

Know your Rights

Question: I am getting married this spring. My first wife passed away five years ago. Although I want to take care of my fiancée, financially, I feel an obligation to my children from my first marriage. My fiancée also has children from her first marriage. What should I do?

What you should do is enter into a marriage contract. Older couples often enter second relationships where the bulk of their assets were acquired during their first marriage. The Marital Property Act makes an assumption that, upon dissolution of marriage, the assets will be divided 50/50 between spouses. This is not a certainty. Section 7 of the Marital Property Act allows for an unequal division of the marital property if an equal division is unfair. Should you separate, you may be able to argue an unequal division before the court. Similarly, Section 6 of the Marital Property Act allows for exclusion of certain family assets. However, the fact remains that those assets from your first marriage are certainly at risk. As a general rule the longer you are married the more likely that your assets would be divided 50/50 after separation.

The best way to know how your assets will be divided upon separation or death is to enter into a marriage contract whereby you and your spouse agree to conduct your affairs by way of separate property regime. This means that the assets you bring into the marriage are yours and the assets that your fiancée brings into the marriage are hers. If you separate you will keep your assets and she will keep hers. Should you pass away, your Executor will be free to dispose of your estate consistent with your wishes which includes leaving a larger share of your estate to the children of your first marriage and less of a share to your fiancée. Actually, a marriage contract can be a very flexible document. Your assets can be divided any way that you and your fiancée agree. Your only limit is your imagination.

If you choose not to enter into a marriage contract and should you pass away without a Will then the Devolution of Estates Act states that all marital property is to go to your widow as well as one-third of the residual or the remainder of your estate. The balance (two-third of residual) of your estate would be divided between your children. Actually, this may be inconsistent with what you would want done with your estate.

Many older people attend my office expecting to clarify the situation by preparing a Will where they agree to leave part of their estate to the families of their first marriage. I begrudgingly prepare such Wills but a Will is no substitute for a marriage contract. First, there is a question of whether each spouse has received independent legal advice. Secondly, Section 4 of the Marital Property Act allows for the surviving spouse to make an application to the Court to have marital property divided in equal shares. Such applications should not be made later than four months after the death of the deceased spouse although, under certain circumstances the Court may extend this period. The Court would certainly look at your Will to determine your intention and attempt to respect your wishes. However, the Court is free to order some other division of your estate if it considers that division to be fair and equitable.

For some reason, older couples don't like to enter into marriage contracts. I would suggest that older couples' aversion to marriage contracts is a reflection of their culture. They seem to consider such a contract as inconsistent with marriage vows. Other cultures, however, have absolutely no problem with a marriage contract. I understand, for example, that the entering into such contracts in France is the norm rather than the exception.

I would most strenuously encourage you to consider entering into a marriage contract. The value of having certainty of knowledge as to how your assets would be divided after separation or death greatly exceeds any abstract value of upholding the sanctity of marriage vows.