in love and she's talking marriage! Of course, me and my siblings want to know more about this guy: what are his assets? What is he after? Will they have a pre-nuptial agreement? So this article, well, it hits close to home.

Life doesn't seem to get any less complicated the older we get, does it? The first time you married you were probably young and in love, and may not have had two nickels to your name. As we get older, when marriage or remarriage is contemplated, there is a lot more to think about.

Consider an example: your spouse has died following a long, loving relationship. Or maybe you have suffered a divorce. After several years of living alone you've decided to date again, and have found an engaging person who makes you feel alive again. You want to take it to the next level but there are "issues" that must be considered. The companionship is warm and all is well, except for ..... the children.

The adult children of the parent may be having some difficulty with mom or dad's new-found love relationship. Why? They are worried about the inheritance.

And there *are* important issues that need to be considered here. A second or subsequent marriage brings with it a number of unique circumstances: blended families, changing priorities, tax and financial implications, life insurance and pension issues, etc. These changes in circumstances create a crucial need to review and revise your prior estate plan to account for your new life, as well as to protect that which is important from your previous one.

Let me raise some of the issues that you may need to consider: Should we marry? Should we sign a pre-nuptial agreement? What do we do if one partner has a disproportionately large amount of assets compared to the other? How do we treat the children of our respective marriages? What about disability or Medi-Cal considerations?

At this stage in life, comprehensive estate planning is critical.

### **Leaving all to New Spouse May Not Be Best**

Although an unlimited amount of assets may pass to a spouse tax-free, leaving the lion's share of your estate outright to your new spouse does not always make sense. Such a

disposition **could disinherit your children from a prior marriage**, and it would fail to take into account the common situation that both spouses bring assets to the marriage that they would like to see preserved for their separate descendants.

### **Key Planning Points**

Here are a few key points to keep in mind when estate planning for a subsequent marriage:

1. Remarriage does not automatically revoke a will or living trust, but your new spouse, if not provided for, has rights. These rights may overrule your estate plan. So if you, like most of us, actually want your assets to pass in the way you have written down, you should create a new estate plan in contemplation of or following a remarriage.
2. A spouse has rights under state law, and, in particular, the right to an **“elective share”** of the estate - **even if you provide otherwise in your will**. The elective share can range from 25% to 50% of your estate, depending on where you live.
3. The estate planning strategy perhaps most specifically tailored to second marriages is the ***Qualified Terminable Interest Property (or QTIP) trust***.

### **QTIP Strategy for Second Marriages**

Normally a married person will want to avoid the federal and state estate taxes at death by taking advantage of the “unlimited marital deduction.” The unlimited marital deduction allows you to leave your spouse an unlimited amount of your estate, free of any estate or death taxes.

In the second marriage situation, it may not be desirable, however, to disinherit the children of a first marriage by leaving everything outright to a second spouse. The QTIP provision allows you to leave an income interest only to your new spouse, preserving the principal for your children- and still qualify the assets passing in trust for the marital deduction. QTIP trusts have other advantages besides preserving assets for the children of a prior marriage, and they are uniquely designed to address such situations.

4. Take special care in drafting estate planning documents that concern how to treat children from different marriages. Do you intend that all children of both marriages be treated equally? Are there certain assets - perhaps inheritances from grandparents - that should be specifically allocated to one set of children? These issues can and should be addressed with your estate planning attorney so that your wishes are properly drafted into your new plan.

Second, (and third and fourth) marriages will be with us as long as there are first marriages. A little forethought and good planning will avoid unintended legal consequences, disheartened, frustrated, angry heirs, or worse - litigation. Bottom line, discuss your circumstances with your estate planning attorney before you remarry, to save you and your heirs from unintended heartache in the future.

A trust can provide for your children and the future of your grandchildren. It also can include a provision to take care of your unmarried partner if you die or are incapacitated. But the most important aspect of a trust may be the peace of mind it gives your children: They know exactly where things stand and that the inheritance won't be squandered.

### **Health Care Directives**

Older couples have heard time whistling in their ears and know that now is the time to plan. A health care directive is also part of estate planning and is it *vital*. A durable power of attorney for health care is a key document for anyone, especially an unmarried couple in their later years. It's not about death or dying; it's about taking care of you while you're living but unable to care for or make decisions for yourself. It's a legally binding document that states that an individual or specific individuals will make health care decisions for you if you can't make them for yourself.

Without such a written statement, your partner can't make decisions for you if you become incapacitated or are seriously injured in an accident--and it makes no difference if you have been together for years. That responsibility for your care falls to your family, even if you're estranged and haven't spoken to them quite some time or even if they live in another state. Getting this right requires thought and frank discussion with family members and others involved.

Darlynn Morgan is an attorney, speaker and Personal Family Lawyer. Darlynn makes it easy for your family to talk about and plan for tough subjects like money, death and taxes. Visit [www.MorganLawGroup.com](http://www.MorganLawGroup.com) for more resources on how to make sure your kids are totally protected if the unthinkable happens to you.

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